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Articles, Essays & Notes

DEFINED BY THE LAW OF THE SEA: "HIGH SEAS" IN THE MARINE MAMMAL PROTECTION ACT AND THE ENDANGERED SPECIES ACT

Lieutenant Commander Keith S. Gibel, JAGC, USN*

I. INTRODUCTION

Considered the "international constitution of the oceans,"[1] the United Nations Convention on the Law of the Sea ("UNCLOS")[2] provides the first global framework on all aspects of the law of the sea.[3] Although the United States has not yet ratified or acceded to UNCLOS, it recognizes that the treaty's division of the ocean into "territorial seas,"[4] "contiguous zones," [5] "exclusive economic zones"[6] ("EEZ"), and the "high seas,"[7] reflects customary

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[1] *Canada's Ocean Strategy, Our Oceans, Our Future*, Fisheries and Oceans Canada, 5 (2002), *available at* http://www.cos-soc.gc.ca/doc/pdf/COS_e.pdf; *See also* DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 659 (2d ed. 2002) (describing UNCLOS as "the constitution of ocean governance").

[2] United Nations Convention on the Law of the Sea, *signed* 10 Dec. 1982, *entered into force* 16 Nov. 1994, 21 I.L.M. 1261, [hereinafter UNCLOS], *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

[3] HUNTER ET AL., *supra* note 1, at 659.

[4] Proclamation No. 5928, 54 Fed. Reg. 777 (1988); UNCLOS, *supra* note 2, art. 3, 21 I.L.M. at 1272.

[5] Proclamation No. 7219, 64 Fed. Reg. 48701 (1999); UNCLOS, *supra* note 2, art. 33, 21 I.L.M. at 1276. The contiguous zone will not be discussed in this Article since the authority of a coastal State in its EEZ extends throughout the contiguous zone.

[6] Proclamation No. 5030, 48 Fed. Reg. 10605 (1983); UNCLOS, *supra* note 2, art. 57, 21 I.L.M. at 1280.

international law.[8] Despite this recognition, incorporation of UNCLOS terminology with its corresponding obligations and definitions in U.S. environmental law has been noticeably absent, specifically with regard to the Marine Mammal Protection Act ("MMPA") and the Endangered Species Act ("ESA").[9] The MMPA protects marine mammals on the "high seas" or in "waters under the jurisdiction of the United States," but the extent and meaning of "high seas" is not defined.[10] Under the MMPA, "waters under the jurisdiction of the United States" include U.S. territorial seas, the contiguous zone, and the EEZ.[11] Similarly, the ESA protects endangered species in the "territorial sea of the United States" and on the "high seas," but the extent and meaning of "territorial sea of the United States" and "high seas" are not defined.[12] These undefined terms of jurisdiction have caused confusion and litigation.[13]

While the meaning of and distinction between the terms "territorial seas" and "high seas" continues to be a flash point in cases involving the MMPA and the ESA, the battleground of this definitional controversy centers on an area

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[7] UNCLOS, *supra* note 2, art. 89, 21 I.L.M. at 1261. "No State may validly purport to subject any part of the high seas to its sovereignty." *Id.*

[8] President Ronald Reagan, *Statement on United States Oceans Policy* (1983), *available at* http://www.reagan.utexas.edu/archives/speeches/1983/31083c.htm (stating that although the United States is not signing UNCLOS, the convention "contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states.").

[9] REVIEW OF U.S. OCEAN AND COASTAL LAW, THE EVOLUTION OF OCEAN GOVERNANCE OVER THREE DECADES, APPENDIX 6 TO *AN OCEAN BLUEPRINT FOR THE 21ST CENTURY,* FINAL REPORT OF THE U.S. COMMISSION ON OCEAN POLICY, ISBN#0–9759462–7–7, Washington, D.C., 10 – 12 (2004) (discussing the development of existing discrepancies between UNCLOS and U.S. statutory terminology related to ocean jurisdictions), *available at* http://permanent.access.gpo.gov/websites/www.oceancommission.gov/documents/full_color_rpt/append_6.pdf.

[10] Marine Mammal Protection Act, 16 U.S.C. §§ 1372(a)(1), 1372(a)(2)(A) (2005) [hereinafter MMPA].

[11] *Id.* § 1362.15. The act also specifically states that it applies in the Russian EEZ pursuant to the Agreement between the United States and the Union of Soviet Socialist Republics. *Id.*

[12] Endangered Species Act, 16 U.S.C. §§ 1538(a)(1)(B) and (C) (2005), [hereinafter ESA]; *But see* 50 C.F.R. § 402.02 (2006) (defining agency "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas.").

[13] *See* Florida Marine Contractors v. Williams, 378 F.Supp.2d 1353, 1357 (M.D. Fla. 2005) ("[MMPA] Section 1371 does not contain any limitations on the scope of the moratorium, geographic or otherwise."); Center for Biological Diversity v. National Science Foundation, 2002 U.S. Dist. LEXIS 22315, at *9 – 10 (N.D. Cal. Oct. 30, 2002) (claiming the foreign exclusive economic zone is considered "high seas" under the MMPA); Hawaii County Green Party v. Clinton, 124 F.Supp.2d 1173, 1182 n.13 (D.Hawaii 2000) (noting "that there is uncertainty about whether or not a permit is required for testing done in the EEZ of foreign nations"); Lujan v. Defenders of Wildlife, 504 U.S. 555, 581-82 (1992) (Stevens, J., concurring) (stating that he is not persuaded that the Endangered Species Act's consultation requirement applies to activities in foreign countries); United States v. Mitchell, 553 F.2d 996, 1001-1004 (5th Cir. 1977) (holding that the MMPA's criminal provisions do not reach foreign territorial seas).

beyond U.S. jurisdiction existing between foreign "territorial seas" and the "high seas" -- the "foreign exclusive economic zone" ("FEEZ").[14] Under UNCLOS and customary international law, the following divisions of the ocean are clear. A State's territorial seas are considered an extension of its territory and may extend up to 12 nautical miles ("NM")[15] from the baseline or the mean low-water line of the coast.[16] Within the territorial seas, a State has complete sovereignty,[17] subject only to the right of innocent passage for vessels of other nations.[18] The high seas are part of the global commons,[19] an area of the ocean not subject to State sovereignty or jurisdiction.[20] In the EEZ, a coastal State has sovereign rights[21] to explore, exploit, conserve, and manage living and non-living resources[22] up to 200 NM[23] from the baseline of the coast. Thus a State has complete authority in its territorial seas, limited authority in its EEZ,[24] and no authority on the high seas. Although "high seas" remains undefined in the MMPA and the ESA, reference to the "EEZ" in the MMPA[25] demonstrates Congress understood the distinctive divisions of ocean jurisdiction under international law.

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[14] See *supra* note 13 and accompanying text.

[15] "One English, statute, or land mile equals approximately .87 geographic, marine, or nautical mile." United States v. California, 381 U.S. 139, 148 n.8 (1965).

[16] UNCLOS, *supra* note 2, art. 3, 21 I.L.M. at 1272.

[17] Sovereignty means "[s]upreme domination, authority, or rule." BLACK'S LAW DICTIONARY 1430 (8th ed. 2004).

[18] UNCLOS, *supra* note 2, arts. 2 and 17, 21 I.L.M. at 1272 and 1273. "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." *Id.* art. 19, 21 I.L.M. at 1274. In other words, vessels may transit peacefully through the territorial seas of foreign nations.

[19] "Global commons" means outside the jurisdiction of any nation; examples include the oceans or Antarctica. Exec. Order No. 12114, § 2-3(a), 44 Fed. Reg. 1957 (1979).

[20] UNCLOS, *supra* note 2, arts. 87 and 89, 21 I.L.M. at 1286-1287.

[21] "'Sovereign rights' lie somewhere in between sovereignty and jurisdiction." JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW 315 (2d ed. 2002).

[22] UNCLOS, *supra* note 2, art. 56, 21 I.L.M. at 1280.

[23] *Id.* art. 57, 21 I.L.M. at 1280.

[24] JOSEPH J. KALO ET AL., *supra* note 21, at 341. "The United States and other coastal countries also exercise a form of territorial jurisdiction over their continental shelves and their EEZs. . . . " *Id.*

[25] MMPA, 16 U.S.C. §§1372(a)(1), 1371(e) (2005). "The provisions of this chapter shall not apply to a citizen of the United States who incidentally takes any marine mammal during fishing operations outside the United States *exclusive economic zone* (as defined in section 1802 of this title) when employed on a foreign fishing vessel. . . ." *Id.* (emphasis added). Section 1802 defines the EEZ as "the zone established by Proclamation Numbered 5030, dated March 10, 1983." Magnuson-Stevens Fishery Conservation and Management Act, 18 U.S.C. § 1802 (11) (2005), [hereinafter Magnuson-Stevens Act]. *See also* MMPA §§ 1362 (15)(B) and (C) (defining "waters under the jurisdiction of the United States" to include "waters included within a zone . . . 200 nautical miles from the baseline from which the territorial sea is measured," and areas east of the U.S./Russia maritime boundary "that lie within 200 nautical miles of the baselines from which the breadth of the territorial sea of Russia is measured but beyond 200 nautical miles of the baselines from which the breadth of the territorial sea of the United States is measured. . . . ").

Whether UNCLOS jurisdictional definitions apply to the MMPA and the ESA determine if the laws apply in the FEEZ. For example, if an American captures a marine mammal in Mexico's EEZ, this conduct may constitute a violation of the MMPA depending on whether the EEZ is considered an extension of Mexico's "territorial seas" (where the Act does *not* apply)[26] or "high seas" (where the Act does apply).[27] However, U.S. court decisions defining the extent of the "territorial seas" and "high seas" under the MMPA and the ESA are inconsistent,[28] and U.S. agencies have inconsistent policies and regulations as to whether the Acts apply in a FEEZ.[29] The inconsistency among agencies and the courts raises doubt for those that need to know if permits are required for taking marine mammals and endangered species in the FEEZ. Whether the MMPA and the ESA apply in the FEEZ may concern navies that conduct military activities in FEEZs, commercial fishermen on U.S. vessels in FEEZs, and American businesses that may be called upon to assist foreign countries exploit the natural resources in their EEZ.

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[26] The *Mitchell* court stated that "the criminal prohibitions of the Act do not reach conduct in the territorial waters of a foreign sovereignty" and found 50 C.F.R. § 216.11(c), which prohibits any person from taking any marine mammal during the moratorium, as agency action in excess of statutory authority. United States v. Mitchell, 553 F.2d 996, 997, 1005 (5th Cir. 1977). *But see* 50 C.F.R. § 216.11(c) (2006) (unchanged after *Mitchell*); Florida Marine Contractors v. Williams, 378 F.Supp.2d 1353, 1364 (M.D. Fla. 2005) (quoting *Mitchell*, 553 F.2d at 1001) (finding that "[t]he Fifth Circuit's actual finding in Mitchell was that 'it is not clear . . . from the legislative history as a whole whether the moratorium was intended to have broader territorial effect than the prohibitions. . . .'").

[27] MMPA § 1372(a)(1).

[28] *See* Center for Biological Diversity v. National Science Foundation, 2002 U.S. Dist. LEXIS 22315, at *10 (N.D. Cal. Oct. 30, 2002) (finding the EEZ "under U.S. law is considered part of the 'high seas' or 'global commons,' that is, territory which belongs to all nations but subject to the sovereignty of none."); *Compare with* Natural Resources Defense Council v. Department of the Navy, No. CV-01-07781 CAS(RZx), 2002 U.S. Dist. LEXIS 26360, at *40 - 41 (C.D. Cal. Sept. 17, 2002) (finding "the United States does have substantial, if not exclusive, legislative control of the EEZ . . . in the area of the environment stemming from its 'sovereign rights' for the purpose of conserving and managing natural resources. . . .").

[29] *See* Robert B. Pirie, Jr., *Compliance With Environmental Requirements in the Conduct of Naval Exercises or Training at Sea* ("At Sea Policy"), Memorandum for the Chief of Naval Operations Commandant of Marine Corps, 2 n.1 (28 Dec. 2000) (stating the Department of Defense, via Department of the Navy, ocean jurisdiction policy for the MMPA and ESA includes "the area from the U.S. high water mark seaward to the recognized Exclusive Economic Zones (EEZs) or fishing zones" of other coastal nations or in other words, the Department of Defense applies the MMPA and ESA in U.S. territorial seas and the high seas but not in the recognized EEZs or fishery zones of other coastal States), *available at* http://www.whalesandsonar.navy.mil/documents/trainingatsea.pdf. *But see* 50 C.F.R. § 216.11 (2006) (stating the Department of Commerce, via National Oceanic and Atmospheric Administration's National Marine Fisheries Service, position that the MMPA prohibits a person subject to U.S. jurisdiction to take a marine mammal on the high seas, in waters under U.S. jurisdiction, or anywhere else).

The proper balance between and among military, fishing, and environmental concerns has inspired much scholarly writing,[30] but this Article examines only one significant aspect underlying the debate: whether *any* American conduct in a FEEZ is subject to the MMPA and the ESA. Although scientific research,[31] commercial fishing,[32] and defense activities[33] are all treated slightly differently under the MMPA, this Article uses the U.S. Navy's ("Navy") employment of sonar (a "military activity") to illustrate the statutory requirements of the MMPA and the ESA. Congress' authority to legislate extraterritorially is not challenged.[34] While the definition of "high seas" is inextricably intertwined with the extraterritorial application of the Acts, the analysis of MMPA and ESA jurisdiction focuses primarily on the definition of "high seas." An examination of the Acts' plain language and legislative history supports the conclusion that Congress intended to define the term "high seas" as it is understood in customary international law and UNCLOS. Applying principles of statutory construction and Supreme Court precedent to define "high seas" in the MMPA and the ESA also results in an interpretation consistent with international law. Using UNCLOS to define "high seas" in the MMPA and the ESA means the two statutes do not apply in the FEEZ.

Part II describes why the term "high seas" in the MMPA and the ESA needs to be defined. Part III provides a statutory overview of the MMPA and the ESA. Part IV examines how the term "high seas" is currently interpreted in the MMPA and the ESA. This part includes discussion of Congressional, Judicial, and Executive interpretation of the term "high seas" and the jurisdictional scope of the MMPA and the ESA. Part V provides ways to reconcile the interpretive conflict outlined in Part IV. This part includes analysis of international law, the Acts' plain language, Supreme Court precedent, and other judicial rules of interpretation. Part VI concludes that the MMPA and the ESA do not apply in a FEEZ based on two essential points: (1) when Congress first used the term "high seas" in the MMPA and the ESA, it understood this term to mean an area that was not subject to the exercise of

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[30] *See*, e.g., Natalie Barefoot-Watambwa, *Who is Encroaching Whom? The Balance Between our Naval Security Needs and the Environment: The 2004 RRPI Provisions as a Response to Encroachment Concerns*, 59 U. MIAMI L. REV. 577 (July 2005); Donna R. Christie, *Living Marine Resources Management: A Proposal for Integration of United States Management Regimes*, 34 Envtl. L. 107 (Winter 2004); Paul C. Kiamos, *National Security and Wildlife Protection: Maintaining an Effective Balance*, 8 ENVTL. LAW. 457 (June 2002).

[31] MMPA § 1372(a)(1).

[32] *Id.* § 1372(a)(2).

[33] *Id.* § 1361(18)(B) (giving an alternate definition of the term "harassment" for military readiness activities).

[34] As in *Mitchell*, this Article "poses a question not about the authority of Congress but instead about the congressional purposes embodied in the statute." United States v. Mitchell, 553 F.2d 996, 1001 (5th Cir. 1977).

foreign sovereign rights under international law; and (2) MMPA and ESA authority stem from control over natural resources.

II. WHY "HIGH SEAS" NEEDS TO BE DEFINED

The use of sonar[35] by navies highlights the importance of properly and clearly defining the terms "territorial seas" and "high seas" as used in the MMPA and/or the ESA, because of the potential effects of sonar on marine mammals.[36] While the most common anthropogenic or human-made source of low-frequency ocean noise comes from shipping,[37] and air guns used in oil and gas exploration produce the loudest human noise in the ocean next to dynamite,[38] the majority of the court cases revolve around the Navy's employment of low and mid-frequency active sonar. [39] In these cases, environmental groups have generally alleged that the Navy failed to obtain requisite or sufficient authorization under the National Environmental Policy Act[40] ("NEPA"), the MMPA, and the ESA to operate active sonar in U.S.

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[35] Sonar stands for SOund NAvigation Ranging. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1231 (1969).

[36] *See* Michael Jasny, et al, *Sounding The Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life*, Natural Resources Defense Council, 22 – 25 Table 2.2 "Active Sonar Systems in Use or Development by NATO Member States" (Nov. 2005), *available at* http://www.nrdc.org/wildlife/marine/sound/sound.pdf; *See also* Edward Cudahy, PhD, *A review of the potential for in vivo tissue damage by exposure to underwater sound* (Mar. 12, 2002); Donald L. Evans/Gordon R. England, *Joint Interim Report Bahamas Marine Mammal Stranding Event of 15-16 March 2000*, National Oceanic and Atmospheric Administration, U.S. Navy (Dec. 2001) [hereinafter Joint Interim Report].

[37] Michael Jasny, et al, *supra* note 36, at 4.

[38] *Id.*

[39] *See* Natural Resources Defense Council v. Winter, No. CV05 – 7513 FMC (FMOx), First Amended Complaint for Declaratory and Injunctive Relief, at paragraph 69, page 25 (D.C.D. Cal. filed Jan. 3, 2006); Natural Resources Defense Council v. Evans, 279 F.Supp.2d 1129 (N.D. Cal. 2003) (dispute over low-frequency sonar). *See also* Australians For Animals v. Evans, 301 F.Supp.2d 1114 (N.D. Cal 2004) (suit to prevent oceanographic research involving the use of under-water sonar); Eugene H. Buck et al., *Active Military Sonar and Marine Mammals: Events and References*, CRS Report for Congress, http://www.opencrs.com/rpts/RL33133_20051103.pdf (Updated Nov. 3, 2005); *The Marine Mammal Protection Act and Surveillance Towed Array Sensor System Low Frequency Active Sonar: Hearings Before the Subcomm. on Fisheries, Conservation, Wildlife and Oceans of the House Comm. on Resources*, 107th Cong. 2 (2001) (statement of Vice Admiral Dennis McGinn), [hereinafter Statement of Vice Admiral Dennis McGinn].

[40] Most cases involving extraterritorial application of the MMPA and the ESA usually involve NEPA as well. NEPA was enacted in 1969, and unlike the substantive protections provided for by MMPA and ESA, it solely provides procedural environmental protection designed to "encourage productive and enjoyable harmony between man and his environment." National Environmental Policy Act, 42 U.S.C. § 4321 (2005); *See also* Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1355-56 (9th Cir. 1994) (NEPA imposes only procedural requirements and does not dictate a substantive environmental result). NEPA also differs from the MMPA and the ESA, because it only applies to conduct by U.S. Federal agencies. Chesapeake Bay Found. v. United

territorial seas, on the high seas, and in FEEZs during peacetime, and that the Navy's operation of sonar will cause irreparable injury to marine mammals and endangered species.[41] Judge Laporte appropriately described the military and environmental interests surrounding this controversy in *Natural Resources Defense Council v. Evans*:

> On the one hand, there can be no doubt that the public interest in military preparedness and protection against enemy submarine attacks through early detection is of grave importance . . . . On the other hand, there can also be no doubt that the public interest in protecting the world's . . . sea creatures . . . is also of the highest importance.[42]

On October 19, 2005, the Natural Resources Defense Council ("NRDC") filed suit in the Central District of California alleging "on information and belief" that "Navy exercises employing mid-frequency active sonar regularly occur in U.S. territorial waters, in the Exclusive Economic Zone of the U.S. *and other countries*, and on the high seas," and that these exercises and use of mid-frequency active sonar violate NEPA, the MMPA, and the ESA.[43] Reference to sonar operation in the EEZ of other countries in the NRDC complaint demonstrates that application of the MMPA and the ESA in the FEEZ is an issue in current litigation. The gravamen of the issue is whether the Navy needs to get MMPA and ESA permits for its operation of mid-frequency active sonar in the FEEZ. The answer to this question depends on whether the FEEZ is a part of the "high seas" as that term is used in the MMPA and the ESA.

Integral to this discussion about whether the FEEZ is part of the "high seas" as that term is used in the MMPA and the ESA is a basic understanding of the following related terms: "sovereignty," "jurisdiction," "sovereign rights," and "territorial sovereignty." The normal complement of State rights or those that reflect statehood is commonly described as "sovereignty;" accumulations of rights by a State that are quantitatively less than the norm or particular rights (or claims), liberties, immunities, or powers are referred to as "jurisdiction."[44] Consent is an important distinguishing factor between the two terms.[45] For

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States, 453 F.Supp. 122, 125 (E.D. Va. 1978). NEPA is silent as to whether it applies to Federal actions outside the United States.

[41] *See* Natural Resources Defense Council v. Winter, No. CV05 – 7513 FMC (FMOx), at 25 (D.C.D. Cal. filed Jan. 3, 2006); *Evans*, 279 F.Supp.2d at 1129; Natural Resources Defense Council v. Department of the Navy, No. CV-01-07781 CAS(RZx), 2002 U.S. Dist. LEXIS 26360 (C.D. Cal. Sept. 17, 2002); *Clinton*, 124 F.Supp.2d at 1173.

[42] *Evans*, 279 F.Supp.2d at 1138.

[43] *Winter*, No. CV05 – 7513 FMC (FMOx), at 25 (D.C.D. Cal. filed Jan. 3, 2006) (emphasis added).

[44] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 106 (6th ed. 2003).

[45] *Id.*

example, State A has exclusive jurisdiction or power over its forces located in a particular area in State B.[46] Although State A may have rights to exclusive use of that particular area in State B, if these rights exist with the consent of the host State (State B), then State A has no sovereignty over any area in State B.[47] "Sovereign rights" are those rights owned by a sovereign to be exercised in a particular area; "territorial sovereignty" reflects the ownership of a particular area or territory by a sovereign.[48] States have "sovereign rights" over the resources in their EEZ under international law.[49]

Applying the MMPA and the ESA to the FEEZ would greatly extend the Acts' geographic reach[50] to include U.S. protection of natural resources under foreign control. At first blush, U.S. protection of foreign natural resources appears to benefit marine mammals and endangered species whether under U.S. or foreign control. The Acts also appear to avoid conflict with foreign jurisdiction since they only apply to American conduct in the FEEZ. But it is important to understand the nature of MMPA and ESA "protection" to appreciate that application of the Acts in the FEEZ could result in U.S. authorization of incidental harm by Americans to natural resources under foreign sovereign control without prior consent of the foreign sovereign. An overview of UNCLOS and the nature of MMPA and ESA protection also demonstrates that such U.S. protection could potentially conflict with a foreign sovereign's natural resource protection or exploitation regime that applies to all conduct in its EEZ.[51]

III. SUBSTANTIVE STATUTORY OVERVIEW

A. Marine Mammal Protection Act

The MMPA was enacted in 1972 to protect marine mammals from human activities and encourage marine mammal development to the greatest

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[46] *Id.*

[47] *Id.* A county may be occupied by another power without consent, but this situation does not constitute a transfer of sovereignty because a legal occupation depends on the occupied State's continued existence. *Id.* at 106-07.

[48] *Id.* at 105-07.

[49] UNCLOS, *supra* note 2, art. 56, 21 I.L.M. at 1280.

[50] "Together, national EEZs cover over 30% of the world's seas, approximately 90% of the commercial fisheries, and almost all the presently exploitable mineral resources." DAVID HUNTER ET AL., *supra* note 1, at 681.

[51] In examining whether the U.S. could impose its environmental requirements on the Philippine Government in connection with the U.S. export of nuclear power to the Philippines, the D.C. Circuit found: "Conditioning an export license on the health, safety and environmental standards we think sound for the foreign nation's regulation directs that nation's choices just about as effectively as a law whose explicit purpose is to compel foreign behavior." Natural Resources Defense Council v. Nuclear Regulatory Commission, 647 F.2d 1345, 1356-57 (D.C. Cir. 1981).

extent feasible commensurate with sound resource management policies aimed at maintaining the health and stability of the marine ecosystem.[52] The Secretary of Commerce through the National Oceanic and Atmospheric Administration's[53] National Marine Fisheries Service ("NMFS" or "NOAA Fisheries")[54] enforces MMPA provisions that protect Cetacea[55] and select Pinnipeds.[56] The Secretary of the Interior[57] through the U.S. Fish and Wildlife Service ("FWS")[58] enforces MMPA provisions that protect other marine mammals.[59] The MMPA establishes an independent Marine Mammal Commission composed of 3 members appointed by the President with the advice and consent of the Senate; its purpose is to review and study U.S. activities pursuant to existing domestic and international law and make recommendations to Federal officials responsible for effecting domestic and international marine mammal policy and implementing marine mammal laws.[60]

Any person[61] is prohibited from the unauthorized taking of marine mammals.[62] The MMPA defines "take" as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal."[63] The term "harassment" means any act of pursuit, torment, or annoyance, which has the potential to injure or "disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering."[64] In the case of a "military readiness activity,"[65] however, the term "harassment" means any act

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[52] MMPA §§ 1361 (1) and (6).
[53] *Id.* §§ 1362(12)(A), 1377.
[54] "The Secretary delegated authority to carry out the provisions of the MMPA to the NOAA Administrator and the Assistant Administrator for Fisheries of the NMFS." Balelo v. Baldridge, 724 F.2d 753, 755 n.2 (9th Cir. 1984).
[55] Cetacea are whales, dolphins, and porpoises.
[56] Pinnipeds are seals, sea lions, and walruses, but the Secretary of Commerce is not responsible for walruses.
[57] MMPA §§ 1362(12)(A), 1377.
[58] "The Fish and Wildlife Service enforces the Marine Mammal Protection Act to protect polar bears." North Slope Borough v. Andrus, 486 F.Supp. 332 (D.C. 1980), *vacated in part*, 14 ERC 1846 (D.C.Cir. 1980), *aff'd in part and rev'd in part on other grounds*, 642 F.2d 589 (D.C. Cir. 1980).
[59] "All other marine mammals," include the sea otter, walrus, polar bear, manatee, and the dugong.
[60] MMPA §§ 1401, 1402.
[61] "The term 'person' includes (A) any private person or entity, and (B) any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government." MMPA § 1362(10).
[62] *Id.* § 1372 (a).
[63] *Id.* § 1362 (13).
[64] *Id.* § 1362 (18)(A).
[65] "Military readiness activity. --(1) In this section [this note] the term 'military readiness activity' includes--(A) all training and operations of the Armed Forces that relate to combat; and (B) the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use. (2) The term does not include--□(A) the routine operation

that "injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild" or any act that "disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered."[66]

In a separate section of the MMPA, there is an open-ended moratorium on the unauthorized taking of marine mammals and import of marine mammals or marine mammal products, which began on the effective date of the statute.[67] During the moratorium, no permits may be issued for taking or importing marine mammals if the Secretary designates the marine mammal as "depleted."[68] Exceptions to this rule allow incidental take permits for purposes of scientific research, photography for educational or commercial purposes, enhancement of the survival or recovery of a stock, or other activities other than commercial fishing that will have a negligible impact on a species or stock within a five-year or one-year period.[69]

Military readiness activities[70] are a type of activity for which the Secretary may authorize, for a period up to five years, the incidental take of marine mammals.[71] To issue a permit for a military readiness activity, the Secretary must find, after notice[72] and comment, that the total incidental taking

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of installation operating support functions, such as administrative offices, military exchanges, commissaries, water treatment facilities, storage facilities, schools, housing, motor pools, laundries, morale, welfare, and recreation activities, shops, and mess halls; (B) the operation of industrial activities; or (C) the construction or demolition of facilities used for a purpose described in subparagraph (A) or (B)." MMPA § 1371 (a)(5)(A)(ii); Migratory Bird Treaty Act, 16 U.S.C. § 703(f) (2006).

[66] MMPA § 1362 (18)(B).

[67] *Id.* § 1371 (a).

[68] Depleted means "a species or population stock is below its optimum sustainable population or listed as endangered or threatened under the ESA." MMPA §§ 1362 (1)(A) – (C).

[69] *Id.* §§ 1371 (a)(3)(B), 1371(a)(5)(A) and (D).

[70] Note that the moratorium also contains an exemption for "actions necessary for national defense," but this exemption applies to any action or category of actions undertaken by the Department of Defense after consultation with the Secretary of Commerce or Interior, or both, for no longer than 2 years. *Id.* § 1371(f). "Actions necessary for national defense" are not defined, but the Department of Defense has used the following rationale for this exemption in a Report to Congress: "The underlying reasons for this National Defense Exemption rests upon the importance to the United States' national defense of the Department of the Navy's (DoN's) ability to continue to test and train with mid-frequency active sonar." Report to Congress: Rationale for Issuing a National Defense Exemption Under the Marine Mammal Protection Act, August 1, 2006.

[71] MMPA §§ 1371 (a)(5)(A)(i) and (ii). Military activities, unlike other activities that qualify under this section, are not subject to "small numbers" and "specified geographical region" requirements of § 1371(a)(5)(A)(i). *Id.* §§ 1371 (a)(5)(F).

[72] Unlike other activities that require notice in newspapers and electronic media, notice of military activities shall only be in the Federal Register. *Id.* § 1371 (a)(5)(A)(iii).

during the five-year period will have a negligible impact on such species or stock.[73] Before issuing regulations prescribing permissible methods of incidental taking and other means of "effecting the least practicable adverse impact"[74] on a species or stock and its habitat due to a military readiness activity, the Secretary shall consult with the Department of Defense regarding "personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity."[75] Navy equipment that emits sonar in readiness training to detect enemy submarines[76] fits the definition of a "military readiness activity" under the MMPA. Because sonar may disturb or injure (i.e., "take") marine mammals,[77] the Navy is required to follow the statutory requirements of the MMPA and the ESA if it conducts sonar training on the "high seas" or on "waters under the jurisdiction of the United States." The ESA has similar statutory requirements that work in conjunction with the MMPA.

B. Endangered Species Act

The ESA was enacted in 1973 to protect endangered and threatened species and the ecosystems upon which they depend.[78] Congress found that the United States "as a sovereign state in the international community" pledged to conserve fish, wildlife, and plants facing extinction pursuant to several multilateral environmental treaties, to include the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES").[79] The United States implements CITES through the ESA.[80] The Secretary of the Interior,

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[73] *Id.* § 1371 (a)(5)(A)(i)(I). The Secretary may also authorize, for up to one year and subject to specified conditions, incidental takes by harassment during military and other activities. *Id.* § 1371 (a)(5)(D).

[74] In addition to the consideration of rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses, in the military readiness context, "effecting the least practicable adverse impact" in the military context will also include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. *Id.* §§ 1371 (a)(5)(A)(i)(II)(aa), 1371 (a)(5)(A)(ii).

[75] *Id.* §§ 1371 (a)(5)(A)(i)(II), 1371 (a)(5)(A)(ii). An example of these types of regulations is: "Taking Marine Mammals Incidental to Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar." Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar, 67 Fed. Reg. 46712, 46768 (2002) (codified at 50 C.F.R. § 216) [hereinafter Taking and Importing Marine Mammals].

[76] *See* Statement of Vice Admiral Dennis McGinn, *supra* note 39.

[77] *See* Edward Cudahy, PhD, *supra* note 36; Joint Interim Report, *supra* note 36.

[78] ESA § 1531 (b).

[79] *Id.* § 1531 (a)(4)(F). CITES regulates the international trade in species presently or potentially "threatened with extinction which are or may be affected by trade." Convention on International Trade in Endangered Species of Wild Fauna and Flora, art. II, *signed* 3 Mar. 1973, *entered into force* 1 July 1975, 27 U.N.T.S. 243.

[80] ESA §§ 1532(4). "Convention" means CITES. *Id.* The Secretary of the Interior is the Management and Scientific Authority under the Convention and the Fish and Wildlife Service shall

through U.S. Fish and Wildlife Service ("FWS"), and the Secretary of Commerce, through National Marine Fisheries Service ("NMFS"), share responsibilities for administering the ESA.[81] "Generally, marine species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior."[82] Unlike the MMPA, which protects all marine mammals, the ESA protects only listed endangered or threatened species[83] and designated critical habitats[84] that are listed and designated by the Secretary of Commerce or Interior.[85] Thus, the ESA does not apply in a FEEZ where there are no listed endangered or threatened species. The ESA and the MMPA both prohibit unlawful conduct by "any person[86] subject to the jurisdiction of the United States" within geographic boundaries,[87] but the ESA contains additional procedures regarding any action by U.S. Federal agencies.[88]

"Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of[89] any endangered or threatened species or result in the destruction or adverse modification of habitat" critical to such species.[90] Joint regulations by the Secretary of Commerce and Interior interpret and implement the consultation

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carry out the functions of each Authority. *Id.* § 1537a(a) - (c). "Depleted" means *endangered or threatened species under the ESA.* MMPA § 1362(1)(C). And "no permit may be issued for the taking of any marine mammal which has been designated by the Secretary as depleted, and no importation may be made of any such mammal." *Id.* § 1371(a)(3)(B). Also, the Secretary may issue a permit to import polar bear parts taken in sport hunts in Canada if legally harvested from Canada and after consultation with the Marine Mammal Commission and after notice and comment, the Secretary finds the export and subsequent import are consistent with CITES. *Id.* § 1374(c)(5)(A).

[81] 50 C.F.R. § 402.01 (b) (2006).

[82] Interagency Cooperation--Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926 (1986) (to be codified at 50 C.F.R. § 402).

[83] 50 C.F.R. § 17.11 (2006) (lists all endangered or threatened species). Listed species may be in foreign territory.

[84] 50 C.F.R. §§ 17.94 – 17.96 (2006) (designated critical habitats).

[85] ESA § 1533.

[86] Definition of "person" under the ESA means, "an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States." *Id.* § 1532 (13).

[87] *Id.* § 1538.

[88] *Id.* § 1536.

[89] "'Jeopardize the continued existence of' means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02 (2006).

[90] ESA § 1536 (a)(2).

procedure.[91] The regulations state that the agency proposing an action ("action agency") determines whether the action "may affect listed species or critical habitat."[92] If the action agency determines its action will not affect listed species or critical habitat, there is no consultation.[93] If the action agency determines its action "may affect" listed species or critical habitat, the action agency must consult with NMFS or FWS ("resource agency") either informally,[94] or formally if the proposed action is "likely to adversely affect" listed species or critical habitat.[95] Generally, formal consultation results in the issuance of a "biological opinion" by NMFS or FWS, which advises the action agency whether the proposed action is likely to jeopardize any listed species and, if so, whether "reasonable and prudent alternatives" exist to avoid jeopardy.[96] While U.S. agencies are generally concerned with jeopardizing endangered species or adversely modifying their habitat, individual agency members must also be concerned with incidentally taking endangered species.

The ESA prohibits taking a listed endangered species by "any person subject to the jurisdiction of the United States."[97] "'Take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[98] The MMPA works with the ESA, however, to allow takings incidental[99] to Federal actions (e.g., military readiness activities) if authorized through the formal consultation process in an incidental take statement attached to the final biological opinion.[100] The resource agency may issue an incidental take statement to the action agency after completion of formal consultation when it determines that the incidental take resulting from the agency action is not likely to jeopardize the continued existence of any species or adversely modify critical habitat.[101] If an endangered or threatened marine mammal is involved, an incidental take statement may be issued under the ESA if it specifies compliance with MMPA Section (a)(5), which, as explained above, permits incidental takes that have a negligible impact on a species or stock within a five-year period.[102] If there is a conflict between the ESA and the MMPA, the more restrictive provision of the MMPA takes

[91] 50 C.F.R. Pt. 402 (2006).
[92] 50 C.F.R. § 402.14 (a) (2006).
[93] *Id.*
[94] 50 C.F.R. § 402.13 (2006).
[95] 50 C.F.R. § 402.14.
[96] ESA § 1536 (b).
[97] *Id.* § 1538 (a)(1). There is an exemption for national security reasons. *Id.* § 1536 (j).
[98] *Id.* § 1532 (19).
[99] "'Incidental take' refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant." 50 C.F.R. § 402.02.
[100] ESA § 1536 (b)(4); 50 C.F.R. § 402.14 (i) (2006).
[101] ESA § 1536 (b)(4).
[102] ESA § 1536 (b)(4)(C)(iii); 50 C.F.R. § 402.14 (i).

precedence over the conflicting less restrictive provision of the ESA.[103] Finally, any subsequent taking that is in compliance with the terms and conditions specified in the incidental take statement shall not be considered to be a prohibited taking of such species.[104] Individuals not affiliated with a Federal agency action may get an "incidental take permit," which has the same effect as an "incidental take statement."[105] Whether authorization to incidentally take a marine mammal or endangered species in the FEEZ is required depends on the meaning of "high seas."

IV. CURRENT INTERPRETATION OF "HIGH SEAS"

Indeed, whether any MMPA or ESA provisions apply in a FEEZ depends on how "high seas" is defined. This key jurisdictional term appears in the prohibition sections of both Acts.[106] The MMPA prohibits the taking of marine mammals on the "high seas" or in "waters under the jurisdiction of the United States," but the extent and meaning of "high seas" is not defined.[107] Under the MMPA, "waters under the jurisdiction of the United States" currently extends 200 NM from shore.[108] Similarly, the ESA prohibits the taking of endangered species in the "territorial sea of the United States" and on the "high seas," but the extent and meaning of "territorial sea of the United States" and "high seas" are not defined.[109] Although the following analysis of legislative history, caselaw, and agency interpretation fails to discern the definition of "high seas" for the MMPA and the ESA, a commonality is the application of both Acts to areas containing natural resources under U.S. control and to areas free from foreign sovereign control.

A. Marine Mammal Protection Act

1. Legislative History

Although several observations can be made, the legislative history of the MMPA provides no explicit guidance on the meaning of "high seas." The best guidance on what Congress implicitly meant by "high seas," however, may be gleaned by examining how the definition of the term "waters under the jurisdiction of the United States" in the MMPA evolved. Before tracing the evolution of this important terminology, it is important to note that when the MMPA and the ESA were enacted in 1972 and 1973 respectively, the United

[103] ESA § 1543.
[104] *Id.* § 1536(o)(2).
[105] *Id.* § 1539.
[106] MMPA § 1372(a)(1); ESA § 1538(a)(1)(C).
[107] MMPA §§ 1372(a)(1), 1372(a)(2)(A).
[108] *Id.* § 1362.15.
[109] ESA §§ 1538(a)(1)(B) and (C).

States claimed 3 NM territorial seas, beyond which began "high seas."[110] The U.S. claim of 3 NM territorial seas was consistent with the 1958 Conventions on the Law of the Sea, which were superseded in 1982 by UNCLOS.[111] While the border from which "high seas" began changed from 1972 to 1982, the international definition of "high seas" as an area free from State sovereignty did not change.[112] Based on this brief historical sketch, one would assume that in 1972 the MMPA term "waters under the jurisdiction of the United States" would extend out to 3 NM, but this was not the case.

The term "water under the jurisdiction of the United States" was defined identically in both a House Report and a Senate Report proposing MMPA legislation, and that definition stated: "'Waters under the jurisdiction of the United States' means waters out to the twelve mile limit."[113] When the House bill finalizing the MMPA legislation was passed, the definition read, "The term 'waters under the jurisdiction of the United States' means- (A) the territorial sea of the United States, and (B) the fisheries zone established pursuant to the Act of October 14, 1966 (80 Stat. 908; 16 U.S.C. 1091-1094)."[114] In 1972, the U.S. territorial seas extended 3 NM from shore and the fisheries zone extended U.S. jurisdiction over natural resources another 9 NM from the outer boundary of the territorial seas, expanding waters under U.S. jurisdiction in the MMPA to 12 NM.[115] The term was amended in 1992[116] and extended waters under U.S. jurisdiction in the MMPA to 200 NM to reflect the establishment of the U.S. EEZ in 1983[117] and the 1990 Agreement on the Maritime Boundary with the Union of Soviet Socialist Republics.[118] As evidenced above, the extent of waters under U.S. control in the MMPA evolved concurrently with the extension of U.S. control over its natural resources.

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[110] Although a 12 NM territorial sea was considered customary international law by 1982 with the conclusion of UNCLOS, the United States did not recognize this rule of customary international law until 1988. *See supra* note 4.
[111] *See infra* Part V.A.2.
[112] *Id.*
[113] H.R. REP. NO. 92-707 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4156; S. REP. NO. 92-863, at 13 (1972). The Senate Report used the numeric representation "12-mile" vice the words "twelve mile" used in the House Report.
[114] Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, § 3, 86 Stat. 1027, 1205 (1972) (prior to 1992 amendment).
[115] An Act to establish a contiguous fishery zone beyond the territorial sea of the United States, Pub. L. No. 89-658, §2, 80 Stat. 908 (1966).
[116] Northern Pacific Halibut Act of 1982, 16 U.S.C. § 773 (2006). The Act also defined "Fishery conservation zone" as the fishery conservation zone of the United States established by section 101 of the Magnuson-Stevens Fishery Conservation and Management Act of 1976 (16 U.S.C. 1801 et seq.), which extended 200 NM in accordance with the U.S. EEZ. *Id.* § 773(c).
[117] Proclamation No. 5030, 48 Fed. Reg. 10605 (1983).
[118] Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, *effected* 1 June 1990, *effective* 15 June 1990, State Dept. No. 90-182, KAV No. 2680, 1990 WL 484559.

Moreover, the U.S. declaration that its 200 NM EEZ was consistent with customary international law implied U.S. recognition that all States may legally declare a 200 NM EEZ.

For purposes of completeness, the following additional observations regarding MMPA legislative history are offered. The first observation concerns the scope of the open-ended moratorium currently found in MMPA Section 1371. This moratorium on the taking and importation of marine mammals and marine mammal products was supposed to last fifteen years under the Senate version of the Act.[119] The House version originally contained a moratorium on the issuance of permits to take marine mammals that was only to last sixty days.[120] Congressman Peter N. Kyros (Dem-Maine) suggested that the moratorium last two years to provide additional time for researching the dangers facing marine mammals before allowing permits to take more marine mammals[121], but his suggestion was rejected because the Committee wanted a more flexible means to deal with protecting marine mammals and the Committee believed that the protections built into the proposed legislation contained a *de facto* moratorium that would last at least two years and probably much longer.[122]

Congress' preference for a flexible approach to protecting marine mammals does not support an interpretation of the moratorium as a permanent worldwide ban on the taking of marine mammals. Although one could argue that Congress' original intention to limit the duration of the moratorium supports an interpretation of the moratorium as instituting a worldwide ban, this interpretation loses force when one recognizes that the moratorium has lasted more than thirty years. Clearly, Congress did not intend to have a moratorium constituting a worldwide ban on the taking of marine mammals to last more than thirty years. This is especially true when one considers that Congress specifically refused to adopt such a lengthy moratorium because it recognized that there were other protections built into the MMPA.

The remaining observations concern Congressional discussion of the high seas. The Department of Commerce proposed amendments to House Report 10420, which was passed in lieu of the Senate bill to enact the MMPA, and those amendments contained a definition of high seas.[123] The Commerce definition read, "'High seas' means the waters seaward of the territorial sea of

[119] S. REP. NO. 92-863, at 13 (1972).
[120] H.R. REP. NO. 92-707 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4158.
[121] H.R. REP. NO. 92-707 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4185-86.
[122] H.R. REP. NO. 92-707 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4153.
[123] H.R. REP. NO. 92-707 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4169.

the United States."[124] But Congress did not adopt this definition in the final House bill that became the MMPA.[125] NOAA maintains this definition was not adopted because the Department of Commerce proposed that the Act only apply in high seas and not in State waters; but, when Congress did not adopt this approach and applied the Act to State waters and high seas, the Commerce definition of high seas was not needed.[126] Perhaps a better explanation is that the Act's prohibitions protected marine mammals from actions by persons subject to U.S. jurisdiction on the high seas or in waters under U.S. jurisdiction;[127] "waters under U.S. jurisdiction" was defined in accordance with U.S. control over its natural resources and "high seas" was left undefined in light of the ongoing UNCLOS negotiations.

UNCLOS was discussed during the hearings before the Subcommittee on Fisheries and Wildlife Conservation, where the Coordinator of Ocean Affairs and Special Assistant for Fisheries and Wildlife to the Secretary of State testified that, "the United States has negotiated a number of treaties and agreements relating to the conservation of living marine resources," and:

> [the] basic concept underlying these arrangements is that of conservation as defined in the convention on fishing and conservation of the living resources of the high seas which was adopted by the United Nations Conference on the Law of the Sea, 1958, and to which the United States is a party.[128]

He further stated that "the United States is very actively seeking a new Law of the Sea Convention," and "[t]here will be a LOS conference very likely in 1973."[129] Thus, UNCLOS was not absent from the Congressional record, and discussion of high seas in the context of UNCLOS provides further support for an international interpretation of "high seas."

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[124] H.R. REP. NO. 92-707 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4170. It is interesting to note that NOAA is still using this definition in the context of the MMPA with regard to foreign nations.

[125] *See* Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. § 1361 (2005)).

[126] Letter from Jane H. Chalmers, Deputy General Counsel, National Oceanic and Atmospheric Administration to Thomas L. Sansonetti, Assistant Attorney General, United States Department of Justice, Environment and Natural Resources Division, at 7 (Mar. 3, 2003) (on file with the National Oceanic and Atmospheric Administration) [hereinafter Chalmers letter].

[127] H.R. REP. NO. 92-707 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4156 (emphasis added). *See also* Nina M. Young & Suzanne Iudicello, *Blueprint For the Whale Conservation: Implementing the Marine Mammal Protection Act*, 9 OCEAN & COASTAL L.J. 149, 151 (1997).

[128] Marine Mammals: Hearings on Legislation for the Preservation and Protection of Marine Mammals Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 92nd Cong., 1st Sess. 92-10, at 181 (1971) (statement of Donald L. McKernan, U.S. Ambassador, Coordinator of Ocean Affairs and Special Assistant for Fisheries and Wildlife to the Secretary of State).

[129] *Id.*

Moreover, during the hearings described above, the Special Assistant to the Alaska Attorney General testified that there are "ample grounds for the Federal Government to assert jurisdiction over mammals and over species which do travel into Federal or international waters" in an attempt to distinguish species that reside primarily in Alaskan territorial waters from those species that migrate into the high seas.[130] Although this testimony related to Alaska's concern regarding the Federal Government's regulation of marine mammals in its territorial seas, it is interesting to note that neither the State Attorney General's office nor the Committee Chairman considered that U.S. legislation protecting marine mammals would or could extend beyond international waters (i.e., high seas) to an area under a foreign sovereign's control (i.e., FEEZ).

2. Caselaw

Against this legislative background, several courts have attempted to resolve the obvious ambiguities in the MMPA's use of the term "high seas." A cursory review of these few cases demonstrate the courts' various and diverse methods of interpretation, to include consideration of State sovereignty, statutory authority, and jurisdictional language in the statute.

a. *United States v. Mitchell*

The first court to attempt to define the jurisdictional limits of the MMPA was *United States v. Mitchell*[131] in 1977. *United States v. Mitchell* is still the leading case on the extraterritorial application of the MMPA, and the *Mitchell* court found that "the criminal prohibitions of the Act do not reach conduct in the territorial waters of a foreign sovereignty."[132] The *Mitchell* court found that the MMPA "is based on the control that a sovereign such as the United States has over the natural resources within its territory."[133] In *Mitchell*, an American citizen named Jerry Mitchell was convicted of violating the MMPA by capturing 21 dolphins within the three-mile limit[134] of the Commonwealth of the Bahamas.[135] Mitchell was prosecuted for violating a

[130] Marine Mammals: Hearings on Legislation for the Preservation and Protection of Marine Mammals Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 92nd Cong., 1st Sess. 92-10, at 451 (1971) (statement of David Jackman, Special Assistant to the Alaskan Attorney General).
[131] United States v. Mitchell, 553 F.2d 996 (5th Cir. 1977)
[132] *Id.* at 997.
[133] *Id.* at 1002.
[134] The United States recognized 3 NM territorial seas in 1977 and did not adopt the current international standard of 12 NM territorial seas until 1988. Proclamation No. 5928, 54 Fed. Reg. 777 (1988). Although 12 NM territorial seas may have been considered customary international law in 1977, UNCLOS did not codify the breadth of territorial seas at 12 NM until 1982. UNCLOS, *supra* note 2, art. 3, 21 I.L.M. at 1272.
[135] *Mitchell*, 553 F.2d at 997.

NMFS regulation,[136] which makes it unlawful for any person subject to U.S. jurisdiction to take any marine mammal during the MMPA moratorium.[137] The validity of the NMFS regulation is discussed further below, but the *Mitchell* court found that the provision could not validly extend MMPA jurisdiction beyond the high seas "because the statutory authority created by Congress does not extend to the territory of foreign sovereigns."[138] This decision is not surprising as courts have been extremely reluctant to apply U.S. law extraterritorially.

b. *Center for Biological Diversity v. National Science Foundation*

Although most courts adopted the *Mitchell* court's interpretation that the MMPA did not extend to foreign territorial seas, there was still no decision that discussed whether the MMPA extended to a FEEZ until *Center for Biological Diversity v. National Science Foundation.*[139] And the court in *Center for Biological Diversity v. National Science Foundation*, basing its decision on *Mitchell* and *Environmental Defense Fund v. Massey,*[140] found that the "EEZ of Mexico which extends 200 miles from the shore is not considered part of its territorial waters and under U.S. law is considered part of the 'high seas' or the 'global commons,' that is, territory which belongs to all nations but subject to the sovereignty of none."[141] This case resulted in the issuance of a temporary restraining order enjoining the National Science Foundation ("NSF") from continuing its acoustical research in the Gulf of California outside the territorial seas of Mexico (in Mexico's EEZ).[142] The NSF was using air guns to fire extremely high energy acoustic bursts to generate geophysical data and these acoustic bursts were shown to present a significant danger of injury to and harassment of marine mammals.[143] While no other courts have specifically addressed whether "high seas" includes the FEEZ under the MMPA or followed the reasoning of this decision, other courts have addressed the nature of the EEZ under U.S. law in the natural resources context.[144]

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[136] 50 C.F.R. § 216.11.
[137] *Mitchell*, 553 F.2d at 999.
[138] *Id.* at 1005.
[139] Center for Biological Diversity v. National Science Foundation, 2002 U.S. Dist. LEXIS 22315 (N.D. Cal. Oct. 30, 2002).
[140] Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993). This was the lone NEPA decision which applied NEPA jurisdiction over Antarctica, "where the United States has a great measure of legislative control." *Id.* at 529.
[141] *Center for Biological Diversity,* 2002 U.S. Dist. LEXIS 22315, at *9.
[142] *Id.* at *2 - 3.
[143] *Id.* at *3 - 7.
[144] *See infra* Part IV.B.2.a.

c. *Florida Marine Contractors v. Williams*

The most recent case to discuss the jurisdictional scope of the MMPA and interpret *United States v. Mitchell* is *Florida Marine Contractors v. Williams*.[145] In *Williams*, the court found the "precise question at issue" was whether the MMPA's moratorium in "Section 1371 applies to a state's inland waters without limitations for hazards attributable to recreational activities."[146] The contractors in *Williams* wanted to build recreational docks on Florida's inland waterways and FWS denied the contractors the necessary permits under the MMPA after concluding that the building and intended use of the docks would result in the incidental taking of the Florida manatee and have more than a negligible impact on the species.[147] The contractors then filed suit under the Administrative Procedures Act,[148] claiming that the MMPA does not apply to residential docks built on Florida's inland waters.[149] Although the MMPA makes it unlawful to take any marine mammal in waters under U.S. jurisdiction, *the MMPA does not include inland waters under its definition of "waters under U.S. jurisdiction."*[150] To overcome this counterintuitive definition in MMPA Section 1362, the court focused on the lack of any geographic restrictions in the moratorium of MMPA Section 1371 and held that this section applied to all waters, including inland waters.[151] Specifically, the *Williams* court held that FWS's authority to allow the taking of marine mammals worldwide is governed under the MMPA moratorium in Section 1371, and found that Section 1372 did not regulate Agency conduct but only that conduct pertaining to individuals.[152]

3. Agency Interpretation

The Commerce Department, the MMPA's primary implementing Agency via NOAA, has not helped the courts define the geographic scope of the MMPA through its conflicting informal and formal[153] guidance. In formally defining the geographic scope of the MMPA, NOAA's implementing regulation

[145] 378 F.Supp.2d 1353, 1355 (M.D. Fla. 2005).
[146] *Id.* at 1360.
[147] *Id.* at 1356.
[148] Administrative Procedures Act, 5 U.S.C. § 551, 706 (2005). The MMPA does not allow for a private right of action, but the Administrative Procedures Act authorizes Federal courts to review a federal agency's interpretation of a federal statute. *Williams,* 378 F.Supp.2d at 1356.
[149] *Williams,* 378 F.Supp.2d at 1356. Conceding that issuance of the permits would have more than a negligible impact on the Florida manatees in Florida's internal waters where the docks would be built, the contractors argued that the MMPA did not apply. *Id.*
[150] MMPA § 1362 (15).
[151] *Williams,* 378 F.Supp.2d at 1357-59. The Court decided the case consistent with the same NOAA regulation previously found invalid by the *Mitchell* Court. *Id*.
[152] *Id. See infra* Part V.D.1.
[153] In this context, formal means that an agency position has undergone the formal rule making process.

adds a provision to the geographic prohibitions under the Act, making it unlawful for "[a]ny person subject to the jurisdiction of the United States to take any marine mammal during the moratorium."[154] So far, only the district court in *Florida Marine Contractors v. Williams* appears to have agreed with this interpretation of the MMPA moratorium in Section 1371. The Fifth Circuit in *United States v. Mitchell* specifically found that the extension of jurisdiction in the regulation "must be set aside as agency action in excess of statutory authority."[155] The *Mitchell* court also noted that, "Although the briefs disputed the definition of the term 'high seas,' the Government conceded in oral argument that the definition, for the purposes of the Act, excludes the territorial waters of sovereign states."[156] And *In the Matter of Tuna/Porpoise Cases*, the NOAA Administrative Law Judge ("ALJ") found that *Section 1372(1) sets out the jurisdictional limits of the MMPA* and cited *Mitchell* for "the correct legal standard" that U.S. jurisdiction under the MMPA "extends to violations of the Act on the high seas, but does not extend to violations which occur in the territorial waters of other nations."[157] The ALJ did not find that MMPA Section 1371, the moratorium, sets out the jurisdictional limits of the MMPA as suggested by the Government (NOAA) in *Mitchell*.[158] Thus, NOAA's current rule that the moratorium applies MMPA jurisdiction worldwide, as argued in *Mitchell* in defense of its regulation, is inconsistent with its recognition in courts and administrative hearings that the Act does not apply in foreign territorial seas. And if the MMPA does not apply in foreign territorial seas because the natural resources in territorial seas are under foreign sovereign control, then the same reasoning applies with equal force in the FEEZ.

NOAA, however, has not included the FEEZ in its interpretation of foreign "territorial seas" in courts and administrative hearings. In a letter from the NOAA General Counsel to the Department of Justice, the NOAA General Counsel stated: "[I]t is the long-standing and consistently held position of NOAA and the U.S. Government that the MMPA applies as a matter of law to actions of U.S. citizens and flag vessels in the EEZs of foreign states."[159]

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[154] 50 C.F.R. § 216.11 (c) (2007)
[155] United States v. Mitchell, 553 F.2d 996, 1005 (5th Cir. 1977)
[156] *Id.* at 1005 n.15.
[157] *In re* Tuna/Porpoise Cases, 3 O.R.W. 96, 1983 NOAA LEXIS 49, at *4 (NOAA 1983) (enunciating the correct legal standard, but applying that standard inconsistently with the customary international law).
[158] *Mitchell*, 553 F.2d at 1005.
[159] Chalmers letter, *supra* note 126, at 1. Evidence of this informal position can also be found in the NOAA/NMFS response to a comment to the final rule: "Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar." Taking and Importing Marine Mammals, *supra* note 75, at 46768. In response to a comment advocating adoption of a coherent noise policy for use in all oceans involving all sources of anthropogenic noise, NMFS replied: "NMFS recognizes that there

Although NOAA advocates that it has consistently applied the MMPA in the FEEZ, it is unclear what legal reasoning supports this assertion. The United States may not legally exert control over the natural resources in the FEEZ if the natural resources in the FEEZ are under foreign sovereign control. Concurrent jurisdiction over natural resources in the FEEZ may not be asserted unilaterally under international law.[160] Although the United States, via the MMPA, asserts jurisdiction only over its citizens, by allowing its citizens incidental take authorization in a FEEZ, it has exercised *de facto* jurisdiction over the foreign resource in the FEEZ as well. Moreover, legislative history shows MMPA jurisdiction to be consistent with areas where the United States may exert control over natural resources. Also, MMPA jurisdiction cannot extend worldwide based on the moratorium in Section 1371 if Section 1372 governs MMPA jurisdiction and does not extend to foreign territorial seas. Finally, one cannot argue that the MMPA has always considered that "high seas" begin after U.S. territorial seas end, since "high seas" are not "waters under U.S. jurisdiction," and "waters under U.S. jurisdiction" in the MMPA have always included a fisheries zone. If the MMPA states that "waters under U.S. jurisdiction" include the U.S. EEZ, then waters under foreign jurisdiction should by implication include the FEEZ.

This last interpretation would be consistent with the Department of Defense's ("DoD") explanation of MMPA and ESA jurisdiction found in the Navy's "at sea policy for environmental compliance," which states that the Acts apply in "the area from the U.S. high water mark seaward to the recognized Exclusive Economic Zones (EEZs) or fishing zones" of other coastal nations; or in other words, the MMPA and the ESA apply in the U.S. territorial sea, the U.S. EEZ, and the high seas, but not in the recognized EEZs or fishery zones of other coastal States.[161] The DoD interpretation is not only consistent with

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are many sources of anthropogenic noise in the ocean. . . . However, NMFS also recognizes that many sources of maritime noise are by activities that either are not subject to the MMPA (e.g., non-U.S. shipping outside the U.S. EEZ), or do not qualify for authorizations under the MMPA (e.g., non-U.S. shipping within the U.S. Exclusive Economic Zone (EEZ))." *Id.* A fair reading of the response by NMFS above is that the MMPA applies to all U.S. shipping without any geographic boundaries. And NOAA, on its website in the frequently asked questions section relating to "Marine Mammal Permits for Directed Take," provides the following question and answer:

"Does a U.S. citizen need a permit under the MMPA to 'take' or collect specimens in a foreign country? No, a U.S. permit is not required for activities conducted by a U.S. citizen . . . in the territorial waters of another nation. . . . However, an MMPA permit is required for any 'takes' by a U.S. citizen on the 'high seas,' i.e., international waters." Marine Mammal Permits Frequently Asked Questions, Office of Protected Resources, National Oceanic and Atmospheric Administration Fisheries, http://www.nmfs.noaa.gov/pr/permits/faq_mmpermits.htm (last visited 1 May 2006). Although equally non-binding as the previous comment, this exchange could be interpreted to mean that NOAA applies the MMPA on the high seas as that term is understood under international law.

[160] *See infra* Part V.A.2.

[161] Memorandum for the Chief of Naval Operations Commandant of Marine Corps, 2 n.1 (28 Dec. 2000), *available at* http://www.whalesandsonar.navy.mil/documents/trainingatsea.pdf.

international law but with how the Acts are applied in the United States as well. As stated above, if "waters under U.S. jurisdiction" include the U.S. fishery zone or EEZ and are distinct from "high seas," then waters under foreign jurisdiction include the FEEZ and are distinct from high seas as well.

The MMPA's co-implementing agency, the Department of the Interior via FWS, appears to have adopted a flexible interpretative approach consistent with interpretations from both the Department of Commerce and the Department of Defense when determining the extent of MMPA jurisdiction. For example, in *Florida Marine Contractors v. Williams*, FWS argued that because MMPA legislative history demonstrated Congressional intent to protect manatees wherever located, U.S. inland waters must be covered under the MMPA's take prohibitions in Section 1372 or the moratorium in Section 1371, which "contains no geographic limitations."[162] Yet the Department of Commerce's concession that MMPA jurisdiction does not apply in foreign territorial seas is inconsistent with the above FWS/NOAA argument regarding Section 1371. But in the final rule on the "Importation of Polar Bear Trophies From Canada Under the 1994 Amendments to the Marine Mammal Protection Act," in response to a Marine Mammal Commission ("MMC") comment that FWS needs to determine if sport hunts conducted beyond Canada's 12-mile limit are consistent with the MMPA's take prohibitions, FWS stated:

> The MMPA does not define the term "high seas." Canada signed the UN Convention of the Law of the Sea in 1982 and considers waters under Canadian jurisdiction to include waters up to the limit of the 200 nautical mile exclusive economic zone . . . . This interpretation is comparable to the definition of "waters under the jurisdiction of the United States" as defined in the MMPA . . . . The Service has, therefore, determined that the taking of polar bear trophies by U.S. hunters is consistent with the MMPA so long as the trophy is hunted legally in Canada, which includes the waters under the jurisdiction of Canada . . . .[163]

Notably, FWS found that the Canadian EEZ was consistent with UNCLOS and "comparable to the definition of 'waters under the jurisdiction of the United States' as defined in the MMPA."[164] This finding led FWS to conclude that the

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[162] Federal Defendants' Motion for Judgment on the Pleadings at 11-18, Florida Marine Contractors v. Williams, 378 F.Supp.2d 1353, 1356 (M.D. Fla. 2005) (Civ. No. 2:03-cv-229-T-30SPC).

[163] Importation of Polar Bear Trophies From Canada Under the 1994 Amendments to the Marine Mammal Protection Act, 62 Fed. Reg. 7302, 7323 (1997) (codified at 50 C.F.R. Part 18). Note that the MMC stated here that they were interpreting "beyond Canada's 12 NM limit" as "high seas" for purposes of the MMPA. *Id.*

[164] *Id.*

Canadian EEZ (FEEZ) is beyond MMPA jurisdiction. Thus, the Department of the Interior enforced the MMPA consistent with a Department of Commerce position when dealing with U.S. inland waters, and it enforced the MMPA consistent with the Department of Defense by interpreting "high seas" in accordance with international law.

B. Endangered Species Act

1. Legislative History

The ESA has followed a somewhat similar path as the MMPA, although because both "high seas" and "territorial seas" have remained undefined, there is arguably less information on the jurisdictional boundaries of the ESA than the MMPA. Despite the lack of information, however, there are many parallels between the two Acts. The ESA was enacted only one year after the MMPA, before the same Congressional Committee, involving the same Federal agencies, to protect listed endangered species including marine mammals, and designed to work in tandem with the MMPA. Therefore, it is doubtful that Congress intended ESA ocean jurisdiction pertaining to taking prohibitions to differ from MMPA ocean jurisdiction regarding the same. And examination of ESA legislative history provides further indication that Congress did not intend to extend U.S. jurisdiction to areas with natural resources under foreign sovereign control. For example, ESA Section 9 prohibits taking a listed species by "any person subject to the jurisdiction of the United States."[165] This provision could be interpreted to mean that an American in the middle of Africa could be liable under the taking provisions of ESA Section 9.

Congress, however, did not intend to extend the taking provisions of ESA Section 9 within foreign countries:

> While the House bill extended the prohibitions of the Act to actions of persons subject to U.S. jurisdiction whenever they might occur, the Senate bill did not reach quite so far, since it did not make illegal such actions if performed entirely *with [sic] one or more foreign countries*. The House accepted the Senate bill in the absence of a demonstrated need for such extensive coverage.[166]

Interpreting "within a foreign country" consistently with the MMPA's emphasis in equating jurisdiction with control over natural resources supports an interpretation that the FEEZ is "within a foreign country" due to the foreign

[165] ESA § 1538(a)(1).
[166] H.R. Rep. No. 93-740 (1973), *reprinted in* U.S.C.C.A.N. 3001 (emphasis added).

sovereign's control over its natural resources. In addition, during discussion of amending ESA Section 4 in 1982, the same year UNCLOS was signed, the Committee noted with approval:

> the existence of a solicitor's opinion in the Department of the Interior stating that the critical habitat provisions of the act only apply to areas within the jurisdiction of the United States and that the designation of critical habitat in foreign countries or on the high seas would be inappropriate.[167]

Although the taking provisions of ESA Section 9 do apply to the high seas, Congressional concern about application of the Act in areas under foreign control appears consistent throughout the ESA.[168] It is equally apparent that Congress intended the ESA to apply to all areas under U.S. jurisdiction. Despite the legislative reservations about application of the MMPA and the ESA in territory under foreign sovereign control, the lack of an express statement by Congress as to the meaning of "high seas" in both statutes or the meaning of "territorial seas" in the ESA has left the courts with little guidance.

2. Caselaw

a. *Natural Resources Defense Council v. Department of the Navy*

The connection between control over natural resources and ESA jurisdiction was highlighted in *Natural Resource Defense Council v. Department of the Navy*.[169] As discussed above, the court in *Center for Biological Diversity v. National Science Foundation* found that the "EEZ of Mexico which extends 200 miles from the shore is not considered part of its territorial waters and under U.S. law is considered part of the 'high seas' . . . ."[170] This statement, however, does not reflect U.S. recognition that the EEZ is distinct from high seas under customary international law for all States. Eighteen days prior to the *Center for Biological Diversity* decision in the Northern District of California, a court in

[167] H.R. Rep. No. 97-567 (1982), *reprinted in* U.S.C.C.A.N. 2807.
[168] For example, when discussing the domestic orientation of ESA Section 7, the Secretary of the Interior noted: "By contrast, in other sections of the ESA that are intended to apply in foreign countries, 'Congress either expressly required consideration of the programs and policies of the affected foreign nations or mandated the involvement of the Secretary of State.'" Brief For The Petitioners at 5, Lujan v. Defenders of Wildlife, 504 U.S. 555, 579-80 (1992) (No. 90-1424), 1991 WL 577003 (quoting 1981 Opinion by the Associate Solicitor for Conservation and Wildlife).
[169] Natural Resources Defense Council v. Department of the Navy, No. CV-01-07781 CAS(RZx), 2002 U.S. Dist. LEXIS 26360 (C.D. Cal. Sept. 17, 2002).
[170] Center for Biological Diversity v. National Science Foundation, 2002 U.S. Dist. LEXIS 22315, at *9 (N.D. Cal. Oct. 30, 2002).

the Central District of California described the U.S. EEZ consistently with its international legal status:

> [I]t is undisputed that with regard to natural resource conservation and management, the area of concern to which NEPA is directed, the United States does have substantial, if not exclusive, legislative control of the EEZ . . . stemming from its "sovereign rights" for the purpose of conserving and managing natural resources, [and thus] the Court finds that NEPA applies to federal actions which may affect the environment in the EEZ.[171]

In *Natural Resources Defense Council v. Department of the Navy*, the plaintiffs sought to enjoin the Navy from active sonar testing in the U.S. EEZ due to potential effects on marine wildlife and alleged non-compliance with NEPA, the MMPA, the ESA, and the Magnuson-Stevens Fishery Conservation and Management Act.[172] During the court's consideration of both parties' motions for summary judgment, the court discussed only the NEPA and ESA claims. As quoted above, the court agreed with the plaintiffs that NEPA applied in the U.S. EEZ and the Navy conceded that the ESA applied in the U.S. territorial sea, the U.S. EEZ, and on the high seas.[173]

The significance of this case is twofold. First, the court and all parties agreed that ESA jurisdiction extends to at least the FEEZ. This is true because the plaintiffs and the Navy appeared to agree that ESA jurisdiction applied in U.S. territorial seas, the U.S. EEZ, and the high seas. Additionally, the Navy policy extends ESA jurisdiction to at least the FEEZ.[174] This means that all parties agreed that the ESA applies in the U.S. EEZ when the statute only states the ESA applies in the "territorial seas" and the "high seas." Thus all parties recognized Congressional intent to extend ESA jurisdiction to all those areas containing natural resources under U.S. control (i.e., EEZ) and those areas free from sovereign control (i.e., high seas). Second, the court's recognition of U.S. sovereign control in its EEZ evidences implicit U.S. recognition of the difference between the EEZ and high seas for all sovereign States in the natural resource context. Once again, if the United States has control over the natural resources in its EEZ, then other countries have the same authority in their EEZs.

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[171] *Natural Resources Defense Council,* 2002 U.S. Dist. LEXIS 26360 at *40 - 41.
[172] *Id.* at 18 - 20.
[173] *Id.* at 10, 17.
[174] Memorandum for the Chief of Naval Operations Commandant of Marine Corps, 2 n.1 (28 Dec. 2000), *available at* http://www.whalesandsonar.navy.mil/documents/trainingatsea.pdf.

Because the United States has sovereign rights to regulate within its EEZ, it is not difficult to conceive why the ESA and the MMPA would apply in the U.S. EEZ. Due to a conflict with foreign sovereign rights, however, it is not necessarily easy to understand why the ESA and the MMPA would apply in a FEEZ. While a FEEZ is not the sovereign territory of a State, it is within the rights of a foreign sovereign to regulate that area. This explains why we can have different answers concerning the applicability of the two statutes in the EEZ: the MMPA and the ESA apply in the U.S. EEZ due to U.S. control over natural resources and the statutes don't apply in the FEEZ due to foreign control over natural resources.

3. Agency Interpretation

Unlike the MMPA, the Department of the Interior and the Department of Commerce interpret the jurisdictional scope of the ESA in a more consistent manner. The scope of ESA Section 9, which prohibits the taking of listed endangered species in "territorial seas" and the "high seas," remains undefined by statute[175] or by the statute's implementing Agencies.[176] But FWS and NOAA have issued joint regulations interpreting and implementing ESA Sections 7(a) through (d) pertaining to agency actions that occur in the United States or on the high seas.[177] Similarly, FWS and NOAA defined agency "action" as that occurring within the United States or on the high seas.[178] This regulation replaced a previous regulation that required agency consultation regarding actions in foreign countries.[179] The replacement of this regulation applying ESA consultation in foreign countries was successfully challenged in the Eighth Circuit,[180] but was reversed by the Supreme Court on appeal, because the challengers were found to lack standing.[181] The Secretary of the Interior explained in his Supreme Court brief that, "FWS and NMFS have consistently taken the position that the Secretary's responsibility under Section (7)(a)(2) to

[175] *See* ESA § 1532.
[176] *See* 50 C.F.R. § 402.02.
[177] 50 C.F.R. § 402.01.
[178] 50 C.F.R. § 402.02. *But see* Dugong v. Rumsfeld, 2005 WL 522106 (N.D. Cal. 2005) (Court denied a motion to dismiss an action brought by U.S. and Japanese environmental groups under the National Historic Preservation Act to prevent the building of a U.S. military base in Japan from potentially harming critical habitat belonging to the Japanese dugong, a species listed as endangered under the ESA and considered a protected "national monument" in Japan); Mitsuhiko A. Takahashi, *Okinawa Dugong v. Rumsfeld: Extraterritorial Operation of the U.S. Military and Wildlife Protection Under the National Historic Preservation Act*, 28 ENVIRONS ENVTL. L. & POL'Y J. 181 (Fall 2004).
[179] Defenders of Wildlife v. Lujan, 911 F.2d 117, 118 (8th Cir. 1990) (*citing* 50 C.F.R. § 402.04 (1978)), *rev'd on other grounds*, 504 U.S. 555 (1992).
[180] *Lujan*, 911 F.2d at 125 (affirming the court's holding that Congress intended the Act's consultation requirement to apply to projects in foreign nations and on the high seas).
[181] Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992).

designate the 'critical habitat' of listed species does not apply to habitat in foreign countries."[182] Moreover, "Section 7(a)(2) expressly requires the Secretary to consult with 'affected States' regarding critical-habitat designations, but it makes no mention of foreign governments."[183] These realizations of agency *modus operandi* and statutory construction led FWS and NMFS to reexamine the legal rationale behind their previous regulation.

The Secretary also explained that FWS and NMFS reversed their initial position that ESA Section 7(a)(2) required Federal agencies to ensure that actions they authorize, fund or carry out are not likely to jeopardize the continued existence of an endangered or threatened species in foreign countries, because of the domestic orientation of the consultation process and "the potential for interference with the sovereignty of foreign nations."[184] Although the Supreme Court did not decide the extraterritoriality question, Justice Stevens concurred in the opinion solely because he was not persuaded that Congress intended the consultation requirement of ESA Section (7)(a)(2) to apply to activities in foreign countries.[185] And while not specifically addressed, the same concerns against extraterritorial application also argue against applying ESA Section 9, which prohibits the taking of endangered species on the high seas, to areas under foreign sovereign control (i.e., FEEZ). The ESA works in tandem with the MMPA when an agency seeks an incidental take statement to take a listed endangered marine mammal.[186] Thus, concerns about extraterritorial application of the MMPA or the ESA may exist when no express consideration of the programs and policies of the affected foreign nations is required, or when involvement of the Secretary of State is not mandated as in other sections of the ESA and the MMPA that are intended to apply in foreign countries or areas under foreign sovereign control.[187]

For example, the Department of Commerce expressed a desire to formally define the term "territorial seas" in the ESA in accordance with international law in a final interim rule.[188] The rule was for the protection of right whales under the authority of the ESA and the MMPA.[189] In this rule, one commenter questioned the necessity and legality of defining the term "territorial

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[182] Brief For The Petitioners at 2, Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (No. 90-1424), 1991 WL 577003.
[183] *Id.* at 3.
[184] *Id.* at 3-6.
[185] *Lujan*, 504 U.S. at 581-82 (Stevens, J., concurring).
[186] ESA § 1536 (b)(4)(C)(iii); 50 C.F.R. § 402.14 (i) (2007)
[187] Brief For The Petitioners at 5, Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (No. 90-1424), 1991 WL 577003 (quoting 1981 Opinion by the Associate Solicitor for Conservation and Wildlife).
[188] North Atlantic Right Whale Protection, 62 Fed. Reg. 6729-02, 6736 (1997) (codified at 50 C.F.R. Parts 217 and 222).
[189] *Id.*

seas" in the ESA as an area extending 12 NM rather than 3 NM from shore.[190] The basis for this comment was a belief that the Presidential Proclamation that extended U.S. territorial seas from 3 NM to 12 NM in 1988 was for international rather than domestic legal purposes.[191] NMFS responded that it, "does not agree with the commenter's interpretation of the jurisdictional scope of the ESA and the effect of the Presidential Proclamation on that scope."[192] Although NMFS decided not to issue a regulatory definition of the term "territorial sea" in the interim rule to have additional time to consult with other Federal agencies, it did comment on its understanding of jurisdiction under both the MMPA and the ESA.[193]

NMFS noted that the MMPA defines waters under U.S. jurisdiction as extending 200 NM from shore "to include both the territorial sea and the EEZ which extends 200 nm (370 km) beyond the baseline from which the territorial sea is measured."[194] NMFS went on to state that although the ESA does not mention the EEZ, persons subject to U.S. jurisdiction are prohibited from taking endangered species within the territorial seas and upon the high seas.[195] Thus, NMFS attempted to close the definitional gap in jurisdiction or account for ESA jurisdiction in the EEZ by including it within "high seas." Otherwise, if NMFS applied the ESA in strict accordance with international law, the ESA would only apply from the shore up to 12 NM ("territorial seas") and beyond 200 NM ("high seas"). Yet in response to a comment questioning whether application of the same rule to foreign vessels was consistent with international law, NMFS stated that while it depended on the circumstances, "In all cases . . . the United States intends to enforce this rule consistently with international law, including customary international law as reflected in the 1982 United Nations Convention on the Law of the Sea."[196] Thus, the proper way to reconcile the plain language of the ESA with international law, and effect Congressional intent, is to define the terms "territorial seas" and "high seas" in accordance with their jurisdictional character (i.e., sovereign rights) and not by their boundaries (e.g., 3 NM).

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[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*

V. WAYS TO RECONCILE THE INTERPRETIVE CONFLICT

A. International Law

The term "high seas" is a term of art in international law. The international legal definition of this term as an area free from State sovereignty has not changed since 1958 and its legal status is recognized under customary international law and UNCLOS. When Congress used the term "high seas" in the MMPA and the ESA in 1972 and 1973 respectively, there was no indication that Congress meant the term "high seas" to mean something different than what it meant under international law. As the boundaries of the "high seas" evolved over time under international law, Congress did not seek to distinguish or define the term "high seas" differently than its contemporary international definition. While Congress could theoretically define "high seas" differently in the MMPA and the ESA and not be in conflict with international law, an interpretation of "high seas" that includes the FEEZ would conflict with international law. Such an interpretation would allow U.S. citizens to incidentally take natural resources under the sovereign control of a foreign State. To avoid an interpretation of "high seas" in the MMPA and the ESA that would conflict with international law, international law must first be understood.

1. Customary International Law

The essence of the term "high seas" as an area of the ocean free from State sovereignty, distinct from other areas of the ocean under sovereign control, is customary international law. Customary international law results from a general and consistent State practice, which is followed by States from a sense of legal obligation or *opinio juris*.[197] Customary international law may be determined by "consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[198] Unlike a treaty that is binding on only those States that are parties to the agreement, once state practice combines with *opinio juris* to form a rule of customary international law, it is generally binding on all States.[199] State practice includes "public measures or other governmental acts or official statements of policy, whether they are unilateral or taken with the cooperation of other states."[200] An example of unilateral governmental action, which was quickly joined by other States, was President Truman's

[197] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102.2, cmt. c (1987).
[198] Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1149 (7th Cir. 2001) (quoting United States v. Smith, 18 U.S. 153, 160-161 (1820)).
[199] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102.2, cmt. d (1987) (note that only those States that persistently object during the formation of a new customary rule may claim to not be legally bound by the customary rule).
[200] *Id.* § 102, cmt. b.

proclamations that the United States would "exercise jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf,"[201] and establish fishery conservation zones contiguous to its coast.[202] Other countries quickly followed suit and "by 1958 almost 20 countries had declared legal control of their continental shelves."[203] As explained by the International Court of Justice in the North Sea Continental Shelf Cases:

> [T]he passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law . . . [although] an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; -and . . . occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.[204]

For example, the doctrine of the continental shelf has been cited as an example of "instant customary law."[205] Thus in 1945, when President Truman's assertion of jurisdiction over natural resources on the continental shelf was accepted by all States,[206] the legal foundation for the present day EEZ was laid.

2. United Nations Convention on the Law of the Sea

While President Truman's assertion of jurisdiction over natural resources on the continental shelf was favorably accepted in the international community, assertions of 200 NM territorial seas by other States were generally opposed, and this opposition led to the first UNCLOS deliberations.[207] In 1958, more than 80 nation-state delegations participated in the deliberations that

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[201] Exec. Order No. 9633, 10 Fed. Reg. 12305 (1945), *available at* http://www.oceanlaw.net/texts/truman1.htm.

[202] Exec. Order No. 9634, 10 Fed. Reg. 12305 (1945), *available at* http://www.oceanlaw.net/texts/truman2.htm.

[203] DAVID HUNTER ET AL., *supra* note 1, at 658. *See also* JOSEPH J. KALO ET AL., *supra* note 21, at 312-13 (explaining that Chile extended its sovereignty over its natural resources out to 200 NM in 1947). Peru did the same in 1947. *Id.* And in 1952, Ecuador followed by declaring 200 NM territorial seas. *Id.* Other developing countries in Latin America and Africa declared 200 NM zones as well. *Id*

[204] North Sea Continental Shelf, 1969 I.C.J. 3, 43 (Feb. 20).

[205] Restatement (Third) of Foreign Relations Law § 102 Reporters' n.2 (1987).

[206] JOSEPH J. KALO ET AL., *supra* note 21, at 312-13 (describing the response to the Truman Proclamation on the Continental Shelf as "immediate favorable response"). "The Truman Proclamation of 1945 was not challenged by governments and was followed by similar claims by other states." Restatement (Third) of Foreign Relations Law § 102 Reporters' n.2 (1987).

[207] JOSEPH J. KALO ET AL., *supra* note 21, at 313.

culminated in the four 1958 Geneva Conventions on the Law of the Sea: [208] The Convention on the Territorial Sea and the Contiguous Zone,[209] The Convention on the Continental Shelf,[210] The Convention on the High Seas,[211] and The Convention on Fishing and Conservation of the Living Resources of the High Seas.[212] The 1958 Law of the Sea Agreements were ratified by the United States.[213] Although the 1958 Agreements contain much of the same ocean jurisdiction rights found in the final 1982 UNCLOS Agreement, the parties failed to define the maximum breadth of the territorial sea.[214] And the failure to define the limits of the territorial sea remained unresolved following a second UNCLOS conference in 1960.[215]

Though the addition of the EEZ in 1982 extended the boundary of the high seas seaward, the character or essence of the high seas definition as an area free from State sovereignty remained the same from the first UNCLOS negotiations in 1958 to the close of the final UNCLOS negotiations in 1982. The 1958 Convention on the High Seas defined the "high seas" as waters where "no State may validly purport to subject any part of them to its sovereignty" or in other words, waters free from the sovereign control of any State.[216] The 1982 UNCLOS Agreement defined "high seas" as waters where "[n]o State may validly purport to subject any part of the high seas to its sovereignty."[217] The 1982 UNCLOS definition of high seas specifically excludes the EEZ,[218] and yet the character of high seas remains the same. Thus, under international law, "high seas" has always meant waters free from State sovereignty.

Although the character of existing international zones of ocean jurisdiction did not change from 1958 to 1982, the breath of these zones was not defined until the final UNCLOS negotiations were complete in 1982. Because "[m]ore than 150 national delegations, collectively representing almost every

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[208] *Id.*
[209] Convention on the Territorial Sea and the Contiguous Zone, *signed* 29 Apr. 1958, *entered into force* 10 Sep. 1964, 15 U.S.T. 1606, T.I.A.S. 5639.
[210] Convention on the Continental Shelf, *signed* 29 Apr. 1958, *entered into force* 10 Jun. 1964, 15 U.S.T 471, T.I.A.S. 5578.
[211] Convention on the High Seas, *signed* 29 Apr. 1958, *entered into force* 30 Sep. 1962, 13 U.S.T. 2312, T.I.A.S. 5200.
[212] Convention on Fishing and Conservation of the Living Resources of the High Seas, *signed* 29 Apr. 1958, *entered into force* 20 Mar. 1966, 17 U.S.T. 138, T.I.A.S. 5969.
[213] *See* United States Treaties in Force Multilateral 2005, Maritime Matters, 2005 WL 3759646; United States Treaties in Force Multilateral 2005, Fisheries, 2005 WL 3759603.
[214] JOSEPH J. KALO ET AL., *supra* note 21, at 313.
[215] *Id.*
[216] Convention on the High Seas, arts. 1, 2, *signed* 29 Apr. 1958, *entered into force* 30 Sep. 1962, 13 U.S.T. 2312, T.I.A.S. 5200.
[217] UNCLOS, *supra* note 2, art. 89, 21 I.L.M. at 1287.
[218] UNCLOS, *supra* note 2, art. 86, 21 I.L.M. at 1286.

place and person on the planet,"[219] participated in the Convention on the Law of the Sea final negotiations from 1973 to 1982,[220] most of the provisions of UNCLOS,[221] including those describing an EEZ, represented customary international law.[222] Thus, those countries that had not ratified the Convention when it came into force[223] on 16 November 1994,[224] including the United States, are bound by most of its provisions. The United States played an important role in the development of the EEZ as it is currently understood under customary international law and came to be defined in UNCLOS. In addition to the Truman Proclamations of 1945, which established the custom of sovereign rights over natural resources on the continental shelf, the United States adopted an exclusive fishing zone in the Fishery Conservation and Management Act of 1976,[225] which established sovereign rights over all living resources in the sea up to 200 NM from the U.S. coast. The MMPA definition of waters under U.S. jurisdiction in 1972 included a 9 NM fishing zone, which changed to 200 NM in 1992. Since within a couple of years following the U.S. assertion of a 200 NM exclusive fishing zone, "it could be said with some confidence that national 200-mile zones, with a common core of exclusive competence to manage living resources, were a part of the customary law of the sea,"[226] waters under foreign

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[219] JOSEPH J. KALO ET AL., *supra* note 21, at 320, 325.

[220] A world record was established when 119 countries signed the Convention on the first day it was opened for signature in December 1982. *Id.* at 320, 325.

[221] "Certainly, some detailed, heavily negotiated provisions of the Convention are not part of customary law. Nor are most of the treaty's articles and annexes on the deep seabed mining regime, since custom cannot create the institutions necessary for the regime to operate, and the same can be said for the treaty's innovative and complex dispute settlement scheme. And there is continuing controversy over whether some parts of the Convention – for example, the straits transit rules – are part of customary law." *Id.* at 326, 335. Because straits transit rules allowing transit in a vessel's normal mode of operation (i.e., submarines can remain submerged) are of paramount importance to nations with a "blue water" or global navy, it is in the best interests of the United States to accede to UNCLOS.

[222] DAVID HUNTER ET AL., *supra* note 1, at 658. "Like no other international negotiation, by the time UNCLOS was signed its provisions *already* constituted customary international law in the eyes of most countries. As of January 2001, 135 States had ratified UNCLOS." *Id.*

[223] "This Convention shall enter into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession." UNCLOS, *supra* note 2, art. 308, 21 I.L.M. at 1327.

[224] Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the implementation of Part XI of the Convention and of the Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, Table recapitulating the status of the Convention and of the related Agreements, http://www.un.org/Depts/los/reference_files/status2006.pdf, (last updated 16 September 2005). Guyana became the 60th ratifier on 16 November 1993. *Id.*

[225] Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 101, 90 Stat. 331 (1976) (Presently known as the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 (2005)).

[226] JOSEPH J. KALO ET AL., *supra* note 21, at 325. *See also Tuna: Current Issues Affecting the U.S. Industry*, United States International Trade Commission Report to the Committee on Finance, United States Senate, on Investigation No. 332-313 Under Section 332(G) of the Tariff Act of 1930 as Amended, 1992 WL 812319 (Aug. 1992): "Beginning in the 1970s, most coastal nations extended

jurisdiction potentially included 200-mile fishing zones as well. These fishing zones evolved into what is presently understood as the EEZ.

UNCLOS describes the EEZ and the extent of a coastal State's authority. Article 56 details the legal rights, jurisdiction, and duties of the coastal State in the EEZ.[227] The coastal State has "sovereign rights" in the EEZ for the purpose of exploring, exploiting, conserving, and managing living and non-living natural resources in its waters, its seabed, and its subsoil.[228] The coastal State also has "jurisdiction" in the EEZ with regard to "the protection and preservation of the marine environment."[229] Because a coastal State's jurisdiction in its EEZ stems from its sovereign rights over natural resources, the coastal State has exclusive jurisdiction over natural resources in its EEZ; hence the title, "exclusive economic" zone.[230] For example, when the same ocean resource or fish stock crosses borders from one EEZ to another, UNCLOS directs those countries to seek, either directly or through regional organizations, agreement on measures necessary to coordinate conservation and development.[231] The coastal State may board, inspect, arrest and conduct judicial proceedings with regard to conduct in its EEZ as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with UNCLOS.[232] In summary, under UNCLOS, a coastal State has sovereign rights to explore, exploit, conserve, and manage natural resources in its own EEZ, and the exclusive jurisdiction to protect these natural resources in its own EEZ. Should a State wish to exercise similar rights over natural resources in a FEEZ, UNCLOS mandates this action occur through international agreement.[233]

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their fishery conservations zones (FCZs) and exclusive economic zones (EEZs) to 200 nautical miles from shore"; Robert W. Smith and J. Ashley Roach, *Limits in the Seas, No. 112, United States Response to Excessive National Maritime Claims*, United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, at 44, March 9, 1992, *available at* http://www.state.gov/documents/organization/58381.pdf: "The general consensus reached on the exclusive economic zone (EEZ) at the Law of the Sea conference as been supported by state practice since the mid-1970s. Thus, the concept of the EEZ, including its maximum breadth of 200 miles and the basic rules governing the zone, has been effectively established as customary international law. These rules are binding, therefore, on states even before the LOS Convention comes into force."

[227] UNCLOS, *supra* note 2, art. 56, 21 I.L.M. at 1280.

[228] *Id.*

[229] *Id.*

[230] In the EEZ, the coastal State does not have jurisdiction to prescribe rules of navigation or any other rights that are guaranteed under UNCLOS Article 87, which describes "high seas" freedoms. *Id.* art. 58, 21 I.L.M. at 1280.

[231] UNCLOS, *supra* note 2, art. 63, 21 I.L.M. at 1282. *See, e.g.,* Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, *effected* 1 June 1990, *effective* 15 June 1990, State Dept. No. 90-182, KAV No. 2680, 1990 WL 484559.

[232] UNCLOS, *supra* note 2, art. 73, 21 I.L.M. at 1284.

[233] UNCLOS Article 65 specifically addresses marine mammals and states that although a coastal State or appropriate international organization may limit or regulate exploitation of marine mammals more strictly in the EEZ than in Part V, Article 65 directs States to work together to conserve marine

B. Plain Language

The plain language of the statutes indicates that Congress did not mean to define "high seas" in the MMPA and the ESA different from the international legal definition of "high seas."

1. Marine Mammal Protection Act

The failure of Congress to expressly apply the MMPA to the FEEZ evidences that the definition of "high seas" excludes the FEEZ. Language indicating foreign application of the MMPA is absent from Section 1372 -- the only part of the MMPA where Congress states *where* marine mammal takings are prohibited.[234] Section 1372 makes it unlawful for any person subject to U.S. jurisdiction to take any marine mammal on the "high seas."[235] Additional jurisdictional language in Section 1372 prohibits any person from the unauthorized taking of marine mammals in waters or on lands under U.S. jurisdiction and from using any port, harbor, or other place under U.S. jurisdiction to take or import[236] marine mammals or marine mammal products "except as expressly provided by an international treaty" [237] or a similar international agreement in effect in 1972.[238] Congress specifically stated that the MMPA applied in the U.S. fishing zone in 1972, and amended the statute in 1992 to reflect the evolution of the fishing zone into the EEZ.[239] Congress could have applied the MMPA to the FEEZ in 1992, but it did not.

Moreover, definition of the jurisdictional terms in MMPA Section 1372 and exceptions to the moratorium in Section 1371 evidence Congressional intent to distinguish "high seas" from the EEZ. Waters under U.S. jurisdiction are defined as the U.S. territorial sea, waters included within a zone that extends 200 NM from the baselines from which the U.S. territorial seas are measured, or within 200 NM from the baselines from which the Russian territorial seas are

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mammals through "appropriate international organizations." UNCLOS, *supra* note 2, art. 65, 21 I.L.M. at 1282.

[234] The moratorium, by contrast, is contained in Section 1371.

[235] MMPA § 1372 (a)(1).

[236] It is also unlawful to import into the United States any marine mammal taken in another country in violation of the law of that country. *Id.* § 1372 (c)(1)(B).

[237] One such international agreement in effect in 1972 was the Convention on the High Seas, which defined "high seas" as "all parts of the sea not included in the territorial sea or in the internal waters of a State" and described the "high seas" as waters where "no State may validly purport to subject any part of them to its sovereignty" or in other words, waters free from the sovereign control of any State. Convention on the High Seas, arts. 1, 2, *signed* 29 Apr. 1958, *entered into force* 30 Sept. 1962, 13 U.S.T. 2312, T.I.A.S. 5200.

[238] MMPA § 1372 (a)(2).

[239] *See supra* Part IV.A.1.

measured pursuant to an international agreement.[240] The United States and Russia both claim 200 NM EEZs.[241] "High seas" is not similarly defined in the MMPA. But if "high seas" included the FEEZ, it would be unnecessary for Congress to have explicitly carved out one exception where the MMPA applies in a FEEZ per the U.S. agreement with Russia.[242] In Section 1371, marine mammals may be taken incidentally in the course of commercial fishing operations subject to regulations prescribed by the Secretary.[243] These rules, however, don't apply to incidental takings by U.S. citizens employed on foreign vessels "outside the United States EEZ."[244] The plain language of this section, "outside the United States EEZ," demonstrates that the EEZ is distinct from "high seas" in the MMPA. When Congress inserted this language in 1997, in support of the International Dolphin Conservation Program Act,[245] it did not define "high seas." Congress did define the EEZ, and that definition is consistent with UNCLOS.[246] When Congress amended the MMPA in 1992 and extended waters under U.S. jurisdiction to 200 NM to include the U.S. EEZ and then amended the statute again in 1997 to limit MMPA application outside the U.S. EEZ, it was aware of UNCLOS ocean divisions and specifically incorporated UNCLOS terminology (i.e., "EEZ") in the MMPA. Thus, "high seas" in the MMPA means "high seas" as defined by UNCLOS.

2. Endangered Species Act

Unlike the MMPA, which at least defines waters under U.S. jurisdiction, the only geographic terms defined in the ESA are "State," which includes U.S. States and territories,[247] and "United States," which includes all States.[248] The ESA is otherwise silent as to what "territorial sea of the United States" or "high seas" mean under the statute. The jurisdictional terms

[240] MMPA § 1362 (15).
[241] Central Intelligence Agency, The World Factbook, Field Listing – Maritime claims, http://www.cia.gov/cia/publications/factbook/fields/2106.html (last updated 10 Jan. 2006).
[242] *See supra* Part IV.A.1.
[243] MMPA § 1371 (a)(2).
[244] *Id.* § 1371 (e) (defining the EEZ as "the zone established by Proclamation Numbered 5030, dated March 10, 1983," which is consistent with UNCLOS).
[245] International Dolphin Conservation Program Act, Pub. L. No. 105-42, 111 Stat. 1122 (codified as amended at 16 U.S.C. §§ 1361, 1362, 1371, 1374, 1378, 1380, 1385, Ch. 31, 1411 to 1418, 952, 953, 962 (1997)). The definition section of the MMPA was amended to incorporate an international Act, yet "high seas" was not defined. MMPA § 1372.
[246] The MMPA refers to the Magnuson-Stevens Act for the definition of the EEZ. MMPA § 1371 (e). The Magnuson-Stevens Act defines the EEZ as "the zone established by Proclamation Numbered 5030, dated March 10, 1983." Magnuson-Stevens Act § 1802 (11). Proclamation Number 5030 defines the EEZ as, "a zone beyond its territory and adjacent to its territorial sea [where] a coastal State may assert certain sovereign rights over natural resources and related jurisdiction." Proclamation No. 5030, 48 Fed. Reg. 10605 (1983).
[247] ESA § 1532 (17).
[248] *Id.* § 1532 (21).

"territorial sea of the United States" and "high seas" are contained in ESA Section 9, which prohibits any person subject to U.S. jurisdiction from importing to or exporting from the United States any listed endangered species, or taking such species "within the United States or the territorial sea of the United States" or "upon the high seas."[249] Absent from Section 9 is the language indicating that the jurisdictional term "high seas" applies to areas under foreign control.

Examples of such jurisdictional language indicating that application of the ESA may conflict with foreign interests can be found in the following sections. In ESA Section 4, when listing an endangered species that is believed to occur in a foreign nation or harvested on the high seas by foreign nationals, the Secretary of Interior or Commerce shall give the affected foreign States notice of the proposed regulation insofar as practical and "in cooperation with the Secretary of State."[250] Surely, if Congress were concerned about notifying foreign nations when *listing* endangered species in foreign countries and on the high seas, it would be more concerned about *taking* endangered species on the high seas if "high seas" included species under foreign sovereign control. Similar language signaling foreign application of the ESA can be found in Section 8, which is titled, "International Cooperation," and requires the Secretary of Interior or Commerce to encourage conservation of endangered species in foreign countries "through the Secretary of State."[251] Thus, the lack of plain language requiring involvement of the Secretary of State in the taking prohibition sections of the ESA and the MMPA indicate that use of the term "high seas" in these sections does not include the FEEZ or other areas under foreign control.

3. Ordinary or Natural Meaning

To interpret undefined words in statutes, the Supreme Court stated in *Smith v. United States*: "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."[252] This rule often causes the Court to turn to the dictionary to ascertain the "ordinary or natural meaning" of a term.[253] Black's Law Dictionary defines the term "high seas" as "[t]he seas or oceans beyond the jurisdiction of any country."[254] All States

[249] *Id.* §§ 1538(a)(1)(A) – (C).
[250] *Id.* § 1533 (b)(5)(B).
[251] *Id.* § 1537 (b).
[252] Smith v. United States, 508 U.S. 223, 228 (1993).
[253] Victor v. Nebraska, 511 U.S. 1, 12-17 (1994); *Smith*, 508 U.S. at 228-29.
[254] BLACK'S LAW DICTIONARY 1376 (8th ed. 2004) (noting that the jurisdiction beyond which "high seas" begins has evolved from 3 to 12 to 200 NM with the EEZ under UNCLOS). *See also* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1231 (1969) (defining "high seas" as, "[t]he open waters of an ocean or sea beyond the limits of national territorial jurisdiction.").

enjoy exclusive economic jurisdiction in their EEZ stemming from their "sovereign rights" over the natural resources in their EEZ.[255] Thus, "high seas" exist beyond a State's declared EEZ.

The question, however, of *when* a term is accorded its "ordinary or natural meaning" *may* mean interpretation of an undefined term at the time the statute first used that term. Before *Smith*, in *Perrin v. United States*, the Supreme Court stated the "ordinary or natural meaning" rule[256] in a slightly different way: "A fundamental cannon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, *contemporary*, common meaning."[257] In *Perrin*, the Court applied this rule of interpretation by looking at the ordinary meaning of the undefined term of "bribery" in the 1961 Travel Act at the time Congress enacted the statute 18 years prior.[258] After detailing the "development and evolution of the common-law definition," the Court found that by the time it was used in the enactment of the Travel Act in 1961, "federal and state statutes had extended the term bribery well beyond its common-law meaning."[259] While the Court in *Perrin* may have found that the meaning of the term "bribery" had developed to a point consistent with its "contemporary" meaning at the time it was used in the Travel Act's enactment in 1961, other undefined statutory terms may not achieve their "contemporary" meaning until after enactment.

Evidence for this interpretation can be found by returning to the Court's analysis in *Smith v. United States*.[260] In *Smith*, the accused attempted to trade his automatic weapon for drugs, but did not fire the weapon or threaten to fire it.[261] The dissent argued that the undefined term of "use," in the context of using a firearm "during and in relation to a drug trafficking scheme" for purposes of 18 U.S.C. § 924(c)(1), "originally dealt with use of a firearm during crimes of violence" and "the provision concerning use of the firearm during and in relation to drug trafficking offenses was added later."[262] Thus, the dissent argued that the term "use" originally was limited to use of the firearm as a weapon and the fact that term "use" is currently used more broadly is "unimportant."[263] The majority responded to this argument by stating, "Even if we assume that Congress had intended the term 'use' to have a more limited scope when it passed the original version of § 924(c) in 1968, . . . we believe it

[255] UNCLOS, *supra* note 2, art. 56, 21 I.L.M. at 1280.
[256] *Smith*, 508 U.S. at 228. Note that the Court in *Smith* cited *Perrin* as precedent for the rule.
[257] Perrin v. United States, 444 U.S. 37, 42 (1979) (emphasis added).
[258] *Id.*
[259] *Id.* at 42-43.
[260] *Smith*, 508 U.S. at 236-37.
[261] *Id.* at 228.
[262] *Id.* at 236.
[263] *Id.*

clear from the face of the statute that the Congress that amended § 924(c) in 1986 did not."[264] The majority goes on to find that because the term "use" was broad enough to cover the added provisions in 1986, Congress was free to and did interpret the term "use" in an expanded way.[265] Likewise, even assuming that Congress meant the term "high seas" in the MMPA to originally include the FEEZ in 1972, when it amended the Act in 1992 and then again in 1997 and added language concerning the U.S. EEZ, Congress meant the term "high seas" to exclude the FEEZ as an area under foreign jurisdiction. The term "high seas" reached its "contemporary" U.S. meaning as distinct from the EEZ in 1983, when the United States declared its own EEZ in accordance with customary international law.[266]

The final nuance to this "ordinary or natural meaning" analysis of the term "high seas" for purposes of the ESA and the MMPA is whether the "ordinary or natural meaning" of the term "high seas" should be ascertained according to U.S. law or international law or both. Authority for interpreting the term "high seas" under both domestic and international law stems from the "Charming Betsy cannon" and *The Paquete Habana*, where the Supreme Court stated, "International law is part of our law."[267] Under U.S. law, courts have observed that although the Supreme Court has defined "high seas" "to mean international or non-sovereign waters" in four different cases dating from 1881 through 1909, "the Court has not provided a consistent definition of 'high seas' throughout the past two centuries."[268] By contrast, the international definition of "high seas," as described above, has been more consistently defined as an area free from sovereign rights or jurisdiction. Moreover, there is ample evidence that Congress intended the term "high seas" in the MMPA and the ESA to be consistent with international law.

When Congress enacted the MMPA in 1972 and the ESA in 1973, the term "high seas" was described in the 1958 Geneva Convention on the High Seas as international waters or an area of the ocean that was free from foreign

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[264] *Id.*
[265] *Id.* at 236-37.
[266] Proclamation No. 5030, 48 Fed. Reg. 10605 (1983); UNCLOS, *supra* note 2, art. 57, 21 I.L.M. at 1280.
[267] The Paquette Habana, 175 U.S. 677, 700 (1900).
[268] *In re* Air Crash Disaster Near Peggy's Cove, 210 F. Supp. 2d 570, 583 (E.D. Pa 2002) (quoting *In re* Air Crash off Long Island, 209 F.3d 200, 205, 206 (2d Cir. 2000) (examining the undefined term "high seas" within the context of the Death on the High Seas Act ("DOHSA")). Note that the *Peggy's Cove* court picked up where the *Long Island* court left off in examining whether DOHSA applies in foreign territorial seas. *Id.* at 580. The court in *Peggy's Cove* found that DOHSA did apply in foreign territorial seas and that this result was consistent with DOHSA legislative history to provide a consistent remedy for U.S. citizens in all seas beyond 12 NM of the U.S. shore. *Id.* at 585-86. But application of DOHSA in foreign territorial seas does not affect foreign sovereigns.

sovereign control.[269] The United States was a party to the 1958 High Seas Convention and Congress was aware of the ongoing Law of the Sea negotiations that culminated in 1982 with UNCLOS.[270] In UNCLOS, the boundary of the "high seas" has changed with the addition of the EEZ, but the definition of "high seas" as an area free from State sovereign control has remained the same since 1958. If the boundary of the "high seas" was the defining aspect of this term and not its character as an area free from sovereign control, then the same analysis should apply to the definition of "territorial seas" in the ESA.

The boundary of the "territorial seas" at the time the ESA was enacted in 1973 was 3 NM according to U.S. law.[271] International law extended the boundary of the "territorial seas" to 12 NM in 1982.[272] NMFS, in its 1997 interim rule on "North Atlantic Right Whale Protection," expressly stated that it interprets the "territorial seas" boundary in the ESA at 12 NM in accordance with the Presidential Proclamation that extended the scope of U.S. territorial seas.[273] NMFS implicitly stated that because the "ESA does not refer to the EEZ," "high seas" begin at 12 NM.[274] If NMFS interprets the boundary of the term "territorial seas" at 12 NM, and "high seas" begin outside of 12 NM vice 3 NM, then NMFS has moved the high seas and the territorial seas boundaries for purposes of the ESA from where they were upon enactment. The NMFS interpretation of "territorial seas," however, is consistent with Congressional intent to define "territorial seas" as an area of the ocean under U.S. jurisdiction rather than an area of the ocean that extends 3 NM from the U.S. shore. Moreover, it would be consistent to further expand U.S. "territorial seas" for purposes of the ESA to 200 NM, since this is the extent of U.S. jurisdiction.

Although territorial seas are distinct from the EEZ, Congress intended the ESA to apply in areas under U.S. and international jurisdiction up to those areas under foreign jurisdiction (i.e., the FEEZ). Thus, in order to interpret the ESA in a way that would consistently effect Congressional intent, to both avoid application of the statute in territory under foreign jurisdiction *and* apply the statute in all areas under U.S. and international jurisdiction, the term "territorial seas" for the purpose of the ESA must include the U.S. EEZ. This interpretation

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[269] Convention on the High Seas, arts. 1, 2, *signed* 29 Apr. 1958, *entered into force* 30 Sept. 1962, 13 U.S.T. 2312, T.I.A.S. 5200.

[270] Marine Mammals: Hearings on Legislation for the Preservation and Protection of Marine Mammals Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 92nd Cong., 1st Sess. 92-10, at 181 (1971) (statement of Donald L. McKernan, U.S. Ambassador, Coordinator of Ocean Affairs and Special Assistant for Fisheries and Wildlife to the Secretary of State).

[271] It was extended to 12 NM in 1988. Proclamation No. 5928, 54 Fed. Reg. 777 (1988).

[272] UNCLOS, *supra* note 2, art. 3, 21 I.L.M. at 1272.

[273] North Atlantic Right Whale Protection, 62 Fed. Reg. 6729-02, 6736 (1997) (codified at 50 C.F.R. Parts 217 and 222).

[274] *Id.*

provides a consistent application of the term "high seas" under both domestic and international law. In sum, not only does defining "high seas" in the MMPA and the ESA consistently with international law effect Congressional intent, it avoids potential clashes with foreign sovereigns that would prefer the U.S. not interfere with their sovereign rights.

C. Supreme Court Precedent

The Supreme Court has never specifically addressed the question of how the term "high seas" should be defined in the MMPA and the ESA, but there is consistent Supreme Court precedent for interpreting ocean jurisdiction terminology in accordance with prevailing international law.[275] In *United States v. California*, the Court turned to the 1958 Convention on the Territorial Sea and the Contiguous Zone[276] to decide the meaning of "inland waters" in the Submerged Lands Act of 1953.[277] The specific issue facing the Court was "the extent of submerged lands granted to the State of California by the Submerged Lands Act of 1953, and . . . whether specified bodies of water on the California coast are 'inland waters' within the meaning of that Act."[278] The Submerged Lands Act grants to the States title to and ownership of the lands beneath navigable waters within the seaward boundaries of a State as they existed at the time the State became a member of the Union or otherwise determined by Congress, but in no case extending from the "coast line" more than three nautical miles into the Atlantic or Pacific Oceans or more than three marine leagues[279] into the Gulf of Mexico.[280] The Act defines the term "coast line" as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of *inland waters*."[281] The Court looked to legislative history to discern the meaning of

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[275] *See* United States v. California, 381 U.S. 139, 163-66 (1965). *See also* United States v. Alaska, 422 U.S. 184, 196 (1975). "In determining whether the enforcement of fish and wildlife management regulations in Cook Inlet was an exercise of authority sufficient to establish title to that body of water as a historic bay, it is necessary to recall the threefold division of the sea recognized in international law." *Id.* At this time the EEZ had not been codified in UNCLOS, but the important aspect of the case is the Court's reliance on established international law. *Id. See also* United States v. Louisiana, 394 U.S. 11, 35 (1969). "[W]e conclude that that part of Louisiana's coastline which, under the Submerged Lands Act, consists of 'the line marking the seaward limit of inland waters,' is to be drawn in accordance with the definitions of the Convention on the Territorial Sea and the Contiguous Zone." *Id.*

[276] Convention on the Territorial Sea and the Contiguous Zone, *signed* 29 Apr. 1958, *entered into force* 10 Sept. 1964, 15 U.S.T. 1606, T.I.A.S. 5639.

[277] *United States v. California*, 381 U.S. at 163-64.

[278] *Id.* at 142.

[279] One "marine league" is equal to three nautical miles. BLACK'S LAW DICTIONARY 907 (8th ed. 2004).

[280] *United States v. California*, 381 U.S. at 145-47 (*citing* Submerged Lands Act, 43 U.S.C. § 1301(a) (2005)).

[281] Submerged Lands Act, 43 U.S.C. § 1301(c) (2005) (emphasis added).

"inland waters," and found that Congress meant to leave the definition of inland waters to the courts.[282] In judicially defining the term "inland waters," the Court noted that it could best fill its responsibility in giving content to the term "inland waters" by adopting the best and most workable definitions available, which it found in the Convention on the Territorial Sea and the Contiguous Zone - the "settled international rule defining inland waters."[283] The Court noted that this solution had the benefit of establishing a uniform rule and one that would be consistent with U.S. conduct of international relations.[284] This case also demonstrates Supreme Court precedent for defining a statutory term in accordance with international law despite the fact that the international law postdates the relevant statute. Thus, even if the EEZ was not universally recognized at the time the MMPA and the ESA were enacted, it is now; and this fact supports an interpretation of "high seas" in the MMPA and the ESA that reflects current international law.

D. Judicial Rules of Interpretation

1. Providing Meaning to All Statutory Provisions

Since the Supreme Court has not yet ruled on the meaning of "high seas" in the MMPA and the ESA, lower courts must turn to traditional judicial rules of statutory interpretation. One rule of interpretation is simply to give meaning to all of a statute's provisions. The U.S. Supreme Court has consistently expressed "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."[285] Discussion of this rule in the context of *Florida Marine Contractors v. Williams* demonstrates that MMPA Section 1372, which states that it is unlawful to take marine mammals on the "high seas," is the only section of the MMPA that sets out the jurisdictional limits of the Act.

In attempting to ascertain whether the MMPA applied to U.S. inland waters, the *Williams* court found that, "Section 1371 does not contain any limitations on the scope of the moratorium, geographic or otherwise."[286] While

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[282] *United States v. California*, 381 U.S. at 150. Although MMPA and ESA legislative history appears silent on the definition of high seas, its silence in the wake of *Mitchell's* holding and the FWS regulations refusing to extend ESA jurisdiction to foreign territory evidences Congressional intent to leave the definition of "high seas" to the courts.
[283] *United States v. California*, 381 U.S. at 163-65.
[284] *Id.* at 165.
[285] Plaintiff's Response to Defendant's Motion for Judgment on the Pleadings at 10, Florida Marine Contractors v. Williams, 378 F.Supp.2d 1353 (M.D. Fla. 2005) (No. 2:03-cv-229-FtM-29SPC), 2004 WL 2038404 (quoting Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 878 (1991) *citing* Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990)).
[286] *Williams,* 378 F.Supp.2d at 1357.

the contractors in *Williams* sought authority to incidentally take manatees under MMPA Section 1371(a)(5)(A); and Congress may have "designed Section 1371 to end the taking of marine mammals without regard to the nature of the activity that caused the taking or the precise location within the habitat where the taking occurred;"[287] giving the moratorium worldwide effect would render the jurisdictional language of Section 1372, which prohibits takes on the "high seas" and in waters under U.S. jurisdiction, superfluous. Specifically, the *Williams* court held that FWS's authority to allow the taking of marine mammals worldwide is governed under the MMPA moratorium in Section 1371, and not under Section 1372, which only regulates the conduct of individuals.[288]

The *Williams* court attempted to harmonize its decision with *United States v. Mitchell,* and in so doing, it stated out of context the finding in *Mitchell* that the MMPA's legislative history as a whole was not clear whether the MMPA moratorium in Section 1371 was intended to have broader territorial effect than the prohibitions in Section 1372.[289] Then the *Williams* court attempted to distinguish the *Mitchell* court's characterization of legislative history by limiting it to the purported extension of the moratorium to the territory of other sovereigns.[290] In fact, when the Government in *Mitchell* argued that the moratorium on taking marine mammals should extend "world-wide," the court responded that the all inclusive language of the moratorium does not expressly address territoriality, and thus this all inclusive language cannot be held to indicate clear Congressional intent of worldwide application.[291] The *Williams*' interpretation of the MMPA moratorium, however, appears consistent with NOAA's regulation implementing the jurisdictional provisions of Section 1372, so the amount of deference due to the implementing agency's interpretation in this regulation must be examined.

2. *Chevron* Analysis

How much deference is due to an implementing agency's position is directly related to the form of the guidance. For example, "[a]dvise of Special Counsel creates no law and binds neither the public agency or officer of government."[292] Deference is afforded an agency interpretation pursuant to

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[287] *Id.* at 1362.
[288] *Id.* at 1357-59. Both sides extensively briefed whether jurisdiction under the MMPA extended to docks on inland waters under Section 1372; and the court could have decided the case based solely on MMPA Section 1372(a)(2)(B), which makes it unlawful for any person to use any port, harbor, *or other place* (e.g., a dock) under U.S. jurisdiction to take or import marine mammals; but instead, the Court makes this interpretation its fallback holding. *Id.* at 1364.
[289] *Id.* at 1364 (quoting United States v. Mitchell, 553 F.2d 996, 1001(5th Cir. 1977)).
[290] *Id.* at 1364.
[291] *Mitchell*, 553 F.2d at 1003-04.
[292] Sabella v. United States, 863 F.Supp. 1, 5 n.6 (D.D.C. 1994).

Chevron v. Natural Resources Defense.[293] *Chevron* analysis is divided into two steps: (1) If Congress has directly spoken to the precise question at issue and its intent is clear, then the court and agency "must give effect to the unambiguously expressed intent of Congress;" (2) If, however, Congress has not spoken to the precise question at issue, and is silent or ambiguous, an agency interpretation must be given deference if it is based on a permissible construction of the statute unless "arbitrary, capricious, or manifestly contrary to the statute."[294] In this instance, the NMFS regulation at issue applies the MMPA worldwide by making it unlawful for any person subject to U.S. jurisdiction to take any marine mammal during the MMPA moratorium.[295] Although the Fifth Circuit in *United States v. Mitchell* found the regulation to be invalid, its analysis was prior to *Chevron*. Applying *Chevron* to the regulation post-*Mitchell*, however, does not result in a different conclusion. Because Congress did not say whether the MMPA moratorium was supposed to apply worldwide, step two of *Chevron* must be applied. Under step two, deference should be denied because applying the MMPA's moratorium worldwide is manifestly contrary to the statute's geographic restrictions in Section 1372.

NOAA has alternatively discussed the extent of MMPA jurisdiction through its opinion that the term "high seas" in the MMPA includes the FEEZ.[296] Whether that opinion is due *Chevron* deference depends on whether it has undergone formal adjudication, rulemaking, or other formal process: "Interpretations such as those in opinion letters-like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law-do not warrant *Chevron*-style deference."[297] Because NOAA's opinion is contained in a letter that has not been expressly formalized in adjudication or rulemaking, it is not entitled to *Chevron* deference. NOAA's opinion, however, may be due a lesser form of deference or respect, called "*Skidmore* deference"[298] if it has the "power to persuade."[299] The weight given to an agency opinion in a particular case " will depend upon the thoroughness evident in its consideration, *the validity of its reasoning*, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[300] For all the reasons discussed herein, to include an unsupported extraterritorial extension of the MMPA into the FEEZ (i.e., invalid reasoning), NOAA's opinion that "high seas" includes the FEEZ is unpersuasive or in other words, "lacks the power to persuade."

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[293] Chevron v. Natural Resources Defense, 467 U.S. 837 (1984).
[294] *Id.* at 843-44.
[295] 50 C.F.R. § 216.11 (c).
[296] Chalmers letter, *supra* note 126, at 7.
[297] Christensen v. Harris County, 529 U.S. 576, 587 (2000).
[298] Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[299] *Christensen*, 529 U.S. at 587.
[300] *Skidmore*, 323 U.S. at 140 (emphasis added).

3. The Presumption Against Extraterritoriality

Application of the MMPA in the FEEZ constitutes extraterritorial application of the statute, which absent express Congressional authorization, is typically presumed to be invalid. The FEEZ is extraterritorial in the natural resources context because all coastal States have sovereign or exclusive regulatory control over the living and non-living natural resources in their EEZ. Thus, Congress used the term "high seas" in a manner consistent with international law because it did not want to legislate in what is essentially territory under foreign sovereign control. The court in *United States v. Mitchell* noted: "[I]f the nature of the law does not mandate its extraterritorial application, then a presumption arises against such application."[301]

The purpose of the presumption against extraterritoriality is "to protect against unintended clashes between our laws and those of other nations which could result in international discord."[302] Applying the MMPA and the ESA within the FEEZ could cause unintended clashes with the exercise of a foreign sovereign's rights over its natural resources. The U.S. Supreme Court has also stated: "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[303] Since Congress has stated, in the MMPA and the ESA, that it intends to legislate outside U.S. borders and on the "high seas," it may seem that this cannon of statutory construction does not apply. The presumption against extraterritoriality is inapplicable in this situation, however, only where there is an affirmative intention clearly expressed by Congress to extend the scope of the MMPA and the ESA to "conduct occurring within other sovereign nations."[304] Congress has not clearly expressed an affirmative intention to extend the scope of the MMPA and the ESA beyond the high seas to the FEEZ or an area where a foreign States exercise their sovereign rights over natural resources.

If the line of cases applying the presumption against extraterritoriality in the NEPA context are examined, it is telling that the only situation where NEPA was found applicable outside the United States was when it was applied to Antarctica, a territory "which is not a foreign country and is in some measure

[301] United States v. Mitchell, 553 F.2d 996, 1002 (5th Cir. 1977).
[302] Environmental Defense Fund v. Massey, 986 F.2d 528, 530 (D.C. Cir. 2003) (quoting Equal Employment Opportunity Commission v. Arabian American Oil Co., 111 S. Ct. 1127, 1230 (1991)); Born Free USA v. Norton, 278 F.Supp.2d 5, 20 n.3 (D.D.C. 2003), *vacated as moot*, 2004 WL 180263 (2004).
[303] Smith v. United States, 507 U.S. 197, 204 (1993) (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)) (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).
[304] *Massey*, 986 F.2d at 530 (quoting Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)).

subject to U.S. legislative control."[305] A FEEZ, however, is under foreign sovereign control and not subject to U.S. legislative control. The essence of the EEZ as an area under State sovereign control was borne out in *Natural Resource Defense Council v. Department of the Navy* when the Navy argued that the presumption against extraterritoriality prevented application of NEPA outside U.S. territorial seas (i.e., in the EEZ).[306] The court agreed with the plaintiffs, who countered the Navy by stating, "the presumption against extraterritoriality does not apply to areas where the United States exercises significant sovereignty and legislative control."[307] Additionally, in *United States v. Mitchell*, the court found that the presumption against extraterritoriality was not overcome.[308] Application of the presumption against extraterritoriality to the MMPA and the ESA[309] supports defining "high seas" as not including the FEEZ or other territory subject to foreign sovereign control.

The *Mitchell* court's extraterritorial analysis consisted of two principles of statutory construction.[310] The first principle of statutory construction required an examination of the nature of the law to determine if by limiting the locus to strictly territorial jurisdiction, the scope and usefulness of the statute would be greatly curtailed and frustrate the purpose of the statute.[311] The *Mitchell* court found that "the nature of the MMPA does not compel its application in foreign territories" and that the nature of the statute is "based on the control that a sovereign such as the United States has over the natural resources within its territory."[312] While the *Mitchell* court was not faced with the specific issue of whether the MMPA applies in a FEEZ, the reasoning of the court applies with equal force to the proposition that MMPA jurisdiction in the

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[305] *Born Free USA*, 278 F.Supp.2d at 19 – 20. *See also* Natural Resources Defense Council v. Department of the Navy, No. CV-01-07781 CAS(RZx), 2002 U.S. Dist. LEXIS 26360, at *34 (C.D. Cal. Sept. 17, 2002). "However, in each of these cases, the court's rationale for finding that NEPA did not apply to particular actions was that its application would implicate important foreign policy concerns or demonstrate a lack of respect for another nation's sovereignty." *Id.*

[306] *Natural Resources Defense Council*, 2002 U.S. Dist. LEXIS 26360 at *29 - 32.

[307] *Id.*

[308] *Mitchell*, 553 F.2d 996, 1003 (5th Cir. 1977). "With regard to the [presumption against extraterritoriality], neither the statute nor its legislative history provide a clear expression of congressional intent for application of the Act in foreign territories." *Id.*

[309] The Eight Circuit in Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990), *rev'd on other grounds*, 504 U.S. 555 (1992), addressed the extraterritorial application of the ESA, and specifically found that the presumption against extraterritoriality was overcome by clear Congressional intent in the words of the Act and in its legislative history. *Lujan*, 911 F.2d at 123. Although the Supreme Court majority did not specifically address this issue, Justice Stevens, in his concurring opinion, stated that his reason for concurrence was because he was not persuaded that Congress intended the consultation requirement of ESA Section 7(a)(2) to apply to activities in foreign countries. *Lujan*, 504 U.S. at 581-82 (Stevens, J., concurring).

[310] *Mitchell*, 553 F.2d at 1002.

[311] *Id.*

[312] *Id.*

FEEZ is precluded by the sovereign control that nations have over the natural resources in their EEZ.[313]

The second principle of statutory construction required an examination of "clear expression of Congressional intent for application of the Act in foreign territories."[314] In analyzing Congressional intent, the court stated: "[W]e must presume that United States jurisdiction under the Act ceases at the territorial waters and boundaries of other states."[315] Although not at issue or discussed in *Mitchell*, the EEZ is jurisdictional State boundary. Moreover, "when Congress did define the geographic scope of the prohibitions in section 1372, it did not make conduct in foreign territory unlawful."[316] The court found that the reasonable inference from this omission is that Congress concluded that the prohibitions should not extend extraterritorially.[317] Because international law considers the natural resources in the EEZ to be under the sovereign control of the coastal State, the FEEZ is extraterritorial. Thus, the *Mitchell* court concluded that the "basic purpose of the moratorium, prohibitions, and permit system therefore appears to be the protection of marine mammals only within the territory of the United States and on the high seas"[318] or in areas free from foreign sovereign control.

4. Charming Betsy cannon

The decision in *United States v. Mitchell* was consistent with international law. Chief Justice Marshall stated: "[A]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[319] This rule of law is called the "Charming Betsy cannon," and it "directs courts to construe ambiguous statutes to avoid conflicts with international law."[320] As an established rule of statutory interpretation,[321] this rule supports interpretation of the term "high seas" in the MMPA and the

[313] "Thus each sovereign may regulate the exploitation of natural resources within its territory." *Id.*
[314] *Id.* at 1003.
[315] *Id.* at 1005.
[316] *Id.* at 1004.
[317] *Id.*
[318] *Id.* at 1003.
[319] Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804). *See also* Princz v. Federal Republic of Germany, 26 F.3d 1166, 1183 (D.C. Cir. 1994) (Wald, J., dissenting) (quoting The Paquette Habana, 175 U.S. 677, 700 (1900)). "It is a well-established cannon of statutory construction that, because '[i]nternational law is part of our law,' . . . we must, wherever possible, interpret United States law consistently with international law."). *Id.* This rule clearly supports the position that undefined UNCLOS terminology ("high seas") used in U.S. law should be defined in a way that is consistent with UNCLOS and established State practice.
[320] Samson v. Federal Republic of Germany, 250 F.3d 1145, 1152 (7th Cir. 2001).
[321] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (2005). "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." *Id.*

ESA consistently with international law. Allowing incidental takes in the FEEZ pursuant to an expansive definition of "high seas" under the MMPA or the ESA conflicts with a foreign sovereign's exclusive control over the natural resources in its EEZ under international law. Said a different way, including the EEZ in a MMPA or ESA definition of "high seas" is not only inconsistent with international law but also may cause a conflict between U.S. and international law if U.S. citizens are permitted to incidentally take a foreign sovereign's natural resources in the FEEZ pursuant to these Acts. Unfortunately, the relevant international law is not always understood.

In *Center for Biological Diversity v. National Science Foundation*, the court misinterpreted the law by stating that under U.S. law the Mexican EEZ was part of the "high seas" to support its position that NEPA and the MMPA applied in the Mexican EEZ.[322] The court in *Center for Biological Diversity* cited to the 1958 Geneva Convention on the High Seas in defining "high seas," which has been superseded by the U.S. recognition (regardless of ratification or accession) of the EEZ in UNCLOS as representing customary international law.[323] It is unclear why the court disregarded UNCLOS. The court also cited to Section 1802(13) of the Magnuson-Stevens Fishery Conservation and Management Act to define "high seas," but failed to note that the Act, in Section 1802(45), states that, "The term 'waters of a foreign nation' means any part of the territorial sea or exclusive economic zone (or the equivalent) of a foreign nation, to the extent such territorial sea or exclusive economic zone is recognized by the United States."[324] The third basis used by the court to support its contention is a citation to Coast Guard regulations defining "high seas,"[325] but the Coast Guard defines "high seas" differently for law enforcement, jurisdiction, and navigation purposes.[326] The court cites one more basis for ignoring the EEZ.

The court in *Center for Biological Diversity* supported its finding that NEPA jurisdiction exists in Mexico's EEZ on the fact that the "concept of an EEZ came into existence after NEPA was enacted."[327] While the "concept" of the EEZ may have come into existence after NEPA and the MMPA were enacted, the character of the "high seas," as an area free from State sovereign

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[322] *Center for Biological Diversity v. National Science Foundation*, 2002 U.S. Dist. LEXIS 22315, at *9-10 (N.D. Cal. Oct. 30, 2002).
[323] *Id.* at *9 n.5. Even under the 1958 Convention, "high seas" meant an area free from State sovereignty.
[324] Magnuson-Stevens Act § 1802 (45); *Center for Biological Diversity,* 2002 U.S. Dist. LEXIS 22315, at *9 n.5.
[325] *Center for Biological Diversity*, 2002 U.S. Dist. LEXIS 22315, at *9 n.5.
[326] *See* 33 C.F.R. Pt.2. "[H]igh seas means all waters that are not the exclusive economic zone . . . territorial sea . . . or internal waters of the United States or any other nation." 33 C.F.R. § 2.32(d).
[327] *Center for Biological Diversity,* 2002 U.S. Dist. LEXIS 22315, at *9 n.4.

control, has not. Additionally, the "Charming Betsy cannon," directing interpretation of ambiguous statutes consistent with international law, does not require construction of the ambiguous statute with international law at the time the statute was enacted. The most incredible aspect of the court's finding that U.S. law considers the Mexican EEZ to be part of the high seas is the date of the court's decision – 30 October 2002. In fact, the country of Mexico established its EEZ in July 1976[328] and the United States established its own EEZ in 1983, when President Reagan explicitly recognized the EEZ defined in UNCLOS as representing customary international law.[329] Although the court cited *United States v. Mitchell* to support its finding that MMPA jurisdiction applies on the high seas, its finding went beyond the facts in *Mitchell* and based its finding "that U.S. law considers high seas to include the EEZ" on an incorrect reading and understanding of domestic and international law related to the EEZ.[330]

VI. CONCLUSION

Defining "high seas" in the MMPA and the ESA consistently with international law, in accordance with the "Charming Betsy cannon," is supported by the plain language and legislative history of the statutes. In the jurisdictional sections of both Acts, where the taking of marine mammals or listed endangered species on the "high seas" is prohibited, there is no language indicating the prohibitions extend to waters with natural resources subject to foreign sovereign control. The EEZ is an area of the ocean where a State has sovereign rights. The United States recognizes the EEZ, defined by UNCLOS, as customary international law. The Acts' legislative history evidences Congressional intent to prohibit conduct by U.S. citizens only in areas of the ocean where Congress may legally assert control over natural resources, not in areas that conflict with foreign jurisdiction. Thus, when Congress first used the term "high seas" in both the MMPA and the ESA, it understood this term to be defined by international law as an area free from the exercise of foreign sovereign rights over natural resources.

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[328] Maritime Claims Reference Manual, DoD 2005.1-M (23 June 2005), *available at* http://www.dtic.mil/whs/directives/corres/html/20051m.htm.

[329] Proclamation No. 5030, 48 Fed. Reg. 10605 (1983); President Ronald Reagan, *Statement on United States Oceans Policy* (1983) (stating that although the United States is not signing UNCLOS, the convention "contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states.").

[330] *Center for Biological Diversity*, 2002 U.S. Dist. LEXIS 22315, at *3. *See also* Daniel Inkelas, *Note: Security, Sound, and Cetaceans: Legal Challenges to Low Frequency Active Sonar Under U.S. and International Environmental Law*, 37 GEO. WASH. INT'L L. REV. 207, 236 (2005)("The court's holding that "U.S. law" considers a foreign state's declared EEZ to be the "high seas" appears to have been in error.")

A PRIMER ON THE NONPROLIFERATION REGIME FOR MARITIME SECURITY OPERATIONS FORCES

Craig H. Allen*

U.S. Naval forces will be employed to detect, monitor, and defeat the threat and/or use of weapons of mass destruction against the United States, our military forces, friends and allies . . . . We will continually refine and expand our participation in this crucial international effort.[1]

I. INTRODUCTION

Maritime security operations (MSO)[2] boardings have become a familiar element in the daily routine of units assigned to the maritime component of combined and joint force commands in some theaters. Indeed, it is not unusual in the Central Command area of operations for assigned naval vessels to conduct one hundred or more visit, board, search and seizure (VBSS) boardings during a six-month deployment. Over the last three years, a number of those MSO boardings were conducted under the framework established by the Proliferation Security Initiative (PSI), a multilateral effort launched in May of 2003 to counter the proliferation of weapons of mass destruction (WMD) and their components and delivery systems. [3] The *Naval Operations Concept*

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[1] Chief of Naval Operations-Commandant of the Marine Corps, *Naval Operations Concept 2006*, (Sept. 1, 2007), [hereinafter "NOC"], at 21-22, *available at* http://www.mcwl.usmc.mil/concepts/ServiceConcepts/NOC%20FINAL%2014%20Sep.pdf.

[2] The most complete working definition of "maritime security operations" is set out in the NOC. It states that the goals of such operations are to "ensure freedom of navigation, the flow of commerce and the protection of ocean resources" and to "secure the maritime domain from nation-state threats, terrorism, drug trafficking and other forms of transnational crime, piracy, environmental destruction and illegal seaborne immigration." *Id*. at 14. The execution of many of these missions must be carried out by personnel with law enforcement authority and jurisdiction, which is one of the U.S. Coast Guard's contributions to the National Fleet Policy Agreement. *See* ADM Thad Allen & ADM Mike Mullen, *America's National Fleet: A Coast Guard-Navy Imperative*, 132 U.S. NAVAL INST. PROC. (Aug. 2006), at 16, 18.

[3] *See* U.S. Dep't of State, Proliferation Security Initiative (Jul. 28, 2004), *available at* http://www.state.gov/t/isn/c10390.htm; Andrew C. Winner, *The Proliferation Security Initiative: The New Face of Interdiction*, 28 WASH. Q. 129 (Spring 2005). In 2005, the United States established its National Counter Proliferation Center (NCPC) within the office of the Director of National Intelligence, as required by the Intelligence Reform and Terrorism Prevention Act of 2004.

excerpt quoted above put the fleet on notice that boardings to intercept WMD shipments may be a growing mission in the coming years. The United Nations Security Council's unanimous decision on October 14, 2006 to impose Chapter VII sanctions restricting the Democratic Peoples' Republic of Korea's imports and exports, in response to Pyongyang's missile and nuclear device tests, certainly suggests that in the coming years the Central Command area of operations might not be the only theater where WMD-related maritime security operations will be a common naval mission.[4]

Although most of the recent legal analyses of the maritime efforts to curb WMD proliferation have focused on counterproliferation operations, it is important not to lose sight of the fact that the first line against proliferation is the nonproliferation regime. Indeed, the long term effectiveness of counter-proliferation measures requires an applicable nonproliferation regime. For example, when counterproliferation forces boarded the North Korean flag vessel *So San* off the coast of Yemen in 2002 and discovered she was carrying Scud missiles, many were shocked to learn that the vessel was not violating any binding international laws against proliferation.[5]

This article seeks to provide the reader with an overview of the WMD nonproliferation regime relevant to MSO and to alert the reader to shortfalls in that regime that might frustrate at-sea efforts to interdict WMD shipments. It begins with a general description of the international approach to combating proliferation of WMD and then examines the individual regimes for nuclear weapons, chemical weapons (CW), biological-toxin weapons (BTW) and WMD delivery systems, such as missiles and unmanned aerial vehicles. It next traces the development of several resolutions by the United Nations Security Council that target global terrorism and WMD proliferation. The article does not directly address maritime operations in support of Security Council resolutions imposing economic sanctions on a particular nation, nor does it address the war-

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See Office of the Director of National Intelligence Press Release 9-05, Dec. 21, 2005, *available at* http://www.dni.gov/aboutODNI/organization/NCPC.htm. The NCPC replaced the Counter-proliferation Center within the Central Intelligence Agency. PSI counterproliferation operations are coordinated in accordance with the recently promulgated Maritime Operations Threat Response ("MOTR") Plan and its protocols. Access to the MOTR Plan is limited by its "for official use only" designation.

[4] *See* S. C. Res. 1718, U.N. Doc. S/RES/1718 (Oct. 14, 2006).

[5] The *So San* was reportedly a Democratic Peoples' Republic of Korea (DPRK, or North Korea) flag cargo vessel that was observed loading missile components while in a North Korean port. The vessel was boarded, under the "right of visit," on the high seas south of Yemen by a Spanish frigate that was part of a combined maritime security force that included U.S. Navy elements. Although the boarding team ultimately discovered a cargo of Scud missiles hidden beneath bags of cement, when it was learned that the missiles were destined for the government of Yemen, the vessel was released. *See* Winner, *supra* note 3, at 131-32. The DPRK protested sharply, characterizing the boarding as an act of piracy.

time doctrines of neutrality, visit and search for contraband or blockade. The article concludes that while the global nonproliferation regime has progressively developed over the past several decades, it remains incomplete.

A. The International Approach to WMD Proliferation

As used in this article, the term "weapons of mass destruction" includes nuclear, chemical and biological-toxin weapons, together with their delivery systems[6] and related materials.[7] Responses to the dangers posed by WMD, and more specifically the dangers they pose in the hands of rogue regimes and terrorist organizations, include the international arms control and nonproliferation regime, safeguards for materials while in storage or transit, domestic and multilateral export controls, a family of treaties on terrorism, United Nations Security Council resolutions, and a new, but not yet legally effective, protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.[8] The signature characteristic of the regime is its multilateral, but not always universal approach.[9]

The international arms control and nonproliferation security regime comprises four components. First, through arms control agreements it seeks to limit the kind and number of available WMD and to deter states from using them.[10] Second, it imposes limits on weapon testing.[11] Third, it prohibits the

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[6] The United Nations Security Council defines the term to include "missiles, rockets and other unmanned systems capable of delivering nuclear, chemical, or biological weapons, that are specially designed for such use." S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004), *available at* http://disarmament.un.org/Committee1540/Res1540(E).pdf.

[7] As defined by the Security Council, the term includes "materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery." *Id*. Radiological (but non-fissile) materials/devices are sometimes included in the term. *See, e.g.*, 18 U.S.C. §§ 2332a, 2332h (2005).

[8] Protocol of Amendment to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation [2005 SUA Protocol], Nov. 1, 2005, IMO Doc. LEG/CONF.15/21, 27 I.L.M. 688 (1988). *See also* U.S. Dep't of State, *International Conference Amends Maritime Treaties on Unlawful Acts*, Oct. 21, 2005, *available at* http://usinfo.state.gov/is/Archive/2005/Oct/28-980286.html. The United States signed the 2005 Protocol on Feb. 17, 2006; however, it is not yet in force.

[9] One writer observed well before the post 9/11 era that "[t]he paradox of American power at the end of this millennium is that it is too great to be challenged by any other state, yet not great enough to solve problems such as global terrorism and nuclear proliferation." Sebastian Mallaby, *A Mockery in the Eyes of the World*, WASH. POST, Jan. 31, 1999, at B5.

[10] Such treaties do not bind non-parties on their own force, or non-state actors. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 34, U.N. Doc. A/CONF.39/39/27, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969). The United States is not a party to the Vienna Convention on Treaties, but it accepts most of the Convention as a codification of customary law. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, Part III, Introductory Note (1987).

emplacement of nuclear weapons in the global commons, such as outer space and the seabed.[12] Finally, it seeks to halt and even reverse the proliferation of WMD and their delivery systems, with the long-term goal of a complete, irreversible and verifiable disarmament of all weapons of mass destruction.

Within the United States, national and homeland security depend on both nonproliferation and counterproliferation measures. The distinction between nonproliferation and counterproliferation is far from clear, and often differs depending on the context, the identity and motivation of the person using the terms, and the times.[13] Proliferation looks at both the kind and quantity of

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[11] Even though the physical principles for constructing nuclear weapons are generally known, producing a reliable and effective nuclear weapon without testing holds significant challenges. Test ban treaties seek to eventually eliminate all nuclear weapons testing. The United States is party to the so-called Limited Test Ban Treaty of 1963. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. 5433, 480 U.N.T.S. 43. In 1999, the U.S. Senate declined, 51:48, to give its advice and consent to ratification of the Comprehensive Test Ban Treaty. *See* Congressional Research Service, *Nuclear Weapons: Comprehensive Test Ban Treaty*, CRS Issue Brief IB92099, at 3. Ratification would have required an affirmative vote by two-thirds of those senators present.

[12] *See* Treaty on the Prohibition of the Emplacement of Nuclear and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. 7337; U.N. Convention on the Law of the Sea, Dec. 10, 1982, art. 141, U.N. Doc. A/CONF.62/122 (1982), 1833 U.N.T.S. 3 [hereinafter "LOS Convention"] (reserving the international seabed for peaceful purposes); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. 6347.

[13] For a distinction between nonproliferation and counterproliferation see Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counter-proliferation, and International Law*, 30 YALE J. INT'L L. 507, 519- 520 (2005). In the early years of the Clinton Administration, the NSC reportedly attempted, without success, to define each term and limit the scope of counterproliferation. A 1999 directive by the Director of Central Intelligence (as he was then called) provided the following definitions (for CIA purposes):

> 1. *Proliferation* refers to the acquisition and spread (including development and transfer) by state and non-state entities of nuclear, biological, and chemical weapons, the means used to deliver them, the significant components of those weapons (such as fissile material and biological and chemical agents), and the technology and equipment necessary to build or exploit such weapons.
>
> 2. *Nonproliferation* is the use of the full range of political, economic, military, law enforcement, and other tools to prevent proliferation, to reverse it, and to protect the interests of the United States against an opponent armed with weapons of mass destruction or missiles or other means of delivery, should that prove necessary. Nonproliferation tools include: intelligence, global nonproliferation norms and agreements, diplomacy, export controls, security assurances, defenses, and the application of military force.
>
> 3. *Counter-proliferation* refers to activities across the full range of US efforts to combat proliferation, including diplomacy, arms controls, export controls, and intelligence collection and analyses, with particular responsibility for ensuring that US forces and interests can be protected should they confront an adversary armed with weapons of mass destruction and their means of delivery.

Director of Central Intelligence Agency Directive 7/2, May 7, 1999.

weapons, and materials for producing weapons, as well as their distribution. Nonproliferation generally refers to the international and national regimes that seek to halt and eventually reverse the proliferation of WMD and their delivery systems.[14] The nonproliferation regime was recently expanded to include measures to identify and secure nuclear materials and other weapons of mass destruction, to prevent their use by terrorist organizations and criminal syndicates. Nonproliferation supplier and export control measures are pursued through arms control and other multilateral agreements,[15] threat reduction assistance programs and domestic export controls.[16] Multilateral export control regimes by so-called "supplier states," while vital, only restrict exports of WMD materials from member states, and only to the extent those members choose to implement them. They do not restrict states that decline to join the export control regime. Nonproliferation and arms control regimes have long struggled with the problems posed by the dual-use of WMD technologies.[17] The dual-use character of many WMD and related equipment and precursors significantly complicates compliance verification and monitoring. Moreover, they present complex "gray-market" issues.[18] Finally, the national implementing measures

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As part of a 1999 federal government reorganization by President Clinton, the Arms Control and Disarmament Agency was merged into the Department of State. Arms control and nonproliferation missions are now carried out by the Department of State's Bureau of International Security and Nonproliferation (ISN) under the direction of the Under Secretary of State for Arms Control and International Security. To develop and implement nonproliferation strategies, the Department of State works closely with the Departments of Defense and Energy. Export controls are coordinated with the Department of Commerce Bureau of Industry and Security (BIS).

[14] *See* Nuclear Non-Proliferation Act of 1978, Pub. L. No. 95-242, 92 Stat. 120, *codified as amended at* 22 U.S.C. § 3201 (2005) (congressional declaration of non-proliferation policy). *See also* Exec. Order No. 12,058 (1978) (performance of duties relating to nuclear non-proliferation).

[15] Multilateral export control regimes by supplier states include the Nuclear Suppliers' Group, the Australia Group and the Missile Technology Control Regime. As discussed more fully below, each is primarily a political commitment by responsible supplier states to restrict and regulate exports of specified WMD materials and delivery systems and does little to address the actual transport of such materials.

[16] Since 1991, the Nunn-Lugar Cooperative Threat Reduction (CTR) program has allocated over $400 million/year to deactivate nuclear weapons in the former Soviet Union. Those funds were used to deactivate 6,760 nuclear warheads and destroy 587 ballistic missiles, 483 ballistic missile silos, 150 bombers, 436 submarine missile launchers and 28 strategic missile submarines. *See Nunn-Lugar Report 2005*, *available at* http://lugar.senate.gov/reports/Nunn-Lugar_Report_2005.pdf. *See also* [Senator] *Lugar Welcomes President's Support of Nunn-Lugar Expansion; Praises Nonproliferation Initiative*, Feb. 11, 2004, *available at* http://lugar.senate.gov/pressapp/record.cfm?id=217970 [hereinafter "Lugar Praises PSI"].

[17] Dual-use materials are those that have both legitimate (peaceful) and illegitimate (weapons) application. For example, a DNA synthesizer has any number of legitimate biotechnology applications, but might also be used to produce BTW agents.

[18] As used herein, "black market" goods are ones that are illegal to sell to any buyer. "Gray market" goods are ones that may be legally sold to some buyers, but are in fact—often through deceptive or fraudulent means—sold to an unqualified buyer. Dual-use materials are prime candidates for the gray market. When sold to a legitimate user who puts them to a legitimate, non-WMD use, they violate no laws. When sold to a user who intends to incorporate them into a WMD, however, the

for export control regimes often limit their application to sellers, exporters and buyers, and typically exclude from their coverage transporters.[19] As a result, those aboard a vessel engaged in transporting illicit WMD or related materials might not be in violation of any laws, even though the actual export of those materials violated the source nation's export control regime.[20]

In contrast to nonproliferation, counterproliferation generally refers to the more muscular efforts to prevent the movement of WMD materials, technology and expertise from states that fail to conform to nonproliferation norms to hostile states and terrorist organizations.[21] Counterproliferation measures include diplomacy, sanctions (granting/withholding of aid, financing, eligibility for government/military contracts, and trade)[22] and, in select cases, interdiction. Interdiction actions that keep WMD out of the hands of rogue regimes and terrorist groups are now a key component in some counterproliferation strategies. Thus, counterproliferation strategies have expanded to include measures to be used in a preemptive sense to deny, disrupt, delay, or destroy proliferation capabilities. Such strategies may include law enforcement measures against those who traffic in or transport WMD and, more recently, who facilitate or finance the transactions.[23] As with nonproliferation measures, the dual-use character of many WMD and their related equipment and materials seriously complicates counterproliferation efforts.

Early approaches to combating the threat of a strike by WMD focused on deterrence strategies and diplomatic efforts to negotiate and implement arms control treaties.[24] Arms control treaties—the diplomatic approach—seek to halt

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transaction may be illegal, depending on the relevant national laws. Gray market sellers are characterized by their willingness to ask no questions if the price is right.

[19] Some United States criminal statutes extend to persons who acquire, transfer, receive, possess, import, export, or use, or possess and threaten to use certain devices. *See, e.g.*, 18 U.S.C. § 2332g (2005). However, such laws are often limited in their application by the location or nationality of the actor.

[20] Although the 2005 SUA Protocol, *supra* note 8, may extend criminal liability to certain transporters, that Protocol is not yet in force.

[21] *See generally* Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853, *codified* at 22 U.S.C. § 3244 (2005) (actions to combat international nuclear terrorism).

[22] *See* Congressional Research Service, *Nuclear, Biological, Chemical and Missile Proliferation Sanctions: Selected Current Law*, CRS Rep. RL31502 (updated Oct. 21, 2005).

[23] On June 28, 2005, under authority of the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1707 (2000), the President issued an executive order authorizing "blocking" (i.e., prohibiting the transfer, payment or withdrawal) of any assets in the United States owned by certain proliferators of WMD. *See* Exec. Order No. 13,382, 70 Fed. Reg. 38,567 (July 1, 2005).

[24] The law of armed conflict (LOAC) also limits the use of certain WMD. *See* Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, [1996] I.C.J. Rep. 226, paras. 55, 86 (July 8), *reprinted in* 35 I.L.M. 80 (1996). Limits on the use of such weapons under the LOAC, their placement in space or on the seabed, and weapons testing restrictions are beyond the scope of this article. Additionally, some uses of WMD could conceivably implicate the 1977 Convention on the

the proliferation of WMD and their delivery systems, with the long-term goal of disarmament.[25] Deterrence strategies—the principal military approach—rest on a threat of retaliation in kind, and are grounded on the belief that a rational state will be deterred from using WMD if it knows, or at least believes, that the enemy has the capability to survive a first strike and respond with similar weapons that will inflict an unacceptable level of damage. The Allies' threat of retaliation in kind against any first use of CW agents by Germany during World War II is believed to be the chief reason Germany never used any of its considerable stockpiles of such weapons. Similar threats are believed to have deterred Saddam Hussein from deploying WMD against coalition forces in the 1991 Gulf War to liberate Kuwait.

The growing threat of WMD use, or the threat of its use, by terrorist groups and so-called rogue regimes, who may not be subject to internal and external political and legal controls or to the same deterrence rationale as responsible states, has added a new sense of urgency to proliferation security discussions. For some, it is becoming increasingly obvious that diplomatic measures and the nonproliferation regime will never be sufficient in themselves to curb the threats posed by WMD in the possession of these actors, and that deterrence strategies have little or no effect on rogue regimes and non-state actors. That realization has set in motion a shift in priority from nonproliferation and deterrence strategies to counterproliferation measures that are more proactive and may even include preemptive or preventive measures aimed at denying those groups access to WMD and their delivery systems.[26]

B. Nonproliferation Regime for Nuclear Weapons and Materials

The Nuclear Nonproliferation Treaty of 1968[27] (NPT) seeks to restrict the application of nuclear technology to peaceful purposes. Under the NPT, only five states—China, France, Russia, the United Kingdom and the United

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Prohibition of Military or Other Hostile Use of Environmental Modification Techniques, 31 U.S.T. 233, T.I.A.S. 9614, *reprinted in* 16 I.L.M. 90 (1977). *See generally* U.S. ARMY, OPERATIONAL LAW HANDBOOK 234 (2004).

[25] Congressional Research Service, *Proliferation Control Regimes: Background and Status*, CRS Rep. RL31559 (updated Feb. 10, 2005); Barry Kellman, *Bridling the International Trade in Catastrophic Weapons*, 43 AM. U. L. REV. 755 (1994).

[26] For an adversary who is immune to deterrence strategies, prevention may be a necessary strategic choice. *See generally* Lawrence Freedman, *Prevention, Not Preemption*, 26 WASH. Q. 105 (Spring 2003).

[27] Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, T.I.A.S. 6839, 729 U.N.T.S. 161 (1970). The NPT was extended indefinitely in 1995. A comprehensive review conference was held in May of 2005, but failed to resolve a number of vexing issues facing the parties, including a timetable for disarmament by the five nuclear weapon states.

States—may legitimately manufacture and possess nuclear weapons.[28] These "nuclear weapon states" may not, however, transfer nuclear weapons or nuclear explosive devices to "any other recipient whatsoever," or in any way assist, encourage or induce any non-nuclear-weapon state to manufacture or otherwise acquire nuclear weapons or nuclear explosive devices.[29] The non-nuclear-weapon states agree not to acquire nuclear weapons in return for assistance in developing peaceful uses for nuclear power. At the same time, each of the "nuclear five" (who are also permanent members of the U.N. Security Council) is obligated under the NPT to undertake "general and complete disarmament under strict and effective international control."[30] Although considerable progress toward disarmament has been made over the last twenty years, the global inventory of strategic and tactical nuclear warheads still exceeds 10,000.[31] The failure of the nuclear weapon states to move more quickly on disarmament has been a recurring source of criticism by the non-nuclear weapon states.[32]

Compliance with the nonproliferation and disarmament requirements of the NPT is monitored by the International Atomic Energy Agency (IAEA).[33] However, it has been frequently pointed out that promulgating safeguards and monitoring and verification measures do not by themselves ensure compliance. "The most air-tight verification regime is worthless if confirmed violations are ignored."[34] Unfortunately, remedies for violations of the NPT are not as well

[28] The five nuclear weapon states are those that had manufactured and tested a nuclear weapon prior to January 1, 1967.
[29] NPT, *supra* note 27, art. I.
[30] *Id*. art. VI.
[31] In 2005, the United States nuclear stockpile stood at approximately 5,000 operational warheads (4,216 strategic and 780 non-strategic). *U.S. Nuclear Forces, 2005*, 61 BULL. ATOMIC SCIENTISTS 73-75 (2005). The 2005 Russian nuclear stockpile stood at 3,814 operational warheads. *Russian Nuclear Forces, 2005*, 61 BULL. ATOMIC SCIENTISTS 70-72 (2005). The Soviet nuclear arsenal is thought to have reached as many as 35,000 warheads at the end of the Cold War in 1991. Estimated nuclear stockpiles for other states are: China: 410, France: 350, U.K.: 185, India: 95, Israel: 75-200 and Pakistan: 52. *See* 14 CONG. Q. RESEARCHER 297, 300 (2004). *See also Nuclear Weapons: An Exchange*, 54 NAVAL WAR C. REV. 13-46 (2001).
[32] *See, e.g*., U.N. General Assembly, Res. 59/83, U.N. Doc. A/RES/59/83 (Dec. 16, 2004) (expressing the Assembly's deep concern with the lack of progress in the implementation of the thirteen steps to implement article VI of the NPT).
[33] The IAEA's authority will be expanded as more states ratify and implement the Model Additional Protocol adopted by the IAEA in 1997. *See* U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2002, at 1057-58 (2003) [hereinafter "2002 DIGEST"]; Nobuyasu Abe, U.N. Undersecretary-General for Disarmament Affairs, Non-Proliferation and the Challenge of Compliance, Sept. 19, 2003, *available at* http://disarmament.un.org:8080/speech/19sept2003.htm. President Bush transmitted the Additional Protocol to the U.S.-IA EA Safeguards Agreement to the Senate for advice and consent on May 9, 2002. *See* SEN. TREATY DOC. NO. 107-7 (2002). The Senate unanimously approved it on March 31, 2004.
[34] U.S. Dep't of State, Undersecretary of State for Arms Control and International Security John R. Bolton, *The NPT: A Crisis of Non-Compliance*, Statement to the Third Session of the Preparatory

developed as the verification regime. The IAEA may report violations to the U.N. Security Council,[35] which may then take appropriate action under Chapters VI or VII of the United Nations Charter,[36] but such measures are impossible without the support of at least all of the permanent members. Given the widely divergent interests expressed by those states over recent issues involving Iraq and longstanding support by some permanent members for North Korea and Iran, the prospects for Chapter VII measures to enforce the NPT were, until quite recently, not encouraging. The unanimous decision to impose sanctions on North Korea, following its October 9, 2006 nuclear test, and to demand that Pyongyang return to the NPT and the IAEA safeguards, may signal a new resolve. U.N. observers will no doubt closely monitor the Council in the coming months to see what actions it takes to "restore international peace and security" with respect to these proliferation threats.

All but four states (India, Israel, North Korea and Pakistan) are party to the NPT.[37] India and Pakistan have both developed and tested nuclear weapons.[38] It is also likely that Israel possesses nuclear weapons,[39] though there is no proof that Israel has tested such weapons, nor has it formally declared it possesses (or denied that it possesses) nuclear weapons. Until quite recently, Israel has generally refused access to the IAEA. North Korea and Iran are at varying stages in the development of a nuclear weapons capability. In 2004 Libya admitted to a WMD development program, but agreed to abandon it. As

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Committee for the 2005 Review Conference on the Treaty on the Non-Proliferation of Nuclear Weapons, Apr. 27, 2004, *available at* http://www.state.gov/t/us/rm/31848.htm ("Enforcement is critical. We must increase the costs and reduce the benefits to violators, in ways such as the Proliferation Security Initiative now being pursued actively around the world.").

[35] Statute of the International Atomic Energy Agency, Oct. 23, 1956, art. XII.A.7, 8 U.S.T. 1093, 276 U.N.T.S. 3 (amended Oct. 4, 1961, 14 U.S.T. 135, 471 U.N.T.S. 333).

[36] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, as amended in 1963 (16 U.S.T. 1134, T.I.A.S. No. 5857), 1965 (19 U.S.T. 5450, T.I.A.S. No. 6529) and 1971 (24 U.S.T. 2225, T.I.A.S. No. 7739).

[37] At last count, there were 189 states-parties. Despite widespread acceptance of the treaty, the parties are not in agreement over the treaty's future direction. *See Nuclear Nonproliferation Treaty Meeting Ends with Deep Divides*, UN WIRE, May 7, 2004, *available at* http://www.unwire.org/News/328_426_23598.asp. *See also* U.S. Dep't of State, *2005 NPT Review Conference*, *available at* http://www.state.gov/t/isn/wmd/nnp/c10602.htm.

[38] In early 2006, the United States and India entered into an agreement on civil nuclear cooperation. In return for a U.S. promise to permit India to engage in trade for civil nuclear technology, India agreed to take steps to bring its program into compliance with IAEA safeguards and Nuclear Suppliers' Group and Missile Technology Control Regime guidelines. *See* The White House, *Fact Sheet: United States and India: Strategic Partnership*, Mar. 2006, *available a* http://www.whitehouse.gov/news/releases/2006/03/20060302-13.html.

[39] One estimate puts the Israeli nuclear arsenal at up to 200 warheads, deliverable by aircraft, missile and perhaps submarine. *Weapons of Mass Destruction: If You Push I'll Shove*, THE ECONOMIST, July 10, 2004, at 41.

an NPT party, Iran is subject to IAEA compliance inspections.[40] Despite two years of negotiations with the European Union and Russia, Iran—whose president has called for the state of Israel to be wiped off the map—continues its enrichment program, ignoring two Security Council resolutions calling for a suspension.[41]

After the world discovered that North Korea had, for years, been systematically violating the 1994 "Agreed Framework" it reached with the United States,[42] and circumvented safeguards in the NPT system to hide its nuclear weapons programs, it withdrew from the NPT in early 2003 and denied further access to IAEA inspectors.[43] Pyongyang's renunciation of the NPT and expulsion of the IAEA inspectors were largely symbolic, since it had been violating the treaty for years despite IAEA oversight. In 2002, the Security Council members considered a resolution critical of North Korea's renunciation of the NPT; however, China blocked the action.[44] China relented, and voted for sanctions, after the DPRK's October 9, 2006 nuclear device test.

Although the long-term goal of the NPT is to eliminate all nuclear weapons, it preserves and even promotes the "inalienable" right to peaceful use of nuclear technology, within a complex system of safeguards agreements entered into between 145 states and the IAEA and implemented through IAEA

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[40] In June of 2004, after the IAEA inspectors discovered traces of highly-enriched uranium (HEU) on centrifuge parts from an Iranian facility. Iran made an ambiguous assertion that it would demand that it be recognized as a "nuclear power." *See Iran Wants Recognition as Nuclear Nation*, CNN.COM NEWS, June 13, 2004, *available at* http://www.cnn.com/2004/WORLD/meast/06/12/iran.iaea/index.html.

[41] S. C. Res. 1696, U.N. Doc. S/RES/1696 (Jul. 31, 2006); S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 23, 2006). *See also* Int'l Atomic Energy Agency Board of Governors, *Implementation of the NPT Safeguards against the Islamic Republic of Iran*, IAEA Doc. GOV/2006/53, Sept. 16, 2006, *available at* http://www.iaea.org/Publications/Documents/Board/2006/gov2006-53.pdf. While Iran negotiated with several European Union governments to end its uranium enrichment program it took advantage of the opportunity to develop the technology to convert solid uranium to its gas form. Between June and July of 2006, Iran also enriched six kilograms of UF6 into uranium 235. *Id*.

[42] The 1994 Geneva Accords, or "Agreed Framework," called for North Korea to freeze its plutonium nuclear program in Yongbyon in exchange for United States foreign aid, oil transfers and assistance in developing two civilian light water reactors. *See* Congressional Research Service, *North Korea's Nuclear Weapons Program*, CRS Issue Brief IB91141 (updated May 25, 2006).

[43] Some argue that North Korea's renunciation of the NPT was invalid when made, for substantive and procedural reasons. *See* Frederic L. Kirgis, *North Korea's Withdrawal from the Nuclear Proliferation Treaty*, ASIL INSIGHTS, Jan. 2003, *available at* http://www.asil.org/insights/insigh96.htm. In Resolution 1718, the Security Council "demanded" that the DPRK "immediately retract its announcement of withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons," and return to the NPT and IAEA safeguards. S.C. Res. 1718, ¶ 3, 4, U.N. Doc. S/RES/1718 (Oct. 14, 2006).

[44] Jean du Preez & William Potter, *North Korea's Withdrawal from the NPT: A Reality Check*, Center for Non-Proliferation Studies, Apr. 9, 2002, *available at* www.cns.miis.edu/pubs/week/030309/htm.

compliance inspections.[45] Rising oil prices seem certain to stimulate interest and investment in nuclear power projects that will significantly add to the challenge of NPT compliance monitoring.[46] The dual-use capability of the relevant nuclear technology presents thorny compliance verification problems, as the present situation in Iran demonstrates. The non-compliance by several states that exploit the benefits of NPT membership to develop nuclear weapons "under cover of supposed peaceful nuclear technology" has produced what a United States spokesman characterized as a crisis.[47] As the President signaled in the *National Security Strategy of the United States*, the NPT parties must work together to close the "loophole in the Non-Proliferation Treaty that permits regimes to produce fissile material that can be used to make nuclear weapons under cover of a civilian nuclear power program."[48]

In 1974, shortly after the Indian nuclear test demonstrated how nuclear technology and materials transferred for peaceful purposes could be used, a number of supplier states (now up to 44) came together to form the "Nuclear Suppliers' Group" (NSG). The NSG is a voluntary multilateral export control regime for nuclear materials used in peaceful applications by other states.[49] The NSG scheme, which complements but is not formally part of the NPT, is a nonbinding arrangement among like-minded nuclear materials supplier states designed to control exports of nuclear materials, equipment and technology, both dual-use and specially designed and prepared components. The primary control mechanism is a set of agreed upon "guidelines." The NSG's guidelines are linked to the work of the thirty-five-member Zangger Committee (also known as the Nuclear Exporters' Committee), which develops the "Trigger List"

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[45] NPT, *supra* note 27, arts. III & IV. The safeguards program will be enhanced by the Model Additional Protocol. *See* Int'l Atomic Energy Agency, IAEA *Safeguards: Stemming the Spread of Nuclear Weapons*, *available at* http://www.iaea.org/Publications/Factsheets/English/S1_Safeguards.pdf.

[46] The Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), signed into law on August 8, 2005, included measures to "encourage investment in a new generation of safer, more reliable, and more proliferation-resistant nuclear power plants." *See also* Ann Stouffer Bisconti, *Nuclear Snapshots: Perceptions of Energy Needs Drive Public Opinion on the USA's Nuclear Future*, 46 IAEA BULL. No. 1, at 27 (June 2004).

[47] *See* Bolton, Statement to the 2005 Review Conference of the NPT, *supra* note 34.

[48] The White House, *The National Security Strategy of the United States* 20 (2006), *available at* http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf.

[49] Nuclear Suppliers' Group (also known as the London Group), *available at* http://www.nuclearsuppliersgroup.org/. The United States proposed formation of the NSG in 1974, following a nuclear test explosion by India. Prominent non-member states who supply such materials include China and Brazil. A proposal to merge the NSG and the three other "supplier group" export control regimes mentioned below into a single organization is under discussion. *See* Seema Gahlaut, et al., *Roadmap to Reform: Creating a New Multilateral Export Control Regime* (2004), *available at* http://www.uga.edu/cits/documents/pdf/CITS%20ROADMAP%20Report.pdf.

of controlled items.[50] Any export of an item on the Trigger List implicates not only the NSG's guidelines, but also the NPT safeguards established by the IAEA. The safeguards are implemented at the national level and enforced under domestic laws. At their 2004 summit, the G-8 member states—having declared that the "proliferation of weapons of mass destruction (WMD) and their means of delivery, together with international terrorism, remain the pre-eminent threat to international peace and security"—adopted an Action Plan for Nonproliferation that calls for significant changes to the NSG guidelines and called for a temporary suspension of transfers of enrichment and reprocessing equipment and technologies while the new guidelines are being developed.[51] The G-8 Action Plan would also require all states seeking supplies for peaceful applications of nuclear technology or materials to accede to the IAEA's Additional Protocol and comply with the more stringent safeguards currently under development.[52]

Advocates of a new Fissile Material Cut-Off Treaty[53] (FMCT) argue that a treaty banning production of fissile material for use in nuclear weapons is necessary to strengthen existing nonproliferation norms.[54] By one estimate, existing stockpiles of fissile materials total approximately 3,000 metric tons; enough to produce 200,000 weapons.[55] The draft FMCT, which has been under consideration since 1998, would not ban fissile materials used for non-explosive

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[50] *See* http://www.zanggercommittee.org. The European Union is a permanent observer. The criteria for listing materials that will fall within the IAEA safeguards are derived from Article III.2 of the NPT, which provides that:

> Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article.

[51] G-8 Action Plan on Nonproliferation, para. 1, June 9, 2004 [hereinafter "G-8 2004 Action Plan"], *available at* http://www.whitehouse.gov/news/releases/2004/06/20040609-28.html. The G-8 reaffirmed their commitment at the 2006 summit in St. Petersburg, Russia. *See Statement on Non-proliferation*, July 16, 2006, *available at* http://www.g8.utoronto.ca/summit/2005gleneagles/nonprolif.pdf.

[52] G-8 2004 Action Plan, *supra* note 51, para. 1. The IAEA Model Additional Protocol, which was adopted in 1997, strengthens the safeguards system by requiring states to provide the IAEA with broader information covering all aspects of their nuclear fuel-related activities and to permit broader access to inspect facilities and install verification technologies. To date, however, only 78 of the 180 NPT signatories have ratified the Additional Protocol. *See* IAEA, *Safeguards and Verification*, *available at* http://www.iaea.org/OurWork/SV/Safeguards/sg_protocol.html.

[53] The proposed treaty is sometimes referred to as FISSBAN.

[54] *See* G.A. Res. 48/75L, U.N. Doc. A/48/75L (Jan. 7, 1994) (calling for negotiation of a non-discriminatory, multilateral and international, effectively verifiable treaty banning production of fissile material for nuclear weapons or other nuclear explosive devices).

[55] Bipartisan Security Group, *Status of the Non-Proliferation Treaty, Interim Report*, June 2003, at 5, *available at* http://www.middlepowers.org/gsi/pubs/06_03_npt_brief.pdf. Those familiar with the group's public statements may reasonably wonder whether the group is indeed bipartisan.

purposes, and it would not apply to non-fissile materials such as tritium.[56] The draft FMCT also does not include measures to reduce existing stockpiles. However, the treaty would do much to reduce availability of fissile material, and therefore the threat of such materials finding their way into an illicit nuclear weapon. Negotiating a fissile materials cut-off treaty that advances the interests of the nation is an announced goal of the United States.[57]

Nuclear weapons and their components are vulnerable to diversion or theft while stored or in transport. A principal aim of the U.S. Department of Energy's Global Threat Reduction Initiative is to secure, remove or dispose of nuclear and radiological materials around the world that are vulnerable to theft.[58] Recent efforts have focused on "repatriating" spent reactor fuel provided by the United States and Russia to other states and to convert research reactors that presently run on highly enriched uranium to non-fissile alternatives. The transport of nuclear materials and the standards for their protection were addressed in the Convention on the Physical Protection of Nuclear Materials (CPPNM), which requires states-parties to the convention to criminalize the theft or fraudulent obtaining of certain nuclear materials, or the use of such materials in attacks or threatened attacks.[59] The United States enacted criminal statutes to implement the CPPNM convention.[60] In 2003, the IAEA approved a revised Code of Conduct on the Safety and Security of Radioactive Sources.[61] The Safety of Life at Sea Convention (SOLAS) [62] and the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High

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[56] *See Fissile Material Cut-Off Treaty* (information article), *available at* http://www.fas.org/nuke/control/fmct.

[57] The White House, *National Strategy for Combating Weapons of Mass Destruction* (Dec. 2002), *available at* http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf. India recently joined the U.S in supporting the conclusion of a Fissile Material Cut-off Treaty. *See* The White House Fact Sheet, *supra* note 38.

[58] The DoE program for nuclear and radiological materials complements and in some ways overlaps with the Nunn-Lugar Cooperative Threat Reduction Program.

[59] Convention on the Physical Protection of Nuclear Materials, Oct. 26, 1979, art. 7, T.I.A.S. 11080, 1456 U.N.T.S. 24631. Parties must also make such offenses extraditable. *Id*. art. 11. Materials of interest are plutonium, uranium 233 and uranium 235. A 2005 diplomatic conference adopted amendments to the Convention designed to strengthen its existing provisions and expand its scope to cover, among other points, the physical protection of nuclear material used for peaceful purposes, in domestic use, storage and transport, and the physical protection of nuclear material and peaceful nuclear facilities against sabotage. *See* IAEA Press Release 2005/03, *States Agree to Stronger Physical Protection Regime*, July 8, 2005, *available at* http://www.iaea.org/NewsCenter/PressReleases/2005/prn200503.html.

[60] *See* 18 U.S.C. § 831 (2005).

[61] *See also* G.A. Res. 58/240, U.N. Doc. A/RES/58/240 (2003), para. 26 (welcoming IAEA Res. GC(47)/RES/7 concerning measures for strengthening international cooperation in nuclear, radiation and transport safety and waste management).

[62] International Convention for the Safety of Life at Sea, Nov. 1, 1974, T.I.A.S. 9700 & Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea, 1974, Feb. 17, 1978, ch. VII, part D, T.I.A.S. 10009.

Level Radioactive Wastes on Board Ships (INF Code)[63] prescribe requirements for the maritime transport of nuclear materials. Liability for maritime transporters is governed by the Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material.[64]

In 2005, the U.N. General Assembly adopted the International Convention for the Suppression of Acts of Nuclear Terrorism,[65] which, if it enters into force, will extend the criminal regime applicable to proliferation-related offenses in several important respects. For example, the General Assembly's Convention would require states-parties to criminalize the possession of radioactive material, or the making or possession of a nuclear or radioactive device, with the intent to use that material to cause death, serious bodily injury or substantial damage to property or the environment.[66] The prohibitions would extend to attempts, and to those who participate as an accomplice, organize or direct those who carry out acts of nuclear terrorism, or who in "any other way contributes to the commission" of a covered act, knowing of the intent to commit such acts or with the aim of furthering the general criminal activity or purpose of the group.[67] States-parties must also take all practicable measures to, *inter alia*, prohibit in their territories illegal activities by persons or groups that encourage, instigate, or organize acts of nuclear terrorism, or knowingly finance or provide technical assistance or information to persons or groups engaged in such acts.[68] The General Assembly's Convention plainly embraces a law enforcement approach to the threat posed by nuclear and radiological weapons in the hands of terrorists.[69] The Convention would also eliminate, with significant exceptions, the political offense exemption to extradition.[70]

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[63] Compliance with the INF Code is mandatory. *See id*. Reg. VII/16. *See also* International Maritime Organization, Res. A.853(20) (adopting updated INF Code); Eugene R. Fidell, *Maritime Transport of Plutonium and Spent Nuclear Fuel*, 31 INT'L LAWYER 757 (1997).

[64] Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, Dec. 17, 1971, U.N.T.S. No. 14120. The Convention limits the transporter's liability for damage caused by a nuclear incident in cases where the operator of the related nuclear installation bears liability under the Paris or Vienna Conventions or national law. *Id*. arts. 1-2.

[65] International Convention for the Suppression of Acts of Nuclear Terrorism, annexed to G.A. Res. 59/240, U.N. Doc. A/RES/59/240 (Feb. 24, 2005), *reprinted in* 44 I.L.M. 815 (2005).

[66] *Id*. art. 2(1).

[67] *Id*. arts. 2(2), (3), (4).

[68] *Id*. art. 7.

[69] The Convention expressly mandates that all states-parties carry out the Convention obligations in a manner "consistent with the principles of sovereign equality and territorial integrity of states and that of non-intervention in the domestic affairs of other States." *Id*. art. 21. The Convention twice addresses the rights of individuals engaged in covered acts of nuclear terrorism (*Id*. arts. 12, 17) and requires the interdicting state to return any seized nuclear material or device to the state to which it belongs or of which the person owning it is a national. *Id*. art. 18(2).

[70] *Id*. arts. 6, 15. However, the grounds for refusing extradition in article 16 of the convention arguably provide a sympathetic state a nearly peremptory basis for denying extradition.

C. Nonproliferation Regime for Chemical Weapons

Nearly seventy years after the 1925 Geneva Gas and Bacteriological Warfare Protocol banned the use of asphyxiating and poisonous gases in war,[71] the Chemical Weapons Convention of 1993 (CWC)[72] took the further step of forbidding parties to the CWC from developing, producing, stockpiling or using chemical weapons. The Convention also requires member states not to permit any such activities to be conducted in any place under the state's control.[73] In contrast to the NPT, which has been ratified almost universally, a significant number of states, including many in the Middle East, are not yet a party to the CWC.

The CWC requires parties to destroy existing stockpiles by 2007. The United States recently stepped up its CW stockpile destruction program; however, it requested an extension on the 2007 destruction deadline.[74] The CWC includes provisions for verification and challenge inspections by the Organization for the Prohibition of Chemical Weapons (OPCW), located in The Hague. So far, however, the OPCW has apparently been consumed more by organizational tasks than field inspections.[75] Although the OPCW has no enforcement powers, violations of the CWC can be reported to the CWC Conference of States-Parties, which can refer the matter to the United Nations Security Council. As with other WMD, however, the fact that many—perhaps most—CW agent precursors and technologies have legitimate dual-use

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[71] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, 26 U.S.T. 571 (1925), *reprinted in* U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 159 (2004) [hereinafter "1925 Geneva Gas and Bacteriological Warfare Protocol"]. U.S. Department of Defense policy on the use of chemical weapons is set out in Secretary of Defense, DoD Directive S-3145.2, Chemical Weapons Policy, July 23, 1987 (secret) and Commander, Joint Chiefs of Staff, CJCS Instruction 2030.01A, Chemical Weapons Convention Compliance Policy, Aug. 9, 2001. For a discussion of the "no-first-use" reservations, see ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK OF THE LAW OF NAVAL OPERATIONS, at para. 10.3.1.1 (1997).

[72] Convention on the Prohibition of the Development, Production, Stockpiling and Uses of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45, *reprinted in* 32 I.L.M. 800 (1993) and U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 435 (2004) [hereinafter "CWC"]. The United States ratified the CWC in 1997. *See* SEN. EXEC. REP. NO. 104-33, Sept. 11, 1996. *See generally* THE NEW CHEMICAL WEAPONS CONVENTION: IMPLEMENTATION AND PROSPECTS (Michael Bothe, et al., eds., 1998).

[73] CWC, *supra* note 72, art. VII(1).

[74] *See* U.S. Dep't of State, *U.S. Requests to Extend Chemical Weapons Convention (CWC) Deadline for Complete Destruction of Chemical Weapons Stocks*, Apr. 20, 2006 (requesting an extension until 2012), *available at http://www.state.gov/t/isn/rls/fs/64874.htm.* Environmental concerns and community opposition have limited U.S. disposal options. *See* Rick Callahan, *Army to Begin Destroying Deadly Nerve Gas*, Assoc. Press, June 9, 2004 (reporting program to destroy 1,269 tons of VX nerve gas at the Newport, IN, facility).

[75] In its first seven years, the OPCW staff grew to more than 500 and its annual budget reached approximately 60 million Euros.

applications complicates enforcement. For example, many chemical production plants exhibit an ability to engage in multiple uses, including production of pesticides, pharmaceuticals and industrial chemicals.[76] In many cases, such plants may be converted to produce CW agents. Thus, in many cases, the intent to create CW cannot be inferred from the mere capability to produce them.

As with the NPT, the CWC requires states-parties to restrict exports of certain CWC materials and enforce those restrictions through their penal laws.[77] In the United States, the CWC is implemented through the Chemical Weapons Convention Implementation Act of 1998.[78] Federal prohibitions on possession and use of CW agents are prescribed in Chapter 11B of Title 18 of the U.S. Code.[79] The 1996 Antiterrorism and Effective Death Penalty Act enacted a number of changes to the prohibitions.[80] Nevertheless, the extraterritorial jurisdictional reach of the CW statute is limited, and would likely not extend to most foreign vessel situations likely to fall within the ambit of a PSI boarding.[81]

To better coordinate export controls, a group of thirty-nine states concerned with the threats posed by CW (and BTW) agent proliferation have formed the "Australia Group," a voluntary multilateral export control regime.[82] Like the Nuclear Suppliers' Group, the Australia Group regime is a nonbinding arrangement among like-minded supplier states designed to control the risk of proliferation of WMD and their component materials. The primary purpose of the group is to ensure that industries of the participating states do not assist, either purposely or inadvertently, another state in acquiring CW or BTW capability. Participating states meet on a regular basis to consult on proliferation issues and harmonize their national export control regimes. The participants have agreed to restrict trade in CW and BTW materials through their national laws and regulations, by establishing a system to license the export of certain chemicals, biological agents and dual-use equipment and facilities that might be used to produce CW or BTW. Finally, all of the states agree to exchange

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[76] Chemical plants capable of manufacturing organic phosphorous pesticides or flame retardants could be converted to CW production in a matter of weeks.
[77] CWC, *supra* note 72, art. VII(1).
[78] 22 U.S.C. § 6723 (2005).
[79] *See, e.g.*, 18 U.S.C. §§ 229, 229A-229F (2005).
[80] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, title V, subtitle C (1996), 110 Stat. 1214. *See also* Omnibus Diplomatic Security and Antiterrorism Act of 1986 (ODSAA), Pub. L. No. 99-399, 100 Stat. 853. Title IX of the ODSAA was the International Maritime and Port Security Act, 100 Stat. 889, *codified at* 46 U.S.C. §§ 1801-1809 (2005).
[81] *See* 18 U.S.C.A. § 229(c) (2005). Extraterritorial conduct to acquire WMD for use in the United States may, however, constitute a substantial step in furtherance of a conspiracy or an attempt. Providing CW agents or precursors to a terrorist organization might also implicate the "material support" prohibition in 18 U.S.C. § 2339B.
[82] Australia Group (for BTW and CW weapons), *available at* http://www.australiagroup.net/.

information with the other participants regarding proliferation trends and entities attempting to procure CW or BTW related materials.

The international regulatory regime for the transport of hazardous chemicals and explosives includes Chapter VII of the SOLAS Convention together with the International Maritime Dangerous Goods Code.[83] The IMDG Code prescribes standards for the packing, stowage and labeling of dangerous goods transported by sea. Compliance with the IMDG Code is now mandatory.[84] Vessels carrying hazardous materials (including radioactive and biohazard materials) by sea are required to have available for inspection a "dangerous cargo manifest," which lists the weight, quantity, packaging, class and stowage of all hazardous cargo on the vessel.[85] Enforcement, however, is generally limited to flag states and port states.

D. Nonproliferation Regime for Biological and Toxin Weapons

The nation's reaction to the anthrax attacks of 2001, which infected twenty-five and killed five, provided the nation with a stark warning on the wider repercussions of even a relatively small-scale biological warfare agent release in the United States. Bio-terrorism exercises like *Dark Winter*, held just before the 2001 attacks, and *Atlantic Storm*, conducted on January 14, 2005, demonstrate a much graver BTW potential, characterized by massive casualties well beyond the initial release site, a panic over infected carriers or other vectors, and a near certain shut down of international travel for a month or more.[86] Indeed, some predict that a large scale BTW attack could shut down much of the world's economic activity, triggering a global depression.

The use of bacteriological methods of warfare has been banned since 1925.[87] The Biological Weapons Convention of 1972 (BWC) takes the further step of banning the production, acquisition or stockpiling of biological agents or

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[83] *See* International Maritime Organization, *International Maritime Dangerous Goods Code*, IMO Pub. No. IE200E (2004) (new version to be released in 2007). A narrative description of the IMDG Code is available at http://www.imo.org/Safety/mainframe.asp?topic_id=158.

[84] *See* 49 C.F.R. pt. 176 (2006) (regulation for carriage of hazardous materials by water).

[85] *See* 49 C.F.R. § 176.30 (2006).

[86] *See* Byron Spice, *Nations Vulnerable to Bioterror*, PITTSBURGH POST-GAZETTE, Jan. 16, 2005, *available at* http://www.post-gazette.com/pg/05016/443175.stm.

[87] 1925 Geneva Gas and Bacteriological Warfare Protocol, *supra* note 71; ANNOTATED COMMANDER'S HANDBOOK, *supra* note 71, para. 10.4.1. The Handbook asserts that the United States considers the ban on the use of biological weapons during armed conflict to be part of customary international law and therefore binding on all nations. ANNOTATED COMMANDER'S HANDBOOK, *supra* note 71, para. 10.4.2. No analysis of state practice is offered in support of that assertion. *See* Howard S. Levie, *Nuclear, Chemical, and Biological Weapons*, in U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, vol. 64, at 331, 341, 344-45 (Horace B. Robertson, Jr., ed. 1991).

toxins (BTW agents).[88] Although the BWC includes a provision for reporting violations to the UN Security Council for possible action,[89] in contrast to the CWC, the BWC does not yet include provisions for verification and challenge inspections. The reasons for failing to close what many see as a potentially critical compliance gap are controversial. It is now known that the former Soviet Union systematically violated the BWC until at least 1992, by carrying on a massive program to produce BTW agents, which were then weaponized and stockpiled.[90] North Korea is believed to have stockpiles of anthrax, botulism, cholera, hemorrhagic fever, plague, smallpox, typhoid and yellow fever. Nevertheless, the United States has so far rejected a proposed protocol to the BWC that would add a verification scheme to increase compliance.[91] The grounds for rejection given by U.S. negotiators included concerns that outside inspections of government-sponsored research facilities would compromise the nation's BTW defensive efforts, which are deemed necessary to guard against known or suspected BTW programs by hostile states and non-state actors. Additionally, outside inspections of commercial facilities in the United States whose products would fall within the dual-use parameters of the protocol might endanger intellectual property rights held by the pharmaceutical and biotechnology companies.[92] Finally, given the nature and ubiquity of biological and pharmaceutical research facilities, and the difficulty of distinguishing prohibited BTW offensive activities from permitted defensive research, some question the extent to which an outside inspection regime could ever be practical and sufficiently reliable.[93]

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[88] Convention on the Prohibition of the Development, Production, Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. 8062, 1015 U.N.T.S. 163, , *reprinted in* U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 342 (2004) ["hereinafter BWC"]. President Nixon ordered an end to U.S. research in offensive use of biological weapons in 1969. *See* 5 WEEKLY COMP. PRES. DOC. 1659-61 (Nov. 26, 1969); U.S. DEP'T OF STATE BULL. 226-27 (1970). Research into defensive measures, primarily vaccine development, continues. *See* U.S. DEP'T OF STATE, 18 MARJORIE W. WHITEMAN, DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 732-36 (1976).

[89] BWC, *supra* note 88, arts. VI & XIII.

[90] U.S. Arms Control and Disarmament Agency, *Adherence to and Compliance with Arms Control Agreements and the President's Report to Congress on Soviet Noncompliance with Arms Control Agreements*, Jan. 14, 1992, at 14.

[91] Rebecca Whitehair & Seth Brugger, *BWC Protocol Talks in Geneva Collapse Following U.S. Rejection*, ARMS CONTROL TODAY (Sept. 2001), *available at* http://www.armscontrol.org/act/2001_09/bwcsept01.asp.

[92] *See* Undersec'y of State for Arms Control and Int'l Sec. John R. Bolton, *U.S. Efforts to Stop the Spread of Weapons of Mass Destruction*, Testimony before Committee on International Relations, U.S. House of Representatives, June 4, 2003, *in* U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2002, at 1037-38 (2003). *See generally* NATIONAL ACADEMY OF SCIENCES, BIOTECHNOLOGY RESEARCH IN AN AGE OF TERRORISM 46 (2004).

[93] *See* "The Debate over BWC Verification" in U.S. Congress, Office of Technology Assessment, *Technologies Underlying Weapons of Mass Destruction*, Report No. OTA-BP-ISC-115 (1993), at 74-75.

Some commentators are now propounding arguments for more onerous consequences when states fail to meet their international obligations to guard against BTW proliferation. For example, one writer argues that a state should bear international responsibility for failing to take adequate precautions against proliferation of BTW agents.[94] An argument might also be made that the criminal liability provisions of the Rome Statute of the International Criminal Court could extend to those who were complicit in putting BTW (or other WMD) or the means of delivery in the hands of those who later used them to commit crimes under the Statute.[95] On another front, an international convention proposed by the Harvard-Essex Program on CBW Disarmament would, if enacted, make it a crime under international law to develop, retain, acquire, transfer or use biological or chemical weapons.[96] U.N. Security Council Resolution 1540 (discussed below) calls for a similar approach at the national level. In the United States, federal prohibitions on possession and use of BTW agents are prescribed in chapter 10 of Title 18 of the U.S. Code.[97] The 1996 Antiterrorism and Effective Death Penalty Act enacted a number of changes to the prohibitions.[98] Nevertheless, the extraterritorial jurisdictional reach of the BTW statute, like the CW statute, remains limited, and would likely not extend to most MSO boarding cases.[99]

E. Measures to Curb and Contain Missile and UAV Proliferation

Despite the fact that the United Nations Security Council has concluded that the proliferation of missile delivery systems for WMD constitutes a threat to international peace and security,[100] international law does not presently prohibit

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[94] Barry Kellman, *State Responsibility for Preventing Bioterrorism*, 36 INT'L LAWYER 29 (2002).

[95] *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, *reprinted in* U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 470 (2004). Article 25(3)(c) extends individual criminal responsibility to one who "aids, abets or otherwise assists in [the commission of a crime under the Statute] or its attempted commission, including providing the means for its commission." Depending on the circumstances, use of a WMD could constitute the crime of genocide, a crime against humanity or a war crime.

[96] Harvard/Sussex program on CBW Disarmament and Arms Limitation, Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring or Using Biological or Chemical Weapons, Nov. 1, 2001, *available at* http://fas-www.harvard.edu/~hsp/crim01.pdf.

[97] *See, e.g.*, 18 U.S.C. §§ 175-178 (2005). The BTW prohibitions were expanded by the USA PATRIOT Act, Pub. L. No. 107-56, § 817, 115 Stat. 272, 385-86 (2001).

[98] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, title V, subtitle B (1996), 110 Stat. 1214 (1996).

[99] *See* 18 U.S.C. § 175(a)(2005) ("There is extraterritorial Federal Jurisdiction over an offense under this section committed by or against a national of the United States"). Providing BW agents to a terrorist organization might, however, implicate the "material support" prohibition in 18 U.S.C. § 2339B.

[100] *See* S.C. Res. 1695, U.N. Doc. S/RES/1695 (Jul. 15, 2006) (reaffirming its finding in Resolution 1540 that missile proliferation constitutes such a threat and condemning the DPRK for test launching

the sale or transfer of missiles or missile technology. For that reason, the nonproliferation regime for missiles is the weakest of the four considered, as the 2002 M/V *So San* incident demonstrated.[101] A number of states concerned with the threats posed by missile proliferation have sought to at least partly fill this lacuna by establishing the Missile Technology Control Regime (MTCR).[102] Like the regimes established by the Nuclear Suppliers' Group and the Australia Group, the MTCR is a voluntary multilateral export control regime.[103] The MTCR consists of a set of guidelines and an equipment and technology annex. Participating states agree to regulate trade in missile technology through their national laws, which establish systems to license the exports of sensitive items. In general terms, the MTCR participants agree to refrain from selling missiles capable of specified ranges and payloads as follows:

> [The] greatest restraint is applied to what are known as Category I items. These items include complete rocket systems (including ballistic missiles, space launch vehicles and sounding rockets) and unmanned air vehicle systems (including cruise missiles systems, target and reconnaissance drones) with capabilities exceeding a 300km/500kg range/payload threshold; production facilities for such systems; and major sub-systems including rocket stages, re-entry vehicles, rocket engines, guidance systems and warhead mechanisms.
>
> The remainder of the annex is regarded as Category II, which includes complete rocket systems (including ballistic missiles systems, space launch vehicles and sounding rockets) and unmanned air vehicles (including cruise missile systems, target drones, and reconnaissance drones) not covered in item I, capable of a maximum range equal to or greater than, 300km. Also included are a wide range of equipment,

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ballistic missiles capable of delivering WMD on July 5, 2006). The resolution goes on to require all member states to prevent the transfer of missile and missile related items to the DPRK's missile or WMD programs or the procurement of such items from the DPRK.

[101] The outcome of the M/V *So San* incident would not have been affected by U.N. Security Council Resolution 1540 because the resolution only directly addresses proliferation to non-state actors. The missiles on board the *So San* were destined for the government of Yemen. The transfer would likely come within the prohibitions of Resolution 1718, which was issued in 2006.

[102] The text of the MTCR is available at http://www.mtcr.info/english/. The MTCR has no secretariat or implementation organization. It is administered collectively by the participating states (34 as of Sept. 2006). *See generally* U.S. General Accounting Office, *Nonproliferation: Strategy Needed to Strengthen Multilateral Export Control Regimes*, GAO-03-43 (Oct. 25, 2002).

[103] Under the MTCR, export licensing requirements do not ban exports. The sole objective of export licensing is to prevent transfers contributing to delivery systems for WMD. MTCR controls are not intended to impede peaceful aerospace programs or international cooperation in such programs, as long as these programs are not used to develop delivery systems for WMD. MTCR controls are also not designed to restrict access to technologies necessary for peaceful economic development. The MTCR Guidelines help to build confidence among suppliers that they can provide access to technology without such technology being diverted to WMD delivery system programs.

> material, and technologies, most of which have uses other than for missiles capable of delivering WMD. While still agreeing to exercise restraint, partners have greater flexibility in the treatment of Category II transfer applications.

The efficacy of the MTCR depends on widespread adoption and adherence to the International Code of Conduct against Ballistic Missile Proliferation.[104] The Code, now referred to as the Hague Code of Conduct (HCOC), is, like the MTCR, a political commitment by the members, and is not legally binding. The HCOC calls on subscribing states to curb and prevent the proliferation of ballistic missiles capable of delivering WMD.[105] On November 25, 2002, the United States became an initial subscribing state to the Code.[106] Well over 100 states have similarly adopted the HCOC. The Code and the MTCR are key elements in the United States' multilateral strategy to impede and eventually roll back the missile proliferation threat.[107] Strengthening the MTCR is an announced goal of the United States.[108]

In addition to ballistic missiles, some 70,000 cruise missiles are in the world's inventory, and the inventory of unmanned aerial vehicles (UAVs) is rapidly growing. The utility of UAVs for reconnaissance, surveillance, targeting and even weapon deployment has been convincingly demonstrated over the past decade. In contrast to the technology for intermediate-range and long-range ballistic missiles, the technology for cruise missiles and UAVs is readily available and increasingly affordable.[109] Iran has reportedly already supplied

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[104] *See* International Code of Conduct against Ballistic Missile Proliferation, Nov. 25, 2002 [hereinafter "HCOC"]. Congress adopted the Code in the International Arms Sales Code of Conduct Act of 1999, Pub. L. No. 106-113, § 1262. However, several missile-producing states, including China, India, Iran and North Korea, as well as Taiwan, have so far declined to join the regime. *See generally* GAO, *Nonproliferation: Strategy Needed to Strengthen Multilateral Export Control Regimes*, *supra* note 102, at 9.

[105] *See* HCOC, *supra* note 104, para. 3(b).

[106] In announcing the support of the United States for the Code, former Undersecretary of State for Arms Control and International Security John Bolton notified the other participating states that this nation "regards the proliferation of ballistic missiles capable of delivering WMD as a *direct threat* to the U.S., our deployed forces, our friends and allies, and our interests in key regions of the world." *See* 2002 DIGEST, *supra* note 33, at 1063 (emphasis added). The full text of Secretary Bolton's remarks is at *Remarks by Undersecretary John Bolton at the Launching Conference for the International Code of Conduct against Ballistic Missile Proliferation*, The Hague, NE, Nov. 25, 2002, *available at* http://www.state.gov/t/us/rm/15488.htm.

[107] Congressional Research Service, *Missile Technology Control Regime (MTCR) and International Code of Conduct against Ballistic Missile Proliferation: Background and Issues for Congress*, CRS Rep. RL31848.

[108] The White House, *National Strategy to Combat Weapons of Mass Destruction* 4 (Dec. 2002), *available at* http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf.

[109] *Id*.; *see also* U.S. Government Accountability Office, *Nonproliferation: Improvements Needed for Controls on Exports of Cruise Missile and Unmanned Aerial Vehicle Technology*, GAO-04-493T (2004).

UAVs (and, apparently, anti-ship cruise missiles) to the Hezbollah organization.[110] Cruise missile and UAV proliferation is addressed by both the MTCR and the Wassenaar Arrangement,[111] but neither is a binding international agreement, nor does either criminalize the sale, transfer or transport of cruise missiles or UAVs.

Missile technology proliferation controls within the United States are implemented through various statutes, including the Arms Export Control Act,[112] the International Emergency Economic Powers Act,[113] and (at times) the Export Administration Act[114] and/or Trading with the Enemy Act.[115] The acts generally restrict exports of items on export control lists and shipments to enumerated states of missile proliferation concern.[116] The Missile Technology Control Act establishes a scheme of missile proliferation sanctions for "U.S. persons" who export, transfer or otherwise engage in the trade of any item listed

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[110] *Hezbollah Drone Humiliates Israel*, IRAN DAILY, Nov. 8, 2004, *available at* http://www.iran-daily.com/1383/2135/html/index.htm; U.S. Dep't of State, *Country Reports on Terrorism, 2004*, April 2005 (Terrorist Group Profile on Hezbollah).

[111] The Arrangement has thirty-three subscribing states. Its stated purpose is:

> to contribute to regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilising accumulations. Participating States will seek, through their national policies, to ensure that transfers of these items do not contribute to the development or enhancement of military capabilities which undermine these goals, and are not diverted to support such capabilities.

See The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-use Goods and Technologies, *available at* http://www.wassenaar.org/. The Wassenaar Arrangement, first launched in 1996, is the first multilateral institution covering both conventional weapons and sensitive dual-use goods and technologies. One of the arrangement's current concerns is the proliferation of man-portable air defense systems (MANPADS), shoulder-fired weapons capable of destroying low-flying aircraft.

[112] *See* 22 U.S.C. § 2797b (2005). Under authority of 22 U.S.C. § 2778, the Department of State has promulgated the International Traffic in Arms Regulations (ITAR). *See* 22 C.F.R. pt. 120 (2006); RESTATEMENT, *supra* note 10, § 812.

[113] International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1707 (2005) [hereinafter "IEEPA"]. *See also* Exec. Order No. 13,206, 66 Fed. Reg. 18,397 (2001). IEEPA violations are punishable by civil and, in cases of willful violations, criminal penalties. 50 U.S.C. § 1705 (2005).

[114] Export Administration Act, 50 U.S.C. app. §§ 2401-2420 (expired) [hereinafter "EAA"]. Congress allowed the EAA to expire in 2001 (50 U.S.C. app. § 2419) and, at the time of this writing, had not yet renewed the act or replaced it with a suitable substitute. Accordingly, most export control measures are promulgated under a series of executive orders and Department of Commerce Bureau of Industry and Security regulations (15 C.F.R. pts. 730-774) issued under authority of the IEEPA, 50 U.S.C. §§ 1701, 1702, 1704 (2005).

[115] 50 U.S.C. app. §§ 1-5 (2005).

[116] States "of missile proliferation concern" under the Export Administration Regulations are listed in 15 C.F.R. pt. 738. In 2004, they included Bahrain, China, Egypt, India, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Macau, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Syria, United Arab Emirates and Yemen. The export control program is administered by the Department of Commerce. *See* U.S. Dep't of Commerce, *Missile Technology Controls*, *available at* http://www.bis.doc.gov/PoliciesAndRegulations/04ForPolControls/Chap8_MTCR.htm.

in the MTCR Annex in violation of the implementing U.S. licensing laws.[117] The Act also prescribes a more limited sanction scheme for "foreign persons" over whom the United States has jurisdiction.[118] In addition, the federal criminal code prohibits certain acts of importing, manufacturing, or dealing in nuclear or explosive materials,[119] as well as bringing, carrying or possessing weapons or explosive devices aboard U.S. vessels.[120]

F. United Nations Security Council Responses to Proliferation and Terrorism

In early 2004, the growing threat posed by the proliferation of WMD and the potential for their use by terrorist organizations prompted the Security Council to invoke its authority under Chapter VII of the Charter. Resolution 1540—which is binding on all states—now forms an essential component of the international nonproliferation regime applicable to states.

Over the years, the Security Council has addressed the threats of global terrorism and weapons proliferation and trafficking in a number of resolutions. In Resolution 1368, issued the day after the September 11 attacks, the council implicitly found that an attack by non-state actors can trigger the inherent right of self-defense under Article 51 of the Charter.[121] The right was ultimately extended to actions against the states that harbored those non-state actors. Importantly, no state appears to have objected to extending the right of self-defense to non-state actors. Thus, the United Nations Charter is now understood by many to include a right of self-defense against attacks by non-state actors and those who harbor them.[122]

On September 28, 2001, the Council passed Resolution 1373, which requires all states to refrain from providing any kind of support to persons involved in terrorist acts and to eliminate the supply of weapons to terrorists.[123] Four years later, in Resolution 1617, the Council reaffirmed the duty of all states

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[117] *See* Pub. L. No. 101-510, Div. A, Title XVII, § 1702(b), Nov. 5, 1990, 104 Stat. 1741; 50 App. U.S.C. § 2410b(a) (2005).
[118] 50 App. U.S.C. § 2410b(b) (2005).
[119] *See* 18 U.S.C. §§ 831, 842 (2005).
[120] *See* 18 U.S.C. § 2277 (2005).
[121] S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).
[122] It should be noted that Article 2(4) does not prohibit a state's use of force against non-state actors *per se*. On November 2, 2002, a Predator UAV fired a Hellfire missile at a car carrying suspected al Qaeda operatives in the Yemen frontier. The principal target of the strike was Qaed Salim Sinan al Harethi, who was suspected of being a key al Qaeda operative in the attack on the USS Cole. Jonathan Landay, *U.S. says CIA missile kills six from al-Qaeda*, PHILA. INQUIRER, Nov. 5, 2002. Reportedly, the government of Yemen consented to the missile strike after earlier losing eighteen Yemeni soldiers in an unsuccessful attempt to apprehend the al Qaeda suspects in a remote region controlled by the tribes.
[123] S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

to prevent the transfer of arms to listed terrorists.[124] Resolution 1373 notes the dangers posed by illegal movement of nuclear, chemical, biological and other potentially deadly materials and emphasizes the need to enhance efforts on the international, regional and national levels to strengthen the global response to the serious challenge and threat to international security posed by those weapons.

On September 23, 2003, President Bush—seeking further United Nations action—reported on the progress of the Proliferation Security Initiative to the United Nations General Assembly:

> Through our Proliferation Security Initiative, eleven nations are preparing to search planes and ships, trains and trucks carrying suspect cargo, and to seize weapons or missile shipments that raise proliferation concerns. The nations have agreed on a set of interdiction principles, consistent with current legal authorities. And we're working to expand the Proliferation Security Initiative to other countries. We're determined to keep the world's most destructive weapons away from all our shores, and out of the hands of our common enemies. [125]

The President announced to the General Assembly that he was asking the Security Council to adopt a new anti-proliferation initiative that would call on all states to criminalize the proliferation of weapons of mass destruction, enact strict export controls consistent with international standards, and secure any and all sensitive materials within their borders, thus closing the loopholes in the existing anti-proliferation regime.

In early 2004, the council specifically addressed the need for all states to prevent vessels or aircraft flying their flag from being used to transport arms and related materials of all types, including weapons and ammunition.[126] But

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[124] S.C. Res. 1617, ¶ 1(c), U.N. Doc. S/RES/1617 (Jul. 29, 2005).

[125] The White House, *Remarks by President George W. Bush to the United Nations General Assembly*, New York, NY, Sept. 23, 2003, at 3, *available at* http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html.

[126] S.C. Res. 1526, ¶ 1(c), U.N. Doc. S/RES/1526 (Jan. 30, 2004). Paragraph 1 of the resolution provides that the Security Council:

> 1. *Decides* to improve . . . the implementation of the measures . . . with respect to Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them . . . to:
>
> (c) Prevent the direct or indirect supply, sale or transfer, to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related material of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned and technical advice, assistance, or

many felt that specific measures calling for universal criminalization of WMD trafficking and transport were still needed. The Council debated various proposed drafts of the resolution for several months[127] before unanimously passing Resolution 1540 on April 28, 2004.[128] Resolution 1540 was co-sponsored by France, the Philippines, Romania, Russia, Spain and the United States. It includes the key finding under Article 39 of the United Nations Charter that the danger posed by proliferation of WMD threatens international peace and security.[129] Arguably, the council's resolution therefore implicates Article 88 of the LOS Convention, which reserves the high seas for peaceful purposes.[130]

Resolution 1540 requires all states to "refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery," and to:

> adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them.[131]

Finally, all states must "take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery. . . ."[132]

To monitor compliance with the resolution, the council established a Nonproliferation Committee and required all states to submit reports on their

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> training related to military activities; and *recalls* that all States shall implement the measures with respect to listed individuals and entities . . . .

[127] *See* UN WIRE, *U.N. Draft Resolution Would Require States Deny Terrorists WMDs*, Mar. 25, 2004, *available at* http://www.unwire.org/UNWire/20040212/449_13079.asp.

[128] S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004). *See also* G.A. Res. 59/80, U.N. Doc. A/RES/59/80 (Dec. 16, 2004) (urging all U.N. member states to strengthen national measures to prevent terrorists from acquiring weapons of mass destruction, their means of delivery and materials and technologies related to their manufacture).

[129] Resolution 1540 reaffirms a 1993 statement by the president of the Security Council to that same effect.

[130] Although "peaceful" is not defined in the LOS Convention, activities condemned by Security Council Resolution 1540 as a threat to international peace and security might well violate Article 88 of the LOS Convention. Nevertheless, Article 88 is not self-executing, and does not in itself confer a right to board vessels whose use of the high seas is not peaceful.

[131] S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

[132] *Id.*

compliance efforts to the committee. The United States submitted its first report on September 27, 2004.[133]

The message sent by the Security Council in Resolution 1540 seems clear: the burden of preventing proliferation is one shared by *all* states. Several Security Council members characterized the resolution as a measure to fill a gap in the existing system, particularly with respect to measures aimed at denying WMD access to terrorists and other non-state actors.[134] The president of the Council emphasized that the disarmament, arms control and nonproliferation regime played the key role for realizing the goals of the resolution, but he also pointed out that the resolution does not authorize unilateral enforcement measures if a given state fails to take effective and appropriate implementation action. Any such action would be the subject of further decisions of the Council, which remain seized of the matter.[135] It is also important to note that the resolution directly addresses only proliferation to non-state actors, not to states. In 2006, the Security Council passed Resolution 1673, extending the program established by Resolution 1540 for two years.[136] It is too soon to predict, however, whether Resolution 1540, Resolution 1718 against North Korea, Resolution 1737 against Iran, and the growing family of resolutions aimed at denying terrorists access to weapons will measurably strengthen the developing anti-proliferation regime.

II. CONCLUSION

Global efforts to halt and eventually reverse proliferation of the world's most dangerous weapons incorporate a range of anti-proliferation measures, including bans on production or use of some WMD, with the long-term goal of disarmament, provisions for safeguarding materials in transport or storage, export controls in source states, information sharing and interdictions. The global nonproliferation system is not without serious gaps. Perhaps such gaps are inevitable in a horizontal community of sovereign states, the collective security of which is the responsibility of an ideologically divided Security

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[133] *See* U.S. Dep't of State, *United States Report to the Nonproliferation Committee--Efforts Regarding United Nations Security Council Resolution 1540*, Sep. 27, 2004, *available at* http://www.state.gov/t/np/rls/37375.htm.

[134] U.N. Security Council Press Release SC/8076 (4956th meeting), Apr. 28, 2004, *available at* http://www.un.org/News/Press/docs/2004/sc8076.doc.htm. *See also* Report of the 4956th Meeting of the Security Council, Apr. 28, 2004, U.N. Doc. S/PV.4956 (2004).

[135] Reportedly, China agreed to support the resolution only after a provision for interdiction at sea was removed, stating publicly that "[t]hat nasty word, interdiction, has been taken out." *See U.S. Wins China's Support for Ban on Proliferation*, BLOOMBERG.COM NEWS, Mar. 25, 2004; Warren Hodge, *Ban on Weapons of Doom is Extended to Qaeda-Style Groups*, N.Y. TIMES, Apr. 29, 2004 (reporting that China ended a threat to use its veto when language that called for interception at sea was dropped).

[136] S.C. Res. 1673, U.N. Doc. S/RES/1673 (Apr. 27, 2006).

Council, whose members display disparate attitudes toward risk, particularly when the risk is to an abstract and distant "international" peace and security rather than to their individual or regional security.

Maritime Security Operations will likely continue to target vessels trafficking in or transporting WMD and their delivery systems. It must be borne in mind, however, that in the absence of a claim of self-defense or authorization by the U.N. Security Council, at-sea "enforcement" actions presume an applicable law actually prohibits the conduct involved. Until the nonproliferation regime is more fully developed and universally adopted, there will continue to be gaps in the regime that, to the consternation of many, might permit a vessel to transport WMD or missile components from one state to another with legal impunity.

THE VIETNAM WAR IN PERSPECTIVE: LESSONS LEARNED IN THE LAW OF WAR AS APPLIED IN SUBSEQUENT CONFLICT*

Colonel James P. Terry, USMC (Ret.)**

INTRODUCTION

More than 30 years after its conclusion, the Vietnam War remains the second most divisive conflict in American history, after the Civil War. Those who opposed the war continue to believe that the Vietnam War lacked strategic importance or moral justification, while many who fought in Vietnam argue our failure to achieve military victory was a reflection of a timid and uncommitted civilian leadership.

Many see the conflict in broader, historical terms. They see President Kennedy's willingness to engage communism in Southeast Asia as reflective of his belief that neither Moscow nor Washington could risk a confrontation between Warsaw Pact and NATO forces on the European heartland. They also see Vietnam as one of the proxy wars within the Cold War, two other segments having already played out in Korea and at the Bay of Pigs in Cuba. They further suggest this conflict was viewed by successive administrations as a necessary stride in the march to exhaust the communist movement, just as Angola from 1975-1977 and Afghanistan from 1979-1987 would be in succeeding years. Vietnam was fought, others would argue, to preserve the military and diplomatic credibility of the United States in the Cold War.

This review of the Vietnam War first examines the broader parameters and the political implications of United States' involvement. The next section

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* This article is dedicated to the memory of Mr. Edward Cummings, U.S. Department of State Legal Advisor's Office and Colonel, U.S. Army Reserve (Ret), who served as the exemplar for innumerable military and government attorneys who richly benefited from his friendship, counsel, writing and insights on a broad range of law or war issues.

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reviews the provisions of the 1954 Geneva Accords and our commitments under the SEATO Treaty with Southeast Asian nations as a counter-balance to Soviet and Chinese adventurism. The third section explores the 1964 determination to enter Vietnam in force in support of the regime in Saigon. The Tonkin Gulf Resolution is examined and compared to the Joint Resolution authorizing President Bush to enter Iraq in 2003, and the effect of an irresolute Congress in both.

Sections IV and V examine the manner in which the Vietnam War was conducted, with emphasis on the interplay between U.S. actions and the requirements of the 1949 Geneva Conventions. The North Vietnamese and their Viet Cong surrogates abused the law of armed conflict, as do the insurgents in Iraq today, and as the forces of Saddam Hussein did in the first Gulf War. Having but one mantra, military effectiveness, the Vietnamese communists engaged in highly effective insurgency operations against an opponent limited by politically imposed and ineffective geographic rules of engagement, weapons selection, and targeting constraints designed to preclude the commitment of outside communist forces on a large scale.

The environmental consequences of the conflict (e.g., use of Agent Orange) are likewise explored and compared in the fourth section with the environmental carnage witnessed in Operation Desert Storm.

The final section, Section VI, explores the meaning of the Vietnam conflict for future conflicts, both politically and militarily, and comments on the lessons that must be incorporated into our current thinking in Iraq. In doing so, this writer observes that when the military understands its role quite differently from national leaders providing over-arching policy guidance, as in Vietnam, the loss of public trust in our political leaders is inevitable.

This review is intended to be neither unduly critical of U.S. actions nor partisan. Rather, it is the author's intent to review the actions of U.S. forces and the conduct of the war *writ large* from the perspective of observing whether its lessons have positively influenced subsequent legal, political and military actions involving U.S. forces, most recently in Afghanistan and Iraq in Operations Desert Storm, Iraqi Freedom and Enduring Freedom.

I. THE POLITICAL AND MILITARY CONTOURS OF THE VIETNAM CONFLICT: AN OVERVIEW

National security decisions, by necessity, consider a broad range of component elements. Those issues must include national goals, as well as political and economic considerations. So it was with Vietnam. The United

States entered the Vietnam conflict under President Kennedy's Administration with 16,000 advisors, an idealistic commitment, and a belief that a successful defense of freedom against Communist aggression would obviate any perceived weakness and lack of U.S. commitment reflected in the Bay of Pigs Operation.[1]

President Lyndon Johnson's Administration escalated the commitment. By 1967, more than 450,000 U.S. Army, Navy, Air Force and Marine forces were engaged with North Vietnamese troops and Viet Cong irregulars, who were supported by Soviet and Chinese arms and resources.[2] The Johnson Administration, neither understanding the crisis nor appreciating the brutality of the North Vietnamese, in the words of Henry Kissinger:

> trapped themselves between their convictions and their inhibitions, making a commitment large enough to hazardour global position but then executing it with so much hesitation as to defeat their purpose. They engaged us in Indochina for the objective of defeating a global conspiracy and then failed to press a military solution for fear of sparking a global conflict—a fear that was probably as exaggerated as the original assessment.[3]

When President Nixon was inaugurated in January 1969, troop level commitments exceeded 535,000 Americans and 65,600 allied soldiers.[4] More than 35,000 Americans (30,610 in combat), and 4,000 foreign allied troops, and double that number of South Vietnamese (88,343), had already died.[5] This total of U.S. dead would exceed 57,000 before our final departure in 1975.[6] Unfortunately, the level of contempt for the Johnson Administration, and for the Nixon Administration that followed, effected a national bitterness that those serving in uniform found difficult to comprehend.

The sheer ugliness of the domestic viewpoints on Vietnam was a national tragedy, signified by a "for the war" and "against the war" litmus test that poisoned the national discourse. In fact, the vitriolic rhetoric more often ignored the merits of U.S. involvement, and typically descended to personal

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[1] See THEODORE C. SORENSON, KENNEDY 629-33 (1967), for a discussion of the Bay of Pigs Operation and its relationship to Vietnam and other areas where the communist threat was present.
[2] See STANLEY KARNOW, VIETNAM 427 (1972), for a discussion of Soviet and Chinese competition for influence in North Vietnam through their respective commitments of military and economic aid.
[3] HENRY KISSINGER, YEARS OF UPHEAVAL 82 (1982).
[4] HARRY SUMMERS, VIETNAM WAR ALMANAC 48 (1985). These allied troops were primarily Australian and South Korean military forces.
[5] *Id.* This helps to explain the national angst of personal loss felt throughout the country in 1969. It is especially understandable in light of the present deep national concern as a result of over 3,500 Americans having perished in Operation Iraqi Freedom and Operation Enduring Freedom.
[6] *Id.* at 113. The total was 57,690.

attacks on motives—ultimately chilling the necessary public dialogue that was, and is, the lifeblood of a democratic society. In volume and drumbeat, this rhetoric exceeded that directed toward President George Bush in the period 2004-2006 as a result of operations in Iraq, but the tone was the same.

Through his campaign slogan of "Peace with Honor," President Nixon indicated his commitment to executing our honorable departure from Vietnam. He was equally committed to ensuring that the thousands of South Vietnamese with whom U.S. forces had served would not be doomed to a bloody communist tyranny. Unfortunately, the collapse of the Military Assistance Command (MAC V) in 1973, as Congressional funding was withdrawn, not only led to unspeakable horrors in South Vietnam,[7] but spurred a Soviet geo-political offensive of similar proportions in Angola, Ethiopia, Iran, and Afghanistan.[8] Equally significant, the Indo-China region's resulting instability also spawned Cambodia's Khmer Rouge.

The loss of Vietnam to communist forces can be attributed to several factors—political, military and economic. Politically, the self-limiting strategies imposed by the two Presidents, Johnson and Nixon, are critical to an understanding of the final phase of the war. President Johnson restricted our military effectiveness out of fear of escalating the conflict and his desire that it not hurt Democrats in the 1968 elections; Nixon did the same until the December 1972 resumption of bombing in the north – arguably to gain maneuvering room for an honorable extrication, as well as for leverage in Paris to redress violations of the cease-fire. Meanwhile, as more and more Americans died during the latter part of President Nixon's first term, the American people were confused over a strategy to withdraw with honor while our troops were being asked to die to maintain America's global credibility.

Militarily, the United States received criticism (both at home and abroad) for bombing North Vietnamese supply lines running through Laos and sanctuaries in Cambodia that were critical to the communists' success, with allegations of violating these countries' neutrality. Interestingly, this obsession by many domestic opponents of President Nixon and U.S. opponents of U.S. involvement in the war ignored gross violations of international law by the North Vietnamese in establishing their supply lines in neutral countries, and

[7] While serving in the Philippines in the mid-seventies, I witnessed the mass exodus of boat people fleeing their homeland and the carnage they reported to be taking place at the hands of the North Vietnamese Army.

[8] *See generally*, James P. Terry, *Moscow's Corruption of the Law of Armed Conflict*, 53 NAVAL L. REV. 73, 141 (2006).

would have denied our right to react not only to the violations of law but also to the threat to the security of our forces.[9]

Fiscally, when Congress removed all funding for the war in the Continuing Appropriations Act for FY 1974,[10] just as it would 19 years later in the 1994 Defense Appropriations Act through the Byrd and Kempthorne Amendments with respect to our peace enforcement operations in Somalia,[11] our role in support of South Vietnam was effectively ended.

II. THE 1954 COMMITMENTS UNDER THE GENEVA ACCORDS AND UNDER THE SEATO TREATY

A true understanding of our initial involvement in Vietnam requires not only a historical appreciation of the world's disengagement from colonialism, but also an understanding of the pertinent Articles and commitments extracted from the parties in the 1954 Geneva Accords, as well as our later coordinated commitments in Southeast Asia under the South East Asia Treaty Organization (SEATO) Treaty. While the Geneva Accords concerned Vietnam (they also directly addressed Laos, Cambodia and France; and indirectly the United States (as a result of the U.S. Declaration to the Accords)), these documents in essence memorialized French capitulation to the Viet Minh and the division of Vietnam into two non-permanent military zones, one for the French Union Forces in the south and one for the communists in the north. A Joint Commission (with an equal number of representatives from the two parties) was to be set up by agreement between the Commanders-in-Chief of the French Union and the People's Armies. An International Commission, with Poland, India and Canada represented, was "to be responsible for supervising the proper execution by the parties of the provisions of the [Geneva Accords] agreement."[12]

The Accords encompassed: (1) an Agreement between the Commander-in-Chief of the French Union Forces in Indo-China and the Commander-in-Chief of the People's Army of Vietnam on the Cessation of Hostilities in Vietnam; (2) an Agreement on the Cessation of Hostilities in Cambodia; (3) an Agreement on the Cessation of Hostilities in Laos; (4) the Final Declaration of the Geneva Conference on the Problem of Restoring Peace

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[9] *See* KISSINGER, s*upra* note 3, at 85 for related discussion.
[10] Pub. L. No. 93-52, § 108, 87 Stat. 130, 134 (1973), expressly provided that
". . . on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia."
[11] *See* JAMES P. TERRY, THE REGULATION OF INTERNATIONAL COERCION ch. IX (2005).
[12] *See* THE VIETNAM WAR AND INTERNATIONAL LAW 554 (Richard A. Falk ed., 1968).

in Indo-China; and (5) Declarations by the Governments of France, the United States, Laos and Cambodia.[13]

In addition to providing for the cessation of hostilities, the Commanders-in-Chief Agreement provided for future elections (in July 1956) in Vietnam to reunify the country, and stated further that "the conduct of civil administration in each regrouping zone shall be in the hands of the party whose forces are to be regrouped there in virtue of the present agreement."[14] Article 14(d) of that Agreement provided that "any civilians residing in a district controlled by one party who may wish to go and live in the zone assigned to the other party shall be permitted and helped to do so by the authorities in that district."[15] As Professor Pickert suggests, the practical result of the work of the Conference was the disengagement of France and the partition of Vietnam into the Republic of Vietnam in the south and the Democratic Republic of Vietnam in the north.[16] Neither South Vietnam nor the United States were signatories to the Geneva Accords.[17]

Unfortunately for the United States, at the same time the negotiations were ongoing in Geneva concerning the future of Vietnam, U.S. forces were concluding final military action in Korea and planning for a long term positioning force to maintain the *status quo* created by the cease-fire and Armistice Agreement. In Europe, the establishment of a NATO military agreement to counter Soviet pressures in Eastern Europe was seen as requiring French support, and therefore pressuring France in Indo-China to accept American proposals for united action was not considered feasible.[18]

On the diplomatic level, the United States quickly responded to the Geneva Accords with the formation of SEATO, described above (Geneva Accords were signed in July 1954, SEATO on September 8, 1954). SEATO's essence was a Collective Defense Treaty negotiated and ratified shortly after the

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[13] ROBERT F. RANDLE, GENEVA 1954: THE SETTLEMENT OF THE INDOCHINESE WAR 569 (1969).
[14] Falk, *supra* note 12, at 546.
[15] Falk, *supra* note 12, at 547.
[16] P.L. PICKERT, *American Attitudes Toward International Law as Reflected in the "Pentagon Papers," reprinted in* Falk, *supra* note 12, vol. 4, at 52.
[17] This portion of the Accords was signed by Brigadier General Deltiel, representing the French Union Forces in Indo-China and Ta-Quang-Buu, Vice Minister of National Defense of the Democratic Republic of Viet Nam (North Vietnam). Nevertheless, the Geneva Accords were titled in a way suggesting broader agreement and legitimacy: "Final Declaration of the Geneva Conference on the Problem of Restoring Peace in Indo-China, in which the representatives of Cambodia, the Democratic Republic of Viet Nam, France, Laos, the People's Republic of China, the State of Viet Nam, the Union of Soviet Socialist Republics, the United Kingdom and the United States took part."
[18] P.L. PICKERT, *American Attitudes Toward International Law as Reflected in the "Pentagon Papers," reprinted in* Falk, *supra* note 12, vol. 4, at 52.

Geneva Conference concluded in 1954 as part of a U.S.-led strategy to contain the outward thrusts of the communist bid for power, not only in Indo-China, but in Malaysia, the Philippines and Korea as well.[19] Under the SEATO Treaty, the United States, the United Kingdom, Australia, France, New Zealand, Pakistan, the Philippines, and Thailand became not only protectors of the three non-communist successor states in French Indo-China, but guarantors of Southeast Asia in its entirety. As Chester Cooper succinctly stated: "It was a commitment . . . to involve the United States in the security and economic development of the countries in that area—a part of the world which until 1954 had been pretty much left to the British and the French."[20]

The implementation of the Treaty was complicated by the fact that while the United States and South Vietnam had not signed the Geneva Accords, Great Britain and France were signatories. Since the Accords forbade military alliances, Great Britain and France were then precluded from forming military alliances with South Vietnam. This required the use of a Protocol to make the provisions of SEATO applicable to South Vietnam.[21] Further, the flexibility demanded by the United States, and our opposition to any unilateral commitment which would restrict U.S. freedom of action, resulted in the formulation of Article IV of the Treaty. That Article provided that the parties recognized that an armed attack in the Treaty area would endanger their own peace and security and that each party agreed "that it [would] in that event act to meet the common danger in accordance with its constitutional processes."[22] Secretary of State Dulles argued at the time that Article IV constituted "a clear and definite agreement on the part of the signatories, including the United States, to come to the aid of any member of the Pact who under the terms of this Treaty is subjected to aggression."[23]

III. THE GULF OF TONKIN INCIDENT, OTHER AGGRESSIVE ACTIONS AND THEIR RELATIONSHIP TO IRAQ

The 1954 Geneva Accords established a line of demarcation between the North and the South in Vietnam, provided for withdrawal of each side's forces into their respective zones, and prohibited the use of either zone for the resumption of hostilities.[24] In the years immediately following the negotiation of the Accords, however, the Communist North engaged in subversion, clandestine supply of arms to sympathizers in the South, infiltration of armed

[19] Southeast Asia Collective Defense Treaty, Sept. 8, 1954, 6 U.S.T. 81, T.I.A.S. No. 3170. *See also* CHESTER L. COOPER, THE LOST CRUSADE: AMERICA IN VIETNAM (1969).
[20] COOPER, *supra* note 19, at 114.
[21] *See* PICKERT, *supra* note 16, at 67.
[22] *See* Southeast Asia Collective Defense Treaty, *supra* note 19, at art. IV.
[23] PICKERT, *supra* note 16, at 68 (quoting Secretary Dulles).
[24] *See* RANDLE, *supra* note 13, at 569.

personnel, and the movement of regular units of the North Vietnamese army into the South. As stated by Department of State Legal Advisor Leonard Meeker:

> During the five years following the Geneva Conference of 1954, the Hanoi regime developed a covert political-military organization in South Vietnam based on Communist cadres it had ordered to stay in the South, contrary to the provisions of the Geneva Accords. The activities of this covert organization were directed toward the kidnapping and assassination of civilian officials—acts of terrorism that were perpetrated in increasing numbers.
>
> In the three year period from 1959 to 1961, the North Vietnam regime infiltrated an estimated 10,000 men into the South. It is estimated that 13,000 additional personnel were infiltrated in 1962, and, by the end of 1964, North Vietnam may well have moved 40,000 armed and unarmed guerrillas into South Vietnam.[25]

In August 1964, the United States asked the U.N. Security Council to consider the situation created by North Vietnamese attacks on United States destroyers in the Tonkin Gulf.[26] That same month, after no U.N. action,[27] the U.S. Congress passed a Joint Resolution providing President Johnson with what constituted an expression of approval and support for the President's determination "to repel any armed attack against the forces of the United States."[28] The Joint Resolution,[29] also called the Gulf of Tonkin Resolution, cited to the attack by the communist regime in Vietnam against United States naval vessels in international waters as part of a campaign of aggression by North Vietnam against its neighbors. The Resolution then stated that certain nations, including the United States, joined with South Vietnam's neighbors in collective defense of their freedom. The document then resolved, first that the Congress "approve[d] and support[ed] the determination of the President, as Commander in Chief, to take all necessary measures –to repel any armed attack against the forces of the United States and to prevent further aggression" and second, that the United States, regarding the maintenance of peace and security

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[25] Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T ST. BULL. 474 (1966).

[26] The destroyers were the USS TURNER JOY and the USS MADDOX. The number of attacks, however, remains in dispute.

[27] More often than not, the U.N. Security Council Charter System has been ineffective in authorizing the use of force—even when the facts were overwhelmingly supportive of Chapter VII authority.

[28] Mottola v. Nixon, 318 F.Supp. 538 (N.D. Cal. 1970).

[29] H.R.J. Res. 1145, 88th Cong., 78 Stat. 384 (1964). Section 3 of the Resolution provided that it could be terminated by concurrent resolution of the Congress. It was later repealed, however, by an amendment to the Foreign Military Sales Act, H.R. 15628, 91st Cong., 84 Stat. 2053 (1971).

in Southeast Asia as vital to its national interests, was prepared, consonant with the Constitution of the United States and the Charter of the United Nations, and in accordance with its obligations under the Southeast Asia Collective Defense Treaty and as the President determined, "to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom," and third, that "this Resolution [would] expire when the President determine[d] that the peace and security of the area [was] reasonably assured by international conditions created by the action of the United Nations or otherwise, except it [could] be terminated earlier by the Congress."[30]

As American casualties grew, the opponents of U.S. involvement in Vietnam argued that Congress never intended that the Gulf of Tonkin Resolution authorize the large scale, long-sustained war subsequently launched by President Johnson; on the contrary, the intent of the Congress was merely to support the President during a reported emergency in his announced determination to repel any attack upon American ships or personnel in Vietnam, and that the Congress would be further consulted with regard to any additional commitment.[31] Those in support of our military efforts not only found clear Congressional support in the 1964 Resolution, but also in its continuing appropriations bills providing billions of dollars in support of military operations as well as the Congressional extension of the Military Selective Service Act.[32]

Similar polemic interpretations of international and domestic use of force authority were voiced in America's commitment of U.S. forces to Operation Iraqi Freedom more than 30 years later. In post-Desert Storm Iraq, the U.N. Security Council had repeatedly and forcefully condemned Iraqi actions which resulted in violations of international peace and security—to include urgent warnings to cease its violations of international human rights laws and to align itself with previous Resolutions demanding fundamental compliance with international law.[33] The Security Council, however, did not endorse military action in support of its resolution. One can only speculate as to whether evidence of senior French, Chinese and Russian officials who benefited from illegal kickbacks in the U.N.-sponsored "Oil for Food" Program, had anything to do with their reluctance.[34]

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[30] H.R.J. Res. 1145, 88th Cong., 78 Stat. 384 (1964).
[31] *See* the legislative debate leading to the passage of the Tonkin Gulf Resolution and the subsequent testimony at the 1967 National Commitment Hearings, as summarized in Lawrence R. Velvel, *The War in Vietnam*, 16 U. KAN. L. REV. 449, 451 (1968).
[32] *See* Holtzman v. Schlesinger, 361 F.Supp. 553 (E.D.N.Y. 1973).
[33] *See* S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002) and previous resolutions cited therein.
[34] The involvement of high French, Russian and Chinese officials in receiving unlawful payments and allocations of oil for resale under the Oil for Food Program, as delineated in draft reports of the House International Relations Committee and by Senator Coleman's Investigations Subcommittee in

But after the United States and Great Britain-led coalition successfully intervened in Iraq to both eliminate the threat to international peace described in numerous Security Council resolutions, and to eliminate the sustained violations of international human rights law – it is important to note that the Council quickly passed UNSCR 1483 (2003) unanimously recognizing the coalition as the appropriate "authority" in Iraq. It is not only obvious—but it also validates notions, discussed below, that the U.N. Charter system is a poor enforcer against tyrants who abuse and murder their own people at will.

Equally incongruous were the actions of the Congress with respect to Iraq in 2003. The October 2, 2002, Joint Resolution[35] of the Congress authorizing the use of all means, including force, to bring Iraq into compliance was merely one of a series of actions by the Congress to address the noncompliance by Baghdad of its international obligations. In 1998, during the Clinton administration, for example, Congress passed a similar resolution[36] which declared that Iraq threatened vital United States interests and international peace and security, and declared Iraq to be "in material breach of its international obligations" and urged President Clinton "to take all appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance with its international obligations."[37]

These Congressional and U.N. Security Council Resolutions were not the only outcry for change. In the Iraq Liberation Act,[38] passed in 1998, U.S. lawmakers expressed the sense of Congress that it should be the policy of the United States to support efforts to remove from power the current Iraqi regime and promote the emergence of a democratic government to replace that regime.[39] The reasons for this strong Congressional reaction to the Hussein regime rested not solely on Iraqi defiance of United Nations resolutions, but was also based on Saddam Hussein's repression of the Iraqi people, his support for international terrorism, his refusal to account for Gulf War prisoners, his refusal to return stolen property to Kuwait following the 1990-1991 Conflict, and the Baathist regime's efforts to circumvent economic sanctions.

The Iraqi intervention reflected an uneasy recognition that the Charter system was inadequate to address certain security and humanitarian crises that may come before the U.N., if unanimity among the five Permanent Members of

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the Senate in 2005 in large part help to explain the failure of these nations to support the coalition intervention in Iraq.

[35] H.R.J. Res. 114, 107th Cong., 116 Stat. 1498 (2002).

[36] S.J. Res. 54, 105th Cong., 112 Stat. 1538 (1998).

[37] *Id.*

[38] Iraq Liberation Act, Pub. L. No. 105-338, 112 Stat. 3178 (1998).

[39] *Id*.

the Security Council continues to be a requirement. Only the United States and United Kingdom among the Permanent Five nations on the Security Council were willing to support an enforcement resolution in the case of Iraq, arguably as a result of the Oil for Food payoffs noted above. Nevertheless, some 40 nations found that authorization of the Security Council was not necessary in Iraq since the action was supportive of, rather than contrary to, the values represented in Article 2(4). More significantly, the response of the Congress during President George W. Bush's second term, just as in Vietnam during President Nixon's Presidency, reflects a disturbing contextual remaking of its own prior voting history and the need for an accounting of Congressional responsibility.[40]

IV. THE LAW OF ARMED CONFLICT IN VIETNAM AND THE ARTICULATION OF ITS LESSONS IN IRAQ

The Vietnam War was highly complex. It involved a combination of an externally supported civil war and a sustained invasion from the North, in varying increments and modes, beginning in earnest in 1959. The complexities of the guerrilla effort by the Viet Cong and infiltrators from the North proved particularly difficult for U.S. forces and allied forces (i.e., Australian and Korean). The enemy employed terrorism; to include assassination, kidnapping, impressment of women and children into service in both military and quasi-military functions, as well as the extensive use of booby traps and the deliberate rocketing of urban areas to create an atmosphere of insecurity and uncertainty,[41] much as the insurgents and imported terrorists have done in Operation Iraqi Freedom.

U.S. forces were engaged in a counter-insurgency for the first time in the modern era,[42] and successful prosecution of this war required a full understanding of its highly complicated strategy and techniques. Training had to be designed to address the civilian participation in combat. Equally important, the role of children as information collectors on behalf of the enemy had to be understood and addressed in a way that did not sour the U.S. force's

[40] When, on Feb. 6, 2006, ABC's Nightline program aired the presentation by the network's Chief Investigative Reporter, Brian Ross, of the translation and excerpts from 12 hours of FBI-authenticated tapes of Saddam Hussein discussing with his leadership group between 1992 and 2000 the use of weapons of mass destruction against his enemies, President Bush's Congressional foes, who had argued in 2004-2005 for his resignation for misleading them, were suddenly silent.

[41] *See* Tom J. Farer, Robert G. Gard & Telford Taylor, Colloquy, *Vietnam and the Nuremburg Principles: A Colloquy on War Crimes*, at Rutgers Law School (Nov. 13, 1971) (transcript on file at the Rutgers International Law Society, Newark, NJ).

[42] U.S. forces had previously engaged the Moros in the Philippines and insurgents during the "Banana Wars."

own relations with helpful South Vietnamese.[43] Certain of the U.S. units engaged in Vietnam were highly successful in employing strategies that were effective in countering the unconventional nature of this conflict,[44] while others were not.

And for the first time, the Department of Defense now spoke of "national security" policy and strategy instead of "national defense," in an apparent attempt to integrate President Kennedy's (and later President Johnson's) doctrine of "flexible response" into military planning and operations in Vietnam.[45] At the same time, those involved in the war claimed that U.S. forces made every effort to comply with the 1899 and 1907 Hague Conventions concerning the conduct of armed conflict and the 1949 Geneva Conventions concerning victims of warfare.[46] While they certainly conceded that the military concept of operations was very different in Vietnam than in previous conventional conflicts, they asserted throughout that U.S. forces largely adhered to the law of war and applied its principles.[47]

In contrast, those opposing the war pointed to two separate categories of unlawful behavior by U.S. forces. The first was represented by those aberrant, infrequent and unlawful actions that were wholly inconsistent with directives from higher military or civilian authority. The most notorious of these were the My Lai (or Son My) killings and the killing of prisoners of war represented in the *Lieutenant Duffy* case.[48] While these incidents were

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[43] *See generally,* Farer et al., s*upra* note 41.
[44] The 3rd and 5th Marine Regiments were recognized for their sophistication in addressing these concerns, while certain other Army and Marine Corps units were less successful.
[45] *See generally,* Farer et al., s*upra* note 41.
[46] *See, e.g.*, Convention on the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, T.S. No. 538; Convention Respecting the Law and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, [hereinafter Hague – Laws and Customs of War on Land]; Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, T.S. No. 540; Convention Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, T.S. No. 542; Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of July 6, 1907, Oct. 19, 1907, 36 Stat. 2371, T.S. No. 543; Convention Relating to Prisoners of War, July 27, 1929, 47 Stat. 2074, T.S. No. 847, 118 L.N.T.S. 303; 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, T.I.A.S. No. 3362 , 75 U.N.T.S. 31 [hereinafter Geneva – Wounded and Sick]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 135 [hereinafter Geneva – Wounded and Sick (Sea)]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135 [hereinafter Geneva – Prisoners of War]; Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Geneva – Civilians].
[47] *See generally,* comments of Brig. Gen. Robert G. Gard, USA, *supra* note 41.
[48] *See* remarks of Professor Telford Taylor, *supra* note 41.

relatively infrequent, they were sensationally reported and resulted in a perception on the part of the American people of a lack of discipline and inadequate leadership in certain U.S. units. They were painted by the press as representing insufficient training and the lack of enforcement of attitudes that would ensure decent and humane treatment of the civilian population. Infrequently reported were the aggressive efforts to prosecute violations by the U.S. forces—as was the paucity of reporting regarding systemic and wholesale murders committed by North Vietnamese and Viet Cong forces.

The second category of claimed improper military conduct involved operational practices and tactics which were in accord with United States directives but were alleged to be in violation of international standards to which the U.S. was committed, specifically those represented by the Geneva and Hague Conventions.[49] This category of questioned military activities was claimed to violate the two competing, but inter-related governing principles underlying these Conventions: military necessity and proportionality.[50] *Military necessity* permits measures reasonably necessary to accomplish the mission of securing the complete submission of the enemy as soon as possible, but requires limiting the use of violence to measures not forbidden by specific prohibition. *Proportionality* requires that the violence itself not be disproportionate to the military advantage gained.[51] These principles, admittedly, are to be viewed in light of circumstances existing at the time, and involve reasonable interpretation.

In Vietnam, three areas were often the subject of international criticism with respect to our military effort. The first was our turnover of Viet Cong and North Vietnamese enemy prisoners of war (EPWs) to the South Vietnamese government for detention, just as we did later with Iraqi EPWs to Saudi Arabian military authorities in Operation Desert Storm in 1991.[52] The second area concerned the charge that indiscriminate firepower was used in violation of the rule of proportionality. The third related to the evacuation of certain areas in the south to permit effective operational control of avenues of approach used by forces from the north.

With regard to the turnover of EPWs, as in Desert Storm, the U.S. obtained the agreement of the receiving power (South Vietnam) to open every one of its EPW camps to the inspectors of the International Committee of the Red Cross.[53] In Vietnam, however, U.S. and Vietnamese forces experienced significant difficulty in providing for captured personnel as a result of a lack of

[49] *Supra* note 46.
[50] *See* TERRY, *supra* note 11, at ch. 1.
[51] *Id.*
[52] *See id.* at ch. 8.
[53] Commentary of Brig. Gen. Gard, USA, *supra* note 41.

centralized management, inadequate training of EPW units, delayed establishment of prisoner of war information centers, and loose accountability of EPWs.[54] The highly publicized and atrocious conditions at the Con Son Prison did not involve enemy prisoners of war, but rather common criminals confined by the South Vietnamese government for unrelated offenses.[55] The difficulties in managing the large EPW population in Vietnam can be largely traced to the lack of experience in that area within our force structure, since the U.S. had not been tasked with such responsibilities since 1953 in Korea.

In Desert Storm, the other recent conflict in which large numbers of EPWs were detained, the process was refined using the lessons learned in Vietnam.[56] Coalition forces in Desert Storm carefully followed the prescribed tenets of the Third Geneva Convention for all EPW's and the Fourth Geneva Convention, the Civilian's Convention (GCC), for all civilian internees. During the Operation, 86,743 Iraqi prisoners of war were captured, with a total of 69,820 EPW's and civilian internees marshaled through U.S.-operated facilities between January 19, 1991 and May 2, 1991.[57] During the earlier Operation Desert Shield, because of the Arab occupation of the defense belt along the Kuwait-Saudi border, the Saudi Government handled all detained persons or Iraqi deserters.

Centralized management of EPW operations began during Operation Desert Shield. The National Prisoner of War Information Center was in place and operational well before the ground offensive began. The Center used a new automated program for capturing information and accounting for personnel which satisfied all requirements of the Third and Fourth Geneva Conventions.[58]

Consistent with the requirements for transfer in Articles 46-48 of the Third Geneva Convention, U.S. policy required that a formal international agreement approved by the Assistant Secretary of Defense for International Security Affairs and the State Department be concluded as a pre-requisite for transferring any EPW's to a Coalition partner.[59] Agreements were concluded with Saudi Arabia on January 15, 1991, with the United Kingdom on January

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[54] *Id.*
[55] *Id.*
[56] See DEP'T OF DEFENSE, 102D CONG., FINAL REPORT ON THE CONDUCT OF THE PERSIAN GULF CONFLICT app. L (1992) (prepared pursuant to Title V of Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, Pub. L. No. 102-25, 105 Stat. 75, 103 (1991)) [hereinafter Title V Report], for a thorough discussion of the Vietnam difficulties in EPW management.
[57] *Id.* United States EPW facilities were operational until May 2, 1991, when the last EPW was turned over to the Saudis for repatriation.
[58] *Id.*
[59] This process is further explained in appendix L to the Title V Report, *supra* note 56.

31, 1991, and with France on February 24, 1991.[60] These agreements outlined the actions to be taken by capturing forces in processing the prisoners and internees to the U.S. camps, through medical channels, and then to the Saudi Government for final repatriation. Officials of the International Committee of the Red Cross stated at the time that the Coalition handling of Iraqi prisoners was the best they had observed under the Third Geneva Convention.

Conversely, Iraqi treatment of the 21 captured Coalition personnel failed to comply with most articles of the Geneva Convention Relative to the Treatment of Prisoners of War, as was the case in North Vietnam.[61] Coalition prisoners were denied capture cards; never registered with the ICRC; used in propaganda videos; paraded before the Iraqi populace; beaten, shocked, sexually assaulted, and generally mistreated; and denied writing privileges.[62]

Coalition prisoners were transported to Baghdad where they were interrogated, then incarcerated. Navy, Marine Corps, and Air Force personnel were confined in the Iraqi Intelligence Service Regional Headquarters, a legitimate military target of the Coalition. The choice of detention violated Article 23 of the Third Geneva Convention,[63] and U.S. prisoners were placed at great risk on February 23, 1991, when the facility was bombed by U.S. aircraft. Army prisoners of war were detained at the Ar Rashid Military Prison, where they remained until repatriation. The detention of prisoners of war in criminal confinement facilities was expressly prohibited by Article 22 of the Third Convention[64] unless justified by the conduct of the prisoners themselves. That circumstance was never asserted by the Iraqi Government.

A second area of international criticism in Vietnam involved the charge of "indiscriminate use of firepower," viewed by critics as a violation of the principle of proportionality. There is no question there was a proclivity to use firepower to destroy enemy combatants when the only alternative was to risk the lives of U.S. forces.[65] Area bombardment was strictly controlled, however, with authorization required from South Vietnamese military officials and prior warning and evacuation of civilians mandated in areas, such as along major

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[60] *Id.*

[61] *See* JOHN MCCAIN, FAITH OF MY FATHERS ch. XIX (1999).

[62] *See* Title V Report, *supra* note 56, app. L at 29-33.

[63] *See* Geneva – Prisoners of War, *supra* note 46, at art. 23 (stating in part: "No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points of areas immune from military operations."

[64] *Id.* at art 22 (stating in part: "Except in particular cases which are justified by the interests of the prisoners themselves, they shall not be interned in penitentiaries.".

[65] This became known as the *Powell Doctrine* when General Colin Powell served as Chairman of the Joint Chiefs of Staff during Operation Just Cause in Panama and during Operation Desert Storm in Iraq.

troop movement areas on the Laotian border, before execution of fire missions.[66] With regard to the terminology "free fire zone" in its application to Vietnam, Army artillery commander General Robert Gard stated:

> [T]he words themselves imply that you could shoot anything that moved in the area. I would certainly concede that the term itself is unfortunate and should never have been used. Though it was changed in 1965, it seems to linger on because people tend to use familiar names from habit. "Free fire zone" really meant only that the military was excused from obtaining clearance from the political authority; all the other rules of engagement applied. These zones were located mainly in remote areas where, if there were people left at all, they were very few and very scattered. What few there were, we tried to evacuate.[67]

Other than the general principle of proportionality, the only prohibition on the evacuation of civilians concerns the population of occupied territory.[68] Vietnam was not such territory and the government was attempting to defend itself. More importantly, the evacuation was directed in Vietnam to protect these civilian lives, and was done with the specific approval of the constituted government in Saigon. The subsequent use of air power or artillery in the evacuated areas was likewise done with the approval of the South Vietnamese government.[69]

The government-approved displacement of civilians in allied territory in South Vietnam for their own safety can be clearly distinguished from the unlawful removal of Kuwaiti civilians by Iraqi forces to Iraq before and during Operation Desert Storm. When Iraqi forces entered Kuwaiti territory on August 2, 1990, the provisions of the Geneva Civilians Convention (GCC)[70] were immediately applicable. By its actions, Iraq had become an Occupying Power in Kuwait,[71] with specific obligations to the Kuwaiti people and other third-country citizens in Kuwait and in Iraq. Although Iraqi officials were quick to claim that U.S. citizens in Iraq and Kuwait were spies, Security Council Resolution 664 of August 18, 1990, made clear that the Iraqi Government was obliged to comply completely with the GCC, and carefully outlined its legal

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[66] *See* comments of Brig. Gen. Gard, USA, *supra* note 41.
[67] *Id*.
[68] Geneva – Civilians, *supra* note 46, at art. 49.
[69] *See* comments of Brig. Gen. Gard, USA, *supra* note 41.
[70] Geneva – Civilians, *supra* note 46.
[71] *See id*. at arts. 47-48 (describing the requirements and responsibilities imposed upon a nation occupying territory of an adversary).

obligations with regard to foreign civilians under Iraqi control.[72] The Resolution obligated Iraq to allow the departure of U.S. citizens and other third-country nationals from Kuwait or Iraq unless national security dictated otherwise. Under Articles 5, 42, and 78 of the GCC, Iraq could intern foreign nationals in Iraq only if internal security made it "absolutely necessary," or in Kuwait only if "imperative." Iraq did not assert these provisions in defense of its illegal hostage taking.

The conduct of the Iraqi Government was the more onerous because of its placement of U.S. and other forced detainees in or around military targets as "human shields," in violation of Articles 28 and 38(4) of the GCC. This act, coupled with the taking of hostages in violation of Article 34 of the GCC, unlawful deportations in violation of Article 49 of the same Convention, and compelling hostages to serve in the Iraqi military, were all "grave breaches" under Article 147 of the GCC, and thus punishable as war crimes should trial and conviction result.[73]

As a result of intense international pressure, noncombatant hostages from the United States and other third Parties (except Kuwaitis) were released in December 1990, well before the commencement of Coalition combatant operations. Not only did Iraq not release Kuwaiti civilians, but it also seized many more during the final phase of Operation Desert Storm and used them to shield retreating Iraqi forces from Coalition forces liberating Kuwait.

Iraq treated civilians in the occupied state brutally. The Government of Kuwait has estimated that 1,082 civilians were murdered during the occupation, with many more forcibly deported to Iraq. The August 2 invasion implicated the GCC on behalf of Kuwaiti citizens, as well as the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land,[74] the 1948 Genocide Convention,[75] and the 1954 Hague Convention on the Protection of Cultural Property.[76] Although Iraq is not a Party to the 1907 Hague Convention, the International Military Tribunal at Nuremburg stated in 1946 that its rules are

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[72] U.N. Security Council Resolution 664 (Aug. 18, 1990) *available at* http://www.fas.org/news/un/iraq/sres/sres0664.htm

[73] *Id*. at arts. 146, 147. Article 146 requires that all those alleged to have committed grave breaches as defined in article 147 must be searched for and brought before the courts of a party to the Convention which can make a *prima facie* case.

[74] Hague – Laws and Customs of War on Land, *supra* note 46.

[75] CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, Dec. 9, 1948, U.N. Doc. A/810, at 174; 78 U.N.T.S. 277.

[76] CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT, May 14, 1954, *reprinted in* THE LAWS OF ARMED CONFLICTS 529 (Dietrich Schindler & Jiří Toman eds., 1973).

recognized by all civilized nations as being a "declaration of the laws and customs of war."[77]

From the outset, Iraqi forces and its government leaders denied Iraq's status as an Occupying Power. That denial was belied, however, by Iraq's claim of Kuwait as the 19th Iraqi Province and its transfer of a part of the Iraqi civilian infrastructure into occupied Kuwait for the purpose of annexation and resettlement, both of which constituted clear violations of Article 49 of the GCC.[78]

Similarly, the confiscation of certain private and public Kuwaiti property was prohibited by Articles 46, 53, 55, and 56 of the Regulations annexed to Hague Convention IV. Confiscation of immovable national public property (e.g., buildings) is authorized and its use allowed, but it may not be damaged. Movable national public property may not be seized without a military requirement for its use, and is subject to cash compensation at the conclusion of hostilities. Iraq violated each of these requirements.

The provisions of the 1954 Hague Convention (concerning cultural property) were applied by all Parties to the Coalition in Iraq. Although the United States is not Party to the Convention, it specifically applied its provisions in its targeting portfolios. Article 4(1) of the Convention provides specific protections for cultural property, to include shrines, temples, and recognized structures of national and religious significance.[79] Waiver of these protections is permitted under Article 4(2) in the case of "imperative military necessity," such as when an enemy uses otherwise protected property to shield lawful military objectives. An example during Desert Storm was the placement of Iraqi combat aircraft contiguous to the ancient Temple of Ur.[80] Despite these actions, U.S. and other Coalition members made every attempt to respect Iraqi cultural property.

The most disturbing abuse of civilians witnessed during the first Gulf War concerned the obvious attempt to destroy the identity of the Kuwaiti people in violation of the Genocide Convention. The 1948 Convention made it an international crime to commit acts with the intent to destroy, in whole or in part,

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[77] International Military Tribunal (Nuremburg), *Judgment and Sentence*, 41 AM. J. INT'L L. 172 (1947).

[78] Geneva – Civilians, art. 49, *supra* note 46. Article 49 provides, in part: "The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

[79] During review of proposed target lists, command judge advocates and lawyers on the staff of the Chairman, Joint Chiefs of Staff in Washington ensured that article 4(1) was carefully adhered to as a matter of policy, even though the United States was not a Party to the 1954 Convention.

[80] Although it was recognized by U.S. military officials that the Iraqi actions made the Temple of Ur a legitimate target, U.S. control of the air made it unnecessary to eliminate those two aircraft.

a national, ethnic, racial, or religious group as such. These acts include killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, or forcibly transferring children of the group to another group. Evidence indicates Iraq committed acts violative of each of these categories except for the forcible transfer of Kuwaiti children to another group.

Kuwaiti citizens were murdered and tortured; others were forcibly removed to Iraq. Women of childbearing age were brutalized and rendered incapable of conceiving. Collective executions were commonplace. Public records were collected and destroyed, and Kuwaiti identification cards and license plates were replaced with Iraqi credentials, thus identifying the people and property as belonging to the State of Iraq.

In the process of destroying the identity of Kuwait's civilian population, Iraqi administrators denied those Kuwaitis who had not succeeded in escaping to Saudi Arabia the necessities of survival (such as adequate food, water and basic medical care), in violation of Articles 55 and 56 of the GCC. Equally significant, medical supplies and equipment in Kuwaiti hospitals necessary for the needs of the civilian population were removed in violation of Article 57 of the GCC. This brutal disregard for law was evident in the findings of U.S. Army war crimes investigators who confirmed that many Kuwaiti infants died as a result of the removal of infant care equipment from Kuwaiti hospitals.[81]

From this recitation of the events surrounding the first Gulf War, it becomes clear that any violation resulting from the temporary evacuation of South Vietnamese for their own safety during the hostilities there was incidental at best.

V. THE ENVIRONMENTAL CLAIMS: AGENT ORANGE IN VIETNAM VERSUS ECOCIDE IN DESERT STORM

Contained in the U.S. arsenal in Vietnam were a variety of herbicides used to defoliate areas of dense jungle in order to prevent enemy infiltration, and to clear fields of fire. From 1962 to 1971, 75 million liters of herbicides, including over 41 million liters of the phenoxy herbicide Agent Orange, were

[81] The U.S. Army investigation was conducted in 1991 by reservists coordinated by the International Affairs Division, Office of the Judge Advocate General of the Army.

sprayed on almost 9 percent of then-South Vietnam.[82] U.S. Air Force personnel sprayed hundreds of acres with Agent Orange, using fixed-wig aircraft as part of Operation Ranch Hand. Spraying on a smaller scale also occurred around American base installations, to include base camps, landing zones (such as LZ Stud in I-Corps) and air fields.[83]

The purpose of the spraying in Vietnam was both strategic and tactical. It was strategic in attempting to limit the infiltration of North Vietnam forces southward and thus limiting the conflict, but tactical in that it attempted to expose enemy forces to allied fire in cleared areas. Prior to its use, there was no belief that it was harmful to U.S. or allied forces.

Many controlled studies since the Vietnam conflict ended have attempted to determine the association of various cancers experienced by veterans with exposure to Agent Orange during the conflict. No convincing evidence has been presented of an association between Vietnam service and soft tissue sarcoma,[84] Hodgkin's disease,[85] liver cancer,[86] or nasopharyngeal cancer.[87] For non-Hodgkins lymphoma, the results have not been consistent. The Centers for Disease Control has reported an excess non-Hodgkins lymphoma risk among certain Navy Vietnam veterans.[88] This risk, however, has not been found to be associated with surrogate measures of Agent Orange exposure such as dates of service, type of military unit, and place of deployment. A Department of Veterans Affairs study also failed to find an association between non-Hodgkins lymphoma and surrogate measures of Agent Orange exposure such as service in a specific military branch, in certain areas within Vietnam, or in a combat role.[89]

Although findings from various mortality studies have been inconsistent regarding cancer outcomes, more consistent findings have been

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[82] *See* Commission on the Effects of Herbicides in Vietnam, National Research Council, *The Effects of Herbicides in South Vietnam. Part A—Summary and Conclusions.* (Wash. D.C. Nat'l Acad. Scis. 1974).
[83] *Id*.
[84] H. Kang et. al., *Soft Tissue Sarcoma and Military Service in Vietnam: A Case-Control Study*, 79 J. NAT'L CANCER INST. 693-99 (1987).
[85] The Selected Cancers Cooperative Study Group, *The Association of Selected Cancers With Service in the U.S. Military in Vietnam IV: Hodgkins Disease, Nasal Cancer, Nasopharyngeal Cancer, and Primary Liver Cancer*, 150 ARCH. INTERN. MED. 2495-505 (1990).
[86] *Id*.
[87] *Id*.
[88] The Selected Cancers Cooperative Study Group, *The Association of Selected Cancers With Service in the U.S. Military in Vietnam I: Non-Hodgkins Lymphoma,* 150 ARCH. INTERN. MED. 2485-92 (1990).
[89] N.A. Dalager, et al., *Non-Hodgkins Lymphoma Among Vietnam Veterans*, 33 J. OCCUP. MED. 774-79 (1991).

observed regarding external causes of death. Several studies reported statistically significant excesses of deaths due to external causes, to include poisonings and motor vehicle accidents.[90] Concerns were also raised regarding the possibility of fathering children with birth defects after exposure to Agent Orange. However, little or no evidence supports an association between military service in Vietnam and the risk of fathering children with birth defects.[91] While the evidence concerning harm caused by Agent Orange has remained a matter of controversy, the Department of Veterans Affairs has applied a Congressionally-mandated presumption in favor of all veterans serving on the ground in Vietnam who have subsequently filed claims for disability arguably resulting from exposure to Agent Orange.

In contrast to the use of Agent Orange by U.S. forces for a valid strategic and tactical purpose in Vietnam, and thus within the construct of military necessity, the Iraqis in Desert Storm established a very different model. The carnage to the natural environment caused by Iraqi forces during Operation Desert Storm was unprecedented when compared to other recent conflicts.

Iraqi forces pre-wired and then detonated more than 600 oil wells in occupied Kuwait. Additionally, Iraq dumped more than 7 million barrels of Kuwaiti crude oil into Gulf waters.[92] The extensive and intentional damage caused by the fires and oil spills represented precisely the kind of vindictive and wanton destruction that has long been prohibited by the laws of war. This basic principle is reflected in many specific rules, such as the prohibition on pillage.[93] Even if a case could be made that these acts were accomplished for a military purpose,[94] the magnitude of destruction was so disproportionate to the military

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[90] *See e.g.*, T.A. Bullman et al., *Proportionate Mortality Among U.S. Army Vietnam Veterans Who Served in Military Region I*, 132 AM. J. EPIDEMIOL. 670-74 (1991); Center for Disease Control Vietnam Experience Study, *Post-Service Mortality Among Vietnam Veterans*, 257 J. AM. MED. ASSOC. 790-95 (1987); K.K. Watanabe et al., *Mortality Among Vietnam Veterans: With Methodological Considerations*, 33 J. OCCUP. MED. 780-85 (1991).

[91] *See* Center for Disease Control Vietnam Experience Study, *Health Status of Vietnam Veterans III: Reproductive Outcomes and Child Health*, 259 J. AM. MED. ASSOC. 2715-19 (1988); J. Donovon et al., *Vietnam Service and the Risk of Congenital Anomalies*, 140 MED. J. AUST. 394-97 (1984).

[92] Title V Report, *supra* note 56, app. L at 49.

[93] *See, e.g.*, Hague – Laws and Customs of War on Land, *supra* note 46, arts. 22, 23(a), 23(e), and 28; Geneva – Civilians, *supra* note 46, art. 33; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 7, 1979, U.N. Doc. ST/HR/1/Rev.6 (2002), arts. 35(2), 48, 51, 57 [hereinafter Geneva Protocol I], *available at* http://www.ohchr.org/english/about/publications/docs/part2_2.pdf.

[94] See, for example, the case of Generaloberst Lothar Rendulic on the "scorched earth" evacuation of Finmark, following the Finnish-Soviet armistice in 1944. Although Rendulic was charged with a war crime arising out of the evacuation, he was acquitted on this particular count by an American military tribunal on the grounds that he had a reasonable belief that his actions were necessary—and consistent with the law of war. *See Trials of War Criminals before the Nurenberg Military*

advantage sought that it was clearly excessive under the circumstances.[95] Equally significant, Iraq's status as an occupying power placed it under a special obligation with respect to the property in Kuwait.[96]

The Iraqi case during Operation Desert Storm demonstrated two principles. The Hague and Geneva Convention rules governing armed conflict that are designed to protect civilian lives, health, and property also protect the environment. Second, knowledge of the environmental consequences of military action affects the application of these rules, broadening their restraint. In other words, the Iraqi leadership was required to consider the effects of their actions on the environment, if only because failure to do so would result in unlawful injury to civilians and non-military objects.[97]

The Regulations Annexed to the 1907 Hague Convention IV have direct application to Iraqi actions. Article 22 provides that "the right of belligerents to adopt means of injuring the enemy is not unlimited." Article 23g specifies that that it is especially forbidden "to destroy or seize the enemy's property, unless such seizure be imperatively demanded by the necessities of war." Article 46 adds that "private property cannot be confiscated" by an occupying force, and Article 47 states "pillage is formally forbidden."

To further clarify the restrictions upon occupying powers such as Iraq during Operation Desert Storm, Article 55 states that: "the occupying State shall not be regarded only as administrator . . . of . . . real estate . . . belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and safeguard them in accordance with the rules of usufruct [property use]." Had these strictures been observed by Iraq, there would have been no significant violation of Kuwait's environment and that of its Gulf neighbors.

The Geneva Conventions of 1949 built upon the requirements and prohibitions of the 1907 Hague Conventions. Article 50 of Geneva Convention I (Wounded and Sick in the Field), for example, provides that it shall be a grave breach for Iraq, or any State, to commit extensive destruction of property that is not justified by military necessity and is carried out unlawfully or wantonly.

Tribunals Under Control Council Law No. 10, Vol. 11: United States of America v. Wilhelm List, et al (Case 7: Hostage Case). U.S. GPO: 1950, pp. 1123-36.

[95] Article 147 of Geneva – Civilians, *supra* note 46, describes as a "grave breach" of the Convention "willfully causing . . . extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

[96] *See, e.g.*, Hague – Laws and Customs of War on Land, *supra* note 46, arts. 46, 47, 55 of the annexed Regulations; Geneva – Civilians, *supra* note 46, art. 56.

[97] *See* James P. Terry, *The Environment and the Laws of War: The Impact of Desert Storm*, 45 NAVAL WAR C. REV. 61 (1992).

Article 51 of Geneva Convention II (Wounded, Sick and Shipwrecked at Sea) merely restates this rule. The Fourth Geneva Convention (Civilians Convention), while restating in Article 147 the general protections for the environment seen in the Hague Rules, also places significant responsibilities upon an occupying power. Article 53 provides that "any destruction by the Occupying Power of real or personal property belonging individually, or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations." It can certainly be argued that Kuwait's territorial seas, bays, beaches, and oil fields were subjected to wanton, unlawful destruction unjustified by military necessity.[98]

In comparison to those activities related to the environment directed by Saddam Hussein, Coalition forces planned their campaign to preserve, rather than destroy, human and material values to the extent possible. Targeting of Iraqi military installations was conducted such that minimal collateral damage was inflicted. The most discriminate weapons available were used. Psychological operations advised of opportunities to surrender without penalty, and those surrendering were treated with dignity. In short the coalition forces were scrupulous in their adherence to law. The concerns raised in Vietnam were taken to heart.

VI. THE VIETNAM WAR IN PERSPECTIVE

During the first weekend in March 2006, Harvard hosted a conference on Vietnam's history and its lessons. Luminaries present included: Jack Valenti, Special Assistant to President Johnson; Henry Kissinger, former Secretary of State to President Nixon; General Alexander Haig, Kissinger's Assistant in the Nixon White House and Secretary of State under President Reagan; and Theodore Sorenson, an Advisor to President Kennedy, among others. Little was agreed to during the weekend, and in discussing our difficulty in disengaging from the conflict in Vietnam compared to the current situation in Iraq, Secretary Kissinger observed: "I know the problem, better than the answer."[99]

Understanding the Vietnam War requires putting aside preconceptions and appreciating this conflict as part of a larger Cold War continuum. Indeed, certain critical post-World War II events were part of that continuum, to include: the communist victory in China in 1949, the Korean War in 1950, and Fidel Castro's 1958 consolidation of power in Cuba. Seen in their historical context,

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[98] *See Id.* at 61-67.
[99] *See* David A. Fahrenthold, *Vietnam and Iraq: Looking Back and Looking Ahead*, WASH. POST, Mar. 12, 2006, at A4.

these struggles were important major battles in a war, the so-called (but inappropriately named) Cold War between communist regimes and the West.[100]

Equally significant is an understanding that historically, no great military power, and the United States is that, can wage a war without losing battles. Vietnam was perceived by the American people, and historians generally, as a loss. Militarily it was not a victory, but strategically it was, as was Korea, a major element in the world-wide process of exhausting the communist movement, and in showing that movement to be nothing more than a shill for oligarchies led by corrupt dictators.

Unfortunately, this broader scope is not yet the subject of widespread historical inquiry in the United States. In that narrower realm, however, as in the broader canvas sketched above, we have similarly not focused on the right issues. As the late Colonel Harry Summers properly observed:

> Just as the military needs to be aware of political, economic and social issues, so our civilian leadership must be aware of the imperatives of military operations. They need to understand that national policy affects not only selection of the military objective but also the very way that war is conducted.[101]

From this it is clear that both military and political leaders must agree on a definition of victory, and make this apparent to the American people. Our strategic goal need not be total submission of the enemy forces, but need only be a resolution of the political crisis that led to our involvement, such as the ejection of Iraqi forces from Kuwait in the first Gulf War or the restoration of the status quo in Korea. When, however, as in Vietnam, there is complete divergence between what we are doing and what we *say* we are doing, the loss of public support is inevitable.

Our Vietnam experience did not reflect large-scale violations of the law of war on the part of American forces, nor did U.S. personnel, except in rare instances, do other than reflect the valor displayed in past conflicts. What Vietnam did reflect was that when the military is fighting one war and the political leadership is directing another in which they are deliberately limiting means and resources in order not to lose a far different worldwide conflict, the mismatch between our military strategy and our policy goals is magnified. More importantly, the cost to our nation's greatest treasure, the soldiers, sailors,

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[100] *See* Terry, *supra* note 8, at 74 (containing a full discussion of those other instances where the then-Soviet Union engaged in the Cold War).

[101] HARRY G. SUMMERS, ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR 249 (1982).

Marines and airmen bearing our burden, led to inevitable erosion of national political support. This may be equally true in Iraq in 2007 and beyond.

REFLECTIONS ON MURDER IN WAR

Edward F. Fogarty*

I. ANATOMY OF ONE MURDER IN WAR: IS IT O.K. TO KILL GORILLAS?**

In the 1950's, the halcyon days of Ozzie and Harriet and drive-in movies, occasionally one of them might talk in front of us – the teenagers of the 1950's. Very few talked. Those that did sometimes lied. They were the still young veterans of World War II. They might speak of the brutalizing they did of the enemy, most often the "Japs", an easier target of loathing and fear than the Germans.

Even as late as a 1962 biography of the Marine hero, Lewis "Chesty" Puller, we could read without critical judgment that on Guadalcanal he ordered the killing of a Japanese prisoner. He later withdrew the order. In a report he described the serial bayoneting of non-resisting Japanese by his men on Cape Gloucester: "The pig sticking was fine."[1] We did not dare to pass judgment on the actors or the actions in the tales.

War crimes were those committed by Nazis on Jews, Poles or Gypsies. War criminals were Japanese generals who ordered or allowed American prisoners to be executed, sometimes by beheading. We averted our minds and eyes from our own transgressions.

Later, in another war, the disclosure in 1969 of the My Lai Massacre sparked a firestorm of debate. The debate ranged from "Free Rusty Calley" (one of the officers in command of the massacre) to "Baby Killers, Leave Vietnam Now." That debate contributed to the ambiguous end of that war.[2]

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**The author uses the term "gorilla" throughout the article to describe the enemy, rather than relying on the more common spelling "guerilla". This is in homage to one of the letters sent to him during a letter writing campaign for one of his clients who was charged with murdering a Vietnamese civilian in 1966, *infra*.

[1] BURKE DAVIS, MARINE! THE LIFE OF CHESTY PULLER 129-130, 181-182 (1962).

[2] The phrases were ones used on the homefront during the Vietnam War era and are from the personal observations of the author.

By the summer of 2006, the *Washington Post* reported sixteen American military members had been either convicted of murdering Iraqis or other charges associated with the murdering of civilians since the war began in March of 2003.[3] Of these, twelve were sentenced to confinement, one was given a dismissal from the service, and three others were convicted with no confinement. Multiple investigations into the killing of civilians were pending as of July 2006, including what is usually termed the "horrific" slaughter by a Marine squad of twenty-four Iraqi civilians. The Marines allegedly rampaged immediately after losing a popular comrade to a roadside bomb.[4] The stormy debate ranges from murderers get out of Iraq now to don't anyone dare to judge these American heroes.

Why the World War II American fighter/murderer didn't raise an eyebrow, the Vietnam fighter/murderer helped to bring down that war effort, and the Iraq fighter/murderer threatens to help bring down this war has many reasons. One reason outweighs all the others taken together. In World War II, a nation of 140 million Americans put 20 million men and women in uniform. The rest of us put our shoulders to the war effort ranging from growing victory gardens to causing astounding war production (e.g. Liberty and Victory ships were turned out almost three a day for the transport of the weapons, equipment, and materials of war).[5]

World War II was really a war of desperate, winner-take-all self-defense. To "preserve freedom" or to "defeat fascism" were inspiring slogans--true in deed-- but slogans. The two most powerful military nations in the world wanted to, and could, fight us and our allies to unconditional surrender. We didn't want to examine too closely what our warfighters had to do in the winning of that war. You didn't ask. They didn't tell.

Vietnam was not and Iraq is not a war of winner-take-all. Spreading freedom, stopping Communism, terrorism, or Islamic fascism were then and are now simply ultimate goals of strategic multi-generational problems. Solutions didn't then nor do they now live or die on this or that diplomatic maneuver or limited war.

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[3] John White et al., *Homicide Charges Rare in Iraq War*, WASH. POST, Aug. 28, 2006, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/08/27/AR2006082700770_pf.html.

[4] *Id.*

[5] Http://www.usmm.org/libertyships.html and http://www.usmm.org/victoryships.html. This website is maintained by the U.S. Maritime Service Veterans. Liberty Ships and Victory Ships were built by the U.S. Maritime Commission during World War II. Over 2700 Liberty class cargo ships were constructed and, put into service starting in September 1941. Over 400 Victory class cargo ships were constructed and put into service starting with the first one launched in February 1944.

These limited wars were and are fought by the few. Americans at home were and are free to ignore the wars. Americans could then and can now become armchair generals or ad hoc pacifists free to parse every strategy, tactic and every war murder.

War murders result in calls from some for the war's end. Others deny, ignore, or minimize the impact of war murder.

To believe that we can stop murder in war is as irrational as believing we can stop murder in Omaha, Des Moines or New York. To believe that we can ignore murder in war is as irrational as saying we can ignore murder in Omaha, Des Moines or New York. Nevertheless, it should be self-evident that murder in war is almost always morally and criminally qualitatively different from murder in Omaha, Des Moines or New York. The self-evident difference is almost always in the mitigating and extenuating circumstances in the war murder not present in ordinary murder.

The questions present themselves. Can we reach a consensus on murder in war: defining it, investigating it, prosecuting it, defending it, and punishing it?[6] Must we all scream at the top of our voices? Can military law achieve just results in the midst of a sometimes irrational uproar?

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Four Marines bounced along a dirt road southwest of Danang in late September 1966, in an open jeep: a captain, two lance corporals, and a private. I was the captain, the defense lawyer to the eighteen-year-old private charged with cutting the throat of a sixty-four year old Vietnamese peasant and tossing him in his well. One lance corporal drove the jeep. The other "guarded" the

[6] The Uniform Code of Military Justice (UCMJ) addresses the classical array of criminal homicides. Article 118 defines two forms of first degree murder, premeditated murder and felony murder. Premeditated murder occurs where one intends to kill according to a "premeditated design" and "without justification or excuse". Felony murder occurs where death occurs during the commission of specified felonies: burglary, forcible sodomy, rape, robbery or aggravated arson. These are punishable by death or mandatory life. Unpremeditated murder occurs when death results from a simple intent to kill or inflict great bodily harm. Not directly applicable to defining these crimes but aiding to interpret them, especially when analyzing justification, excuse, duress, necessity or choice of evils are the Geneva Conventions protocols on treatment of prisoners, disabled combatants, and non combatants. Article 119 defines the various types of manslaughter: voluntary manslaughter is marked by an intent to kill or do great bodily harm in the heat of passion under adequate provocation; involuntary manslaughter occurs where unintentional death results from culpable negligence or unintended death in commission of an offense not included in felony murder (e.g. unintended death in a fist fight). Manual for Courts-Martial, United States pt. IV, ¶¶ 43-44 (2005) [hereinafter MCM].

private who was not in handcuffs. We kept an extra rifle for the private, should we need to defend ourselves in this notoriously hostile area.

We were on our way to Hill 55, headquarters of the 9th Marine Regiment where the Article 32 investigation of the premeditated murder charge against the private would occur.

The private leaned over to me and started to tuck the collars of my fatigue jacket under. I asked him what the hell he was doing. He said "I'm hiding your captain's bars. This road has snipers." Finishing tucking under the shiny, silver bars, he said, "Now we all have the same odds, sir." I said, "Thanks."

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Americans are noble warriors, good persons, always on moral missions, called upon to make hairtrigger life and death decisions. Undermining the spirit and resolve of the American warfighter by dwelling on war murders may be a right in a democracy. At the shrill edges of such carping about war murders, the true patriot must point out it is criminal: aiding and abetting the enemy, even treason.

Americans are misguided warriors taken into unnecessary wars. The true patriot's duty is to criticize the war in detail at every turn and to try to get us out of it under any reasonable terms. We have every right to be Monday morning quarterbacks of our wars. If freedom of speech allows Monday morning quarterbacking of only the Bears v. Packers and not the United States v. the terrorists, or the communists, or whomever, the First Amendment is worthless.

The above songs are timeless, written a thousand years ago. In a democracy, they will be wheeled out and sung for any discretionary war.

Assume this reasonable hypothesis: If in 2000 the Supreme Court had decided Vice President Al Gore won the election and the same string of events occurred (Saddam's violation of the UN resolutions, 9/11, etc.), this could be President Gore's war. The songs would be the same. Only the singers would change.

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To understand my client's murder case, you need to understand his war. Maybe you had to be there.

The area around Hill 55 saw brutal action over a protracted time. In 1966, the Viet Cong (VC) and North Vietnam Army (NVA) fought by ambush, booby traps, landmines, snipers, and rockets in the night. The Marines patrolled and tried to close for combat with the enemy units. The peasants maintained an uneasy balance alternatively cooperating with the VC from loyalty or fear or both and trying to appear to cooperate with the Marines and their Republic of Vietnam (RVN) allies. There was occasional unit to unit contact.

General Vo Nguyen Giap, head of the VC and NVA military effort, had a particular loathing of the aggressive 1st Battalion, 9th Marines (1/9), my client's unit. He promised Ho Chi Minh that he would wipe it out as an effective force. He told Ho, "The men of 1/9 are the walking dead -- they just don't know it."[7]

On May 12, 1966, a fourteen-man patrol from B Company, 1st Battalion, 9th Marines Regiment, (B/1/9), ran into a 300 strong battalion of VC. The fighting was fierce and twelve Marines died. The two Marines who survived played dead when their small patrol was finally overrun and VC rummaged over the dead and dying Marines, killing any living Marines. The two survivors reported that all fourteen stood up "to fight and die standing." They poured deadly rifle fire into the charging VC until the entire unit was overwhelmed.[8]

That contact led to an immediate Marine counterattack upon the now exposed VC. Artillery and air strikes were called in. Company B and Company D (my client's company) were lifted by helicopter to the VC's positions. The VC battalion was routed. Marines killed 175 VC war fighters. My client received shrapnel wounds in the battle.

In 1/9 lore, the fourteen are known as The Lost Patrol. The battle on May 12, 1966, is revered as a huge victory. "The Walking Dead" could fight. General Giap's obituary for 1/9 was premature. 1/9 went on to adopt the nickname "The Walking Dead," and it proudly carries that name today on shoulder patches featuring the silhouette of the Grim Reaper.[9]

A memorial service program for the B/1/9 Marines killed May 12, 1966, listed 14 names as two more Marines from B Company died in the counter-attack after the VC killed "The Lost Patrol". Of the 12 dead from the Lost Patrol, one was eighteen years old, six were nineteen, and the oldest was

[7] Much of this 1/9 history comes from personal file materials including after action reports, newspaper clippings, the 1/9 poem *infra*, and other items shared with the author by Lt. Col. Robert Jadlow, USMCR (retired), who for much of 1966 was the executive officer of B/1/9.
[8] *Id.*
[9] *Id.*

twenty-two. A mimeographed "1/9 Memorial Service" program for deaths in June 1966 listed 27 names. Seven were from my client's Dog Company. [10]

It did not, in the minds of young Marines, take a math genius to figure that in a 13-month tour maybe 300 Marines of 1/9, battalion strength organized at about 1100, might die. The dying promised often to be by the hand unseen: the mine, the sniper, the rocket at night. If asked for information on the unseen enemy, the civilians would almost always say, "Cam-biet"; "I don't know."

These memorial services in the field served multiple purposes. The dead earned the honor. The surviving comrades would be comforted to know that if their time came, they would be prayed over, sung over, and have rifles fired in salute of them by the men closest to them when they died young.

To willingly embrace the thought of dying with the honor of your comrades and to keep an abiding belief in the good of the mission and the war are indispensable for the warfighter. Without that, he cannot endure the battle. Without that embrace and that commitment from all the fighting force, the war will fail altogether or wind down to an uneasy peace.

Both the brutality of war and the warfighter's courage and commitment to one another and to the war's mission found expression in the untutored, passionate, idealistic poetry of five enlisted Marines from the Lost Patrol's company. The poem was written the evening of the massacre of the twelve Marines.

> The Vietcong charged. The Marines showed no fear.
> The wounded and dying rose to their feet
> To fight against odds they could not meet
> They would face it standing as few men do . . . .
> Men must die, no end seems near
> When the purpose is to free people from Communist fear
> They joined together with this their goal
> They made this stand the last stand
> of a Marine patrol.[11]

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Most Marines around Hill 55 in 1966 won the struggle to be honorable. Some fell short. My client had been twice wounded. The first was May 12,

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[10] *Id.*

[11] *Id.* "The Last Stand of a Marine Patrol", 5/12/66; composed by Sgt. Hudson, Cpl. Whipple, Cpl. Triano. L Cpl. Maunter, L Cpl. McHenry (All members of B/1/9).

1966, in the counter-attack following the extermination of the Lost Patrol. The second injury was in early June of that same year. A landmine put him on the hospital ship USS REPOSE for a month. As he was loaded on the medivac helicopter, his good friend's corpse was put on the same helicopter, his head blown off by the same mine. Many friends had died or lost limbs. The platoon organization called for 40 Marines. They were down to 19 when he left for the USS REPOSE. His Marine brother also had two purple hearts.

After 30 days on the USS REPOSE, he returned to duty in July with D (Dog) Company, 1/9 around Hill 55. He hated the Vietnamese civilians. He had come to distrust them. He was there to give them freedom, and they didn't care. They would collaborate with the enemy. Some were not civilians at all, but Viet Cong posing and living as civilians.

On September 16, 1966, my client cut the throat of 64 year old peasant Nguyen Chay. He then threw him in a well.[12]

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We are advised that in Iraq we have the best trained, most professional fighting force of all time. Don't dare to slander them by bringing up this murder stuff. Americans spread freedom and give children chocolate bars. If a soldier or Marine kills a civilian we must "let the justice system play out." We must assume it was a snap judgment made in fear for one's life. It didn't happen. If it did happen, it's nearly an unprecedented event. It's a "fog of war" thing. They do it to us.

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There was no publicity for my client's case, except in his hometown. I had solicited his parents to organize a letter writing campaign of friends to show that he really was a good boy.

Letters and petitions from his hometown flowed in. About a thousand people signed a petition that ended by asking, "How can you hold a man of these standards (boy scout, Christian, patriot, a Marine with a brother also a Marine in Vietnam) responsible for this act during the trials of warfare?"

[12] Material on the murder of Nguyen Chey comes from the author's case file, United States v. Defendant #1 (on file with author). The author has chosen not to release the names of his clients in United States v. Defendant #1, United States v. Defendant #2, and United States v. Defendant #3, *infra*. The author's intent is to protect the servicemembers' continued rehabilitation into society.

The disconnect at home from what went on so far away was even greater from some individual letters. Only an insurance agent could do this. A "Congratulations, you're in the news" card came to the family. It enclosed the local paper carrying the story that my client had cut an old man's throat and was charged with murder.

The best knee-jerk reaction came from a young man fortunate enough neither to be drafted nor to volunteer. He asked how you could charge a Marine with murder in Vietnam, where you can't tell the "good Vietnamese from the gorillas?" (sic).

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The Iraq War murders get soaked first in the flood of hard news coverage. This is then followed by a tsunami of commentary. Twenty-four hours a day cases are discussed. There is neither realism nor balance. Any single murder charge generates a call for the war's end on one side. On the other side the litany begins: it didn't happen, it hasn't been proven, don't slander these heroes, things like this are rare, talk of murders is aiding and abetting the enemy. Where's your patriotism?

******

My client pled guilty to unpremeditated murder. This was pursuant to a plea bargain. This allowed the court-martial to assess a sentence less than the mandatory life in prison or death provided for premeditated murder.

The record of trial shows the following stipulation of facts:

> On the morning of 16 September 1966 . . . The [Accused's] platoon set up a patrol base in Thai Cam. The [Accused] and others occupied the home of Nguyen Chay, a 64-year-old Vietnamese man, and began playing cards.[13]
>
> Chay, upset and annoyed by the occupation of his home went about mumbling and complaining. . . . He was told by his Marine guests to go away. He left the house and walked over to a nearby machine gun position where he was again told to go away. . . . Someone in the house in apparent jest suggested killing Chay. [The Accused] borrowed a K-bar knife from one of the card players. . . . He walked outside and called Chay to come over. Chay obliged and upon his arrival

[13] United States v. Defendant #1.

> [The Accused] . . . walked him over to a nearby dry well. . . . [The Accused] proceeded to slit the throat of Chay and throw the old man in the well. . . . [The Accused] returned to the house with the bloody K-bar. He asked for a towel[,] . . . wiped off the knife, washed his hands and calmly proceeded to play cards.[14]

The K-bar knife cut through the fog of war. It made no difference whether Chay was a "good Vietnamese or a gorilla." The card game was hearts.

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Again, there are two songs. The American soldier is a brutal murderer who must be punished brutally. His only mitigation is that he is a pawn of a corrupt and evil administration.

War is war. We can't make too much of things like this. Punishment must be tempered with generous mercy.

Regrettably, there will always be that chorus who beat the drum to "free them all -- it's only gorillas that got killed." The substantial "Free Rusty Calley" crowd had political muscle. First Lieutenant Calley commanded the murders of men, women and children at My Lai. He served three and one-half years of the life sentence the court-martial handed down. On the road to Ft. Calhoun, north of Omaha, Nebraska, a farmer has named the path to his home "Rusty Calley Lane".

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Given the subjective bias of any factfinder, it is easy to imagine that a 1966 jury composed of Berkeley graduate students hearing a case like my client's case would convict and deliver maximum punishments after brief deliberations. Likewise, a 1966 jury of hard hats would acquit after brief deliberations.[15]

People make jokes about "military justice" being an oxymoron. Like any institution, military justice can be ridiculed by a recitation of its blunders

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[14] *Id.*

[15] Reference to students and hard hats of the Vietnam era is an anachronism. Now left-wing and right-wing members of the chattering class and their bloggers carry the knee-jerk resistance to or support of the Iraq War. The Author will use the Berkeley student and hard hat reference throughout, even where anachronistic. This is in homage to the genuine passion and relative lack of cynicism back then from those quarters.

over history. When the system works, the assessment of innocence or guilt of a warfighter for criminal acts under the Uniform Code of Military Justice (UCMJ) is best left to a court-martial panel of real peers: other warfighters.

On November 11, 1966, one day after the Marine Corps' 191st birthday, my client faced a court-martial composed of majors and lieutenant colonels, headed by Colonel Clay Boyd, a barrel-chested, veteran of World War II, Korea, and Vietnam. The military judge was Colonel William Wander, a Marine legal legend who presided at over 100 general courts-martial in Vietnam, hopping helicopters to get from one trial site to another.

The court-martial members heard the stipulation. They heard the mitigation. The Accused had been a boy scout, regularly attended church growing up, and had been an athlete with city honors in football and state honors in wrestling. At seventeen he dropped out of high school after his junior year to join the Marines and to fight for his country in Vietnam. He'd been nominated for but did not receive a Bronze Star for having saved a wounded Marine under heavy enemy fire. He won two purple hearts.[16] His courage could not be questioned.

A Navy psychiatrist testified the Accused was clearly mentally competent and showed little evidence of a personality disorder and suffered only from a minor mental illness: a situational stress disorder temporary in nature. His inability to express even the slightest remorse about murdering an old man, other than he "let the Marine Corps down" was explained by the situational stress. He could not be allowed back to combat due to his hatred of the Vietnamese. A modest sentence, return to the United States and therapy would probably restore him. He probably would not be a threat in the future, once out of the war.

What the Court heard from the Accused's fellow enlisted Marines was troubling, but not surprising. The brutal warfare around Hill 55 left young men like my client both sad and angry from losing friends to landmines, booby traps, sniper fire, all done apparently under the nose of civilians who would not cooperate. When the old man was killed, nobody tried to stop the young Marine. When he returned to the card game, nobody criticized the killing. It wasn't a big deal. Some squad members said they had seen it all before, only no prosecutions occurred. Nobody from the platoon reported the killing. It came to light only when Chay's family carried his corpse to the 1/9 headquarters. Several Marines stated "civil affairs" training was non-existent or blown off.

[16] United States v. Defendant #1.

The training that sunk in was to the effect that you must be wary of the Vietnamese civilian or you might end up dead.

These were men of eighteen, nineteen, and twenty years of age. War beat their souls down. War hardened their hearts.

The prosecutor argued for a severe sentence for life or for decades. This would show the world we care deeply about maintaining the order, discipline and honor of our military. The United States can't win a "hearts and minds" war by killing those we aim to help.

I argued my client was a good young man. The needs of the service and homage to the good men, boys really, put under terrible pressure to hold it together under Hill 55 type warfare would be better served by a short sentence. The line between decency and savagery was easy to cross in Hill 55 type warfare. He had crossed it, but redemption was a certainty with help back home. We pointed out the failure of leadership. "Hearts and minds" was not much taught and when taught was quickly forgotten. Distrust or pay a price was taught and, with one's life and limb in the equation, not forgotten.

The Accused was sentenced to five years in prison and a dishonorable discharge.[17]

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Two songs. That measly sentence is an outrage. It endorses such brutality and proves the entire war is immoral and our fighters and our leaders evil. We must end it now.

This is an isolated incident. Free that Marine hero. What he did is not bad in the fog of war. Why don't you talk about the 99% of our warfighters who are brave and honorable -- as if 1 in 100 warfighters being a murderer is a good, workable ratio. We can't cut and run. Either you are against communism (terrorism) or you are a coward at best and a traitor at worst.

Depending on whose discretionary war it is, the songs will not change. Only who sings which song will change. Justifiable and wholly moral wars may peter out to equivocal endings in the high decibel debate and that's bad. Questionable wars may suffer the same fate and that's good.

[17] *Id.*

II. VIETNAM: MANY MORE MURDERS – MILITARY JUSTICE COPES, BUT WITH MY LAI COLLAPSES

The result of my client's trial generated spirited discussions in the 3d Marine Division Legal Office: was the result too lenient? In those days, senior Marine lawyers were usually men who had served in WWII and Korea as line officers: infantry, artillery, tanks and such. They'd seen combat up close, been in it. They became lawyers when they went to law school during the peaceful intervals following WWII and Korea.

It was these older officers, combat veterans, who ran the legal office that uniformly and strongly believed harsher punishment of my client had been called for.

One particularly strong-willed field grade legal officer put it this way: You can criticize command failures and training all you want, but the critical point is and always will be the failure of the individual conscience and individual moral character.[18] When this war is over we will hear of terrible things from men like my client. The argument drew strength from these senior officers' histories. They and most every one of their counterparts held it together under as bad or worse circumstances in the Pacific and Korea.

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That failure of conscience by war murderers, my senior Marine lawyers rued, was not confined to the case of my client. In the last half of 1966, the 3d Marine Division Legal Office processed at least five cases of Marines charged with murder of Vietnamese civilians. Our prosecutors had to make value judgments and prosecutorial judgments calibrating moral turpitude in war. The cases could be measured by the reader from the bad to the worst on the turpitude scale.

The 3d Marine Division prosecuted First Lieutenant Phil Caputo for murder. Later he was part of a team of journalists who won a Pulitzer Prize for

[18] Lieutenant Colonel Frederick D. Clements, USMC, with whom the author served with in 1967 while stationed in Vietnam. LtCol Clements was a combat arms veteran of World War II and the Korean War and later became a judge advocate.

the *Chicago Sun Times*.[19] His *Rumor of War* is considered by many to be the best memoir on Vietnam.[20]

On a mission Caputo ordered, two VC suspects were kidnapped from their beds in the night time. At this point stories conflict. The government's evidence was the men were captured and shot execution style. The first enlisted Marine was tried and defended on a mix of "Caputo authorized us to shoot them" and "they tried to escape." He was acquitted. So, charges were dismissed against the other enlisted men. Caputo's murder charge was dismissed, but he received a letter of reprimand for making a false statement in the investigation.[21]

In another prisoner execution case, a Navy corpsman allegedly shot a prisoner in the head. He was acquitted on his testimony that the prisoner, in his mind, appeared to bolt. He took this for an escape effort. Other Marine witnesses also guarding the disarmed VC fighter didn't see him bolt or flinch. The corpsman was acquitted after lengthy deliberations.[22]

Another Marine was charged with the unpremeditated murder of a Vietnamese woman. He'd been to the village near his base to drink. He got stumbling drunk and for no apparent reason fired his M-16 repeatedly into a villager's hut killing a sleeping woman. He had no other explanation than he was drunk and just raising hell. The court-martial found unpremeditated murder and sentenced the Marine to confinement for ten years.[23]

Third Marine Division conducted the review of the record of several premeditated murder and rape convictions obtained at trials of a case from First Marine Division. A patrol of Marines from 1st Battalion, 5th Marines (1/5) killed a Vietnamese family of five from a village by Chu Lai. The wife, and mother, was raped by several of the Marines, shot, and left for dead. The last death was that of a three year old child wounded and lying on the ground. The patrol leader raised his rifle butt above the child and said, "somebody give me a count." Another Marine obliged: "1. . . 2 . . . 3." At "three" the squad leader

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[19] In 1965, as an infantry lieutenant in the Marine Corps, Phil Caputo was deployed to South Vietnam. He returned to the United States in 1966. After serving three years in the Corps, Caputo began a career in journalism, joining the staff of the *Chicago Tribune*. Caputo returned to Vietnam as a foreign correspondent for the *Tribune* and covered the fall of Saigon in 1975. He also served as a correspondent in Italy, the Soviet Union, and the Middle East. In 1972, Caputo was part of a writing team that won the Pulitzer Prize for reporting on election fraud in Chicago.

[20] PHILIP CAPUTO, A RUMOR OF WAR (1977).

[21] *Id*. at 336.

[22] United States v. Defendant #2, (1966) (on file with author).

[23] United States v. Defendant #3, (1967) (on file with author).

brought the rifle butt down hard against the child's head crushing his skull and killing the child.[24]

The platoon commander, a young officer, came to the scene and helped the patrol throw grenades about and make it look like a firefight. The murders came to light when the rape victim, left for dead, was brought by the villagers to the 1/5 aid station and the Navy doctor reported it.[25]

Esquire ran a long article on this case three years later in 1969.[26] Nobody paid it any mind. That same year, My Lai, with hundreds of murder victims, first got widely reported in the media, about a year and a half after the massacre had taken place.[27] The lid had slipped off the My Lai cover up. Now people were forced to pay attention to murder in war.

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Military law enforcement had critical prevention and enforcement flaws in Vietnam. As vigorously as division level legal office prosecutors prosecuted and defense lawyers defended those cases where charges got filed, many serious crimes went undetected and never charged. Murder and rape, especially done stealthily or with colleagues hardly likely to "rat", could easily go undetected or disguised on reporting back up the chain of command.

Navy Lieutenant Robert Kerrey's report of his Seal team's mission in February 1969 earned him a Bronze Star when his report was reviewed by his superiors. His Bronze Star citation read "21 VC Killed". His team approached a hamlet where a VC leader was supposed to be located, with the intent of capturing him. At an outlying hooch the Seal team killed a family of five including children with knives. The team proceeded to the village and allegedly gathered about fourteen unarmed men, women and children and shot them.[28]

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[24] Author's file notes on draft report to Staff Legal Officer; LT. COL. GARY D. SOLIS, USMC, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE, 53-54 (1989).
[25] SOLIS, *supra* note 24.
[26] Normand Poirier, *An American Atrocity*, ESQUIRE, Aug. 1969, at 59, *reprinted in* SMILING THROUGH THE APOCALYPSE: ESQUIRE'S HISTORY OF THE SIXTIES (1970).
[27] My Lai occurred in March 1968. In March 1969, a recently discharged soldier wrote numerous public officials a secondhand account of the events. In November 1969, the Army initiated an investigation. In December 1969, Life Magazine published pictures of the massacre taken by former Army photographer, Ronald Haberle. Major Jeffrey F. Addicott & Major William A. Hudson, Jr., *The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons,* 139 MIL.L.REV. 159-160 (1993).
[28] Gregory L. Vistica, *One Awful Night in Thang Phong,* N.Y. TIMES, Apr. 25, 2001, §6 (Magazine), at 50, *available at* http://www.nytimes.com/2001/04/25/magazine/

The Navy received a timely report from a Vietnamese national of the massacre version of the facts but ignored the report. It was ignored as the Navy discounted anything from that VC controlled area as propaganda. One Seal team member, 30 plus years after that "awful night", told the story of massacre to the *New York Times* and *CBS* creating an uproar swirling about former United States Senator Robert Kerrey.[29]

The case deserved investigation and disposal then, not now. If charged, Kerrey's team had a "choice of evils" defense on the killing of the family of five with knives rather than give away the mission or their presence exposing them to a VC attack. Reasonableness of the family killing would be decided by military officers. The gathering up of unarmed civilians and gunning them down had no defense at law. However, 30 years later, other Seal members "recalled" through the "fog of war" there really was a firefight, wasn't there? In the spring of 1969, speedy investigation and possible trial would have ended the matter one way or the other.

Not letting go of the Vietnam War may continue to stir up old, uncharged murders. There are so many journalism awards out there to be garnered as to be mind numbing. Where does it end?

The *Toledo Blade* won a Pulitzer Prize in 2005 for a four part series in October 2004 detailing a summer of murder in 1967 by "Tiger Force", a 101st Airborne Division unit responsible for the serial individual and mass killings of civilians.[30] It wasn't that hard to assemble the evidence: interview ex-soldiers who abhorred it; review Army records from 1975 when the Army investigated many incidents of the summer; and, a trip to Vietnam by the reporters to interview Vietnamese and tie unit diary records to events as remembered by the locals. Even at a distance of 35 years, compelling cases of guilt could be made from the *Blade's* investigation.[31]

Credible cases for uncharged murders can be put together to this day. Most emphatically none should be. The only helpful use of this looking back is

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25KERREY.html?pagewanted=1&ei=5070&en=a9410d890bdf1041&ex=1170306000; *60 Minutes II* (CBS television broadcast, May 1, 2001) worked with the N.Y. Times on this investigation and ran a piece on it.

[29] Vistica, *supra* note 28.

[30] Michael Sallah & Mitch Weiss, *Tiger Force,* TOLEDO BLADE, Oct. 2004; *See also* MICHAEL SALLAH & MITCH WEISS, TIGER FORCE (2006). The four part series and later book detail the killings of Vietnamese civilians (elderly men, women, and children) by an elite Army unit. The series discusses the events, the cover-up, interviews of those villagers that survived, and interviews of some of the members of "Tiger Force".

[31] Michael Sallah & Mitch Weiss, *Tiger Force,* TOLEDO BLADE, Oct. 2004.

to set the record straight. Murder got out of hand then. We can do better now. We are doing better now.

As to prevention, not enough was done in those days to connect the universal understanding each Marine and soldier had that communism had to be stopped to the notion you can't win a "hearts and minds" war by abusing the people you would make free. The generals understood the connection and most of the officer corps did.

However, the saying of the day was: "grab 'em by the balls and the hearts and minds will follow." For almost all warfighters that was just the edgy humor of men at war. For some it had an element reflecting an evil attitude, inadequate training and inadequate command and control. Too many fighters didn't care that civilian or prisoner murder, rape, and abuse undermined the mission, played into the enemy's hands, and weakened the political will to continue the fight back home.

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On March 16, 1968, a company-sized task force from the Army's Americal Division entered My Lai and nearby hamlets expecting, on faulty intelligence, to find several hundred VC fighters and only a few villagers. The soldiers were spoiling for a fight as they had suffered dozens of deaths and injuries from landmines, snipers, booby traps and had yet to close unit on unit with the Viet Cong.[32]

There were no VC fighters. There were only villagers. The company officers ordered the killing of the villagers. Many soldiers balked at killing children, old men, old women, and unarmed men and women of fighting age. Many soldiers obeyed the orders to murder people by the dozens and scores. Over the next four hours, the mass murders continued. Some people were shot fleeing and others were gathered and shot at point blank range as they huddled in groups. Women were raped.[33]

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[32] Addicott, *supra* note 27, at 156-57. The Author has borrowed liberally from Major Addicott and Hudson's article for this history of My Lai, its investigation, prosecutions, and remedial actions. The Author omits internal citations of Addicott and Hudson. A summary of the report is available on the University of Missouri at Kansas City Law School website at http://www.law.umkc.edu/faculty/projects/ftrials/mylai/MYL_Peers.htm.

[33] There were heroes at My Lai. The most often cited example is the story of Chief Warrant Officer Hugh C. Thompson, a helicopter pilot. When he realized soldiers were killing, not aiding wounded civilians, he landed his helicopter and confronted 1LT William L. Calley, Jr., a platoon commander directing mass murder. First Lieutenant Calley made clear his intent to continue the killing. Chief Thompson ordered his M-60 machine gunner to open fire on any soldier not retreating from the civilians. He then loaded his helicopter with as many civilians as it could carry and took them to safety. Addicott, *supra* note 27, at 157-59.

The massacre was papered over. The final Americal Division reports suggested a successful combat encounter with some unfortunate, unavoidable civilian deaths. The military grapevine buzzed with the scuttlebutt (gossip) of what really happened.

In March 1969, a recently discharged soldier, Ron Ridenhour, wrote a remarkably accurate account of what occurred at My Lai to twenty-three congressman, President Nixon, the Secretaries of State, Defense, and the Department of the Army, and to the Army Chief of Staff. Ridenhour, though himself not at My Lai, had pieced the account together from the first or second hand accounts he had heard in Vietnam.[34]

When the Army finally acted, the investigation phase was commendable. On November 26, 1969, the Secretary of the Army and Chief of Staff of the Army appointed Lieutenant General William R. Peers to conduct a thorough investigation of My Lai and the apparent cover-up that followed.[35]

General Peers assembled a team of military and civilian lawyers and some seasoned infantry officers as investigators. They got right to it. By March 7, 1970, the Peers' Committee had interviewed and recorded testimony from 398 witnesses in the United States and Vietnam and reviewed thousands of pages of documents.[36]

The "Peers Report" was completed and delivered to General Westmoreland on March 14, 1970. It brutally tore apart the massacre and the cover up. It contained an unflinching analysis of the "why" of it – both individual failure and systemic Army failure.[37]

What followed as the military justice system took over brought both the Army and military justice no honor. Nine enlisted men were charged with murder. Four officers were charged with murder. One officer, Second Lieutenant Brooks, was not charged because he died in later combat. Peers found that Brooks supervised and ordered the killing of 60 to 70 Vietnamese by his platoon and did nothing to stop his men engaged in serial raping. Twelve

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[34] *Id.* at 159-60. Ridenhour letter dated Mar. 29, 1969, *available at* http://www.law.umkc.edu/faculty/projects/ftrials/mylai/ridenhour_ltr.html.
[35] Directive for Investigation dated 26 November 1969, *available at* http://www.law.umkc.edu/faculty/projects/ftrials/mylai/directive.html.
[36] Summary of report *available at* http://www.law.umkc.edu/faculty/projects/ftrials/mylai/summary_rpt.html.
[37] Chronology of My Lai events *available at* http://www.law.umkc.edu/faculty/projects/ftrials/mylai/mylaichron.html.

officers, including two generals, were charged with crimes related to the cover up.[38]

With Brooks dead, 1Lt William L. Calley, Jr. became the face of My Lai. He had ordered the gathering up and execution of at least one hundred villagers. He himself machine-gunned many as they huddled in a ditch. He was tried and found guilty of twenty-two premeditated murders. He received a mandatory life sentence.

Immediately upon his conviction, President Nixon himself ordered Lt. Calley not to go to prison but simply to be confined to quarters at his base pending appeal. Brigadier General Oscar E. Davis reduced the life sentence to 20 years. The civilian Secretary of the Army in April, 1974, reduced the twenty years to ten years. Altogether, Calley did three years of house arrest and six months in prison at Fort Leavenworth. He was then paroled by the Secretary of the Army. There were no other convictions. Charges against the other 24 officers and enlisted men charged were either dismissed before trial or the defendants were acquitted by courts-martial.

By 1969, officers in the military complained that discipline had fallen apart in Vietnam. Even the military justice system could no longer be counted on to mete out appropriate justice, only inappropriate mercy. Maybe military justice was cowed by the deafening roar of President Nixon's Silent Majority. After all, "They were only gorillas."[39]

The Peers Report put the count of the dead at My Lai at 175. This was probably low as the Report itself speculated the count could be as many as 400. The Vietnamese government has posted a monument in My Lai with the names of 540 men, women and children said to have died in the massacre.[40]

You could add one more casualty to the My Lai massacre: the military justice system. Serial dismissals or acquittals of twenty-four of twenty-five defendants charged with murder or covering up murder is, in ordinary criminal law, statistically improbable to the point of approaching the impossible.

For the only defendant convicted to serve just 3½ years for 22 mass murders should shock the individual conscience and that of the nation as a whole. It shocked neither.

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[38] Addicott, *supra* note 27, at 160-61.

[39] Neither the anti-Vietnam war crowd nor the pro-Vietnam war crowd was particularly silent. Politics were played out more often in the streets and not so much by shrill talking heads from either side.

[40] Addicott, *supra* note 27, at 157.

By the time Calley was paroled in 1975, the nation had moved on. The hard hats felt justice had finally come to Calley. Most of the angry young war protestors were starting careers and going dancing in the night time in leisure suits. Most of them had quit protesting after 1969 when the draft lottery based on one's birth date was adopted. The majority of all college students received "safe" birth date draft lottery numbers. This insured they would not be drafted and the war no longer seemed so immoral as to warrant their precious time to protest it in the streets, maybe just grumble about it at the student union.

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The Marine Corps, after the My Lai story broke in the media, suffered its own mini-My Lai. On February 19, 1970, five Marines from B/1/7 were sent by their company commander on a "killer team" patrol. "Killer team" was simply a macho term for a combat patrol with a lawful purpose of hunting and killing enemy soldiers encountered opportunistically.[41]

Motivated by his company commander's aggressive pep talk, the patrol leader, a lance corporal, led the team to a nearby VC village where they shot and killed sixteen unarmed women and children at three separate huts. With the help of the company commander, a cover story was concocted: six VC killed in fire fights; one weapon recovered (they used one retrieved by the company on an earlier mission); some civilians killed in the cross fire.[42]

The battalion operations officer receiving the report smelled a rat and conducted an immediate investigation. His examination of the fields of fire showed no spent ammo in any area from which the VC's contribution to the "cross fires" could have come. There was no blood or crushed brush in areas the VC would have dragged any wounded or any of the "6 VC kills" from the scene of the fire fights reported by the killer team.[43]

Four of the five Marines broke down and told the truth. One received immunity for his testimony. Convictions with life sentences resulted. The fourth and final Marine tried was the patrol leader who had to repeat again and again his order to reluctant team members to kill the civilians. Ironically, he was acquitted. Presumably a huge factor was his "obeying orders" defense based on his company commander's aggressive pep talk.

With the ring leader acquitted, the other three sentences were reduced to one year. With good time, the Marines were out of prison before the first

[41] SOLIS, *supra* note 24, at 175.
[42] *Id*. at 174-90.
[43] *Id*. at 178-79.

anniversary of the mini massacre.[44] Shocking? Yes. Surprising? No. Were we all now war weary?

The case was widely reported. The squad leader, an Oklahoma man, had a petition signed by 160,000 Oklahomans demanding he be set free. This roar of the "only gorillas" crowd showed the Silent Majority was not all together silent.

III. THE COMEBACK – MILITARY LAW REDEEMS ITSELF IN IRAQ

Ponder this for a while: After three years of war under the most heart breaking, soul breaking, and conscience numbing conditions, there were only sixteen convictions of U.S. warfighters for murdering Iraqi civilians.[45]

Ponder this for a while: For a long time, each battalion-sized unit carried an imbedded reporter, many of whom certainly might see Pulitzer written large in their future if they could break an atrocity story. Awards might flow even for "low morale encourages many to murderous thoughts" stories. The present military must have supreme confidence in its teaching, training, command and control (TTCC to coin an acronym) down to the lowest ranking warfighter that war murders are in fact a rare event in Iraq. Otherwise reporters in Iraq would get Department of Defense written press releases and spend their time in safe areas interviewing hometown men and women for local television and newspapers.

It looks like both prevention and enforcement are working in Iraq. Stealth killings could be made to look like sectarian violence, common crime, or foreign terrorists. Because our warfighters are so well taught, trained, commanded and controlled, presumably such covered-up murders are incredibly rare.

Could undiscovered murder possibly be non-existent? No. We cannot be myopic. Yet we can't act like Chicken Little ("We must leave now. We must leave now.") when these murders do come to light.

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As the Iraq War goes on and on and early definitions of "victory" get watered down, the stress on warfighters is fertile ground for war crimes. Hence TTCC becomes even more important. Discipline had sunk out of control after three or four years in Vietnam. Today's military copes better, but that discipline

[44] *Id*. at 189.
[45] White, *supra* note 3, at A1.

can't last indefinitely, especially as warfighters get brought back for second and third tours of duty.

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The improvement from the Vietnam experience did not happen by chance. Years of critical self-examination and systemic changes caused the reversal.

The Peers Report addressed the why of My Lai – how could American warfighters collapse into such criminal butchery. The report identified five factors not excusing individuals but describing the conditions that contributed to the massacre.[46] They apply equally to serial war murders by warfighters turned rogue and "mini mass murders" by warfighters swept away by events – the befuddled private pointing and shooting at My Lai villagers.

(1) Lack of Proper Training. "Task Force Barker (the My Lai combat group) had not received sufficient training in . . . the safe guarding of non-combatants and the rules of engagement."[47] A specific Army regulation implemented November 10, 1967, required annual refresher training on the Geneva Convention but Peers found many commanders did not emphasize the training. The Army issued pocket-sized cards on the rules of war:[48] simple enough, don't kill or abuse non-combatants nor prisoners or disabled combatants not capable of resistance. They were seldom read. Peers noted poor training was no excuse for the malum in se butchery at My Lai. Many of the enlisted and officers were just simply criminals according to Peers.[49]

(2) Attitude Toward the Vietnamese. Forever soldiers have dehumanized the enemy to make killing them more palatable (Krauts, Nips, Ragheads, etc.). Common dehumanizing jargon for the Vietnamese was "gooks", "dinks", and "slopes".[50] In Charlie Company, where Calley was a platoon leader, the practice went to unreasonable extremes. The frustration of gorilla warfare helped explain this fixed false belief of some that the Vietnamese were subhuman. However, the main factor according to Peers was once again that the individual killer had a criminal mind and a lack of character.[51]

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[46] Addicott, *supra* note 27, at 162-72.
[47] *Id*. at 163.
[48] *Id.*
[49] *Id*. at 164.
[50] *Id*.
[51] *Id*. at 164-65.

(3) Nature of the Enemy. He fought from hiding, disappearing into tunnel structures. He would quickly drop his military insignia and weapons and appear in the civilian population. He fought by booby traps, landmines and ambush. He'd commence firefights from the midst of villages drawing on women and children as his shield and relying on American abhorrence of killing innocent civilians. He'd use women and children to hump ammo and set booby traps. Our warfighters couldn't count on determining civilian from combatant by uniform, age, even gender. Our fighters were constantly on edge – ready to fight in self-defense even if approached by a girl or boy in a supposedly friendly village.[52]

The Peers Report concluded the nature of gorilla warfare helps explain My Lai. It did not cause it. A company-wide instant descent into massive savagery can't be explained by the chronic tension all fighters had all the time or My Lai scale massacres would have occurred much more often.[53]

(4) Organizational Problems. The twelve month rotation system of sending soldiers to Vietnam for a year left the make up of units always changing. This hurt unit cohesion and consistency of training and operating. Task Force Barker specifically lacked intelligence gathering capacity and operational planning and supervision capacity. Barker went into My Lai expecting a handful of civilians and 250 Viet Cong.[54] They hoped for a huge, long overdue fight. Finding only civilians and without decent command and control, Task Force Barker went about killing civilians by the hundreds for hours.

The Peers Report noted that task force leaders regularly described operations as "search and destroy", but without the caution that "search and destroy" missions never were meant to be a license to kill anybody encountered on an operation. "Search and destroy" tactics were never meant to create murder zones.[55]

(5) Leadership. At the platoon and company level incompetent officers led the men. There was virtually no responsible command and control. In fact, 1Lt Calley had to give repeated orders to kill the villagers. Many of his men were stunned and didn't believe his orders were for real.[56] He could have withdrawn his orders and saved hundreds.

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[52] *Id*. at 165-67.
[53] *Id*. at 167.
[54] *Id*. at 167-68.
[55] *Id*. at 168.
[56] *Id*. at 168-70.

Calley's inadequacies were not unprecedented in the Army of 1968. He was a college dropout who squeaked by in Officer Candidate School. His men said he couldn't read a map and a compass befuddled him. He only stood five foot three inches tall.[57]

It's a shame Calley got an infantry platoon to lead. Back home the smart, athletic men who would have made great junior officers were avoiding the draft by seeking serial college deferments, seeking out friendly doctors to find disqualifying conditions, joining the reserves or national guard (a path much more likely to avoid Vietnam than by being drafted), or studying St. Augustine on the "just war" to see if their fine-tuned consciences were sufficiently offended to assert conscientious objector status. Some simply "had other things to do" than volunteer their patriotic selves.[58]

(6) Lack of a Grand Strategy.[59] By 1968, it looked like we had no plan to win. Some argue we should have invaded North Vietnam – the real enemy.[60] Others argued for an all out nation building effort in South Vietnam. Drive the VC and NVA into the jungles and mountains, build a nation on the rich farmlands and coastal cities, get rid of the corrupt RVN officials and hunker down for at least ten years of nation building with a 500,000 man American security and civil affairs force.[61] By 1968, the United States had neither the political consensus nor the will to go along with any grand strategies.

Without a grand strategy to win, morale sank. No one wanted to be the last to die in a war that would eventually end by countless negotiations in Paris. Low morale heightens that sense of self-preservation that favors shooting first and asking questions later at the slightest real or imagined hostile gesture of a non-combatant or prisoner.[62]

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[57] *Id*. at 171-72.

[58] Typical of war lovers working hard not to be warfighters, Vice President Dick Cheney had five deferments and studied political science at the University of Wisconsin during the height of antiwar student activity at that hotbed of rebellion. He is quoted as observing much later that Vietnam and the draft "were not the most important things" in his life then. DAVID MARANISS, THEY MARCHED INTO SUNLIGHT: WAR AND PEACE, VIETNAM AND AMERICA, OCTOBER 1967, 112-13 (2003).

[59] Some of My Lai's commentators argue the lack of an overall winning strategy on the part of the United States made atrocities like My Lai possible in that the enemy would fight to win in all ways and at all costs while U.S. forces were bound by stringent rules and a lack of support from the home front. The result was demoralized fighters who wanted to avoid dying, at any cost, in an unsupported war with no end in sight. Addicott, *supra* note 27, at 172-73

[60] *Id*. at 154-56, 172-74.

[61] This was the strategic thinking of General Victor Krulak, top Marine Commander in the Pacific, developed in 1965, debunking the war of attrition thinking of President Lyndon B. Johnson and Secretary of Defense Robert McNamara. He lobbied fiercely within the military and to the Secretary and the President. His thinking was rejected in favor of winning by achieving huge "body counts". NEIL SHEEHAN, A BRIGHT SHINING LIE 631-38 (1988).

[62] Addicott, *supra* note 27, at 174.

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The Peers Report was issued in March 1971. It was a good start. All the elements necessary to keep murder in war at a minimum were identified. The factors were essentially a restatement of long-standing conventional wisdom on military discipline.

The progress was not without what might appear to be backsliding. The war for the United States had ended by treaty in December 1973. The last Americans fled Saigon in January 1975, lifted by helicopters to a waiting ship. There was no will to prosecute war crimes.

The Secretary of the Army paroled 1Lt Calley in 1975. The same year the Army declined to file charges against several soldiers investigated for the summer of '67 murders by Tiger Force. Particularly disappointing was the fact the Army in 1975 had assembled evidence of multiple murders against a still active-duty soldier from Tiger Force, Lieutenant James Hawkins, by 1975 a Major. Including, but not limited to these murders, he ordered his men to take potshots at ten farmers in a field, killing four; another time he shot a frightened old man in the head.[63] We were war weary.

The Marine Corps had only twenty-seven convictions for premeditated or unpremeditated murder of Vietnamese. Leniency was extended in most cases. The average prison time actually served was four years.[64] The corporal/patrol leader who led the rape and murder at Chu Lai in 1966 and the bashing of the child's skull was paroled after 12 years in prison. That was the longest prison term any Marine served for murder in Vietnam. He was set free in 1978.[65] The war was over.

The best case for abundant leniency for these men was that they were by and large pretty decent people. Had they not volunteered or been drafted to serve, they would not have killed or raped anybody. They would have been in school, or working, and drinking beer on weekends and looking for mates. Their war and its damage to them, was not then and for most even now is not over. Any value of continuing to punish them was over a long time ago.

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[63] TOLEDO BLADE, *supra* note 30. After the *Blade* series, Army JAG looked again at Major Hawkins' alleged murders and recommended an Article 32 investigation. As of the May 2006 publication of the book, Sallah and Weiss indicate the Army has taken no action. The authors make no recommendation one way or the other, noting sound policy issues cutting both ways. TIGER FORCE, *supra* note 30, at 321. Most definitely the Army should not proceed criminally against Hawkins. That war is over. We should look back to the past on these matters only to do better now and in the future..

[64] SOLIS, *supra* note 24, at 139, Appendix E.

[65] *Id.* at Appendix F.

When any war ends it is time to bind up all wounds and allow the peace to settle in. The healing balm that is peace works slowly.

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In the years since Vietnam, the military published updated training manuals and canned lesson plans on the Law of War. Typically, the instruction covered the following: (a) obligations toward enemy and noncombatants and property; (b) our warfighters rights and duties if captured; (c) duty toward captured or detained enemy personnel, property, and civilians; (d) the probable results of violence against and inhuman treatment of personnel; (e) illegal orders and duty not to obey clearly illegal orders; (f) rules of engagement; and (g) duty to report war crimes. (This is the sticky one – young fighters won't want to rat on their comrades, and command officers may not be able to overcome the temptation to cover up atrocities committed by their warfighters).[66]

Lessons, manuals, and regulations are virtually useless unless imbued into the warfighter as instinct. It is not an easy task. It is complicated by the inconsistencies of what a warfighter is: physically fit, trained to kill, to kill at close quarters with rifle, bayonet, knife, grenade, and dirty fighting tricks. He kills to kill the enemy, defend himself, and protect his comrades. We superimpose by teaching, training, and asserting command and control over all the cautions and niceties a "hearts and minds" war and the law of war require. With this tautology, you have quite a task to turn out fighters who won't go rogue under Hill 55 warfare or Iraq type urban insurgency warfare and yet who fight hard and courageously within the rules. This is how the Marine Corps is doing it now.[67] This is TTCC meant to turn out the complete package: a fierce fighter with courage, brains, heart and discipline to fight within the rules.

Non-Commissioned Officer and Officer Basic Schools both have formal Law of Warfare classes. After 9-11, when responsive, limited wars seemed both inevitable and imminent, teaching and training got intense. Field exercises set up hypothetical situations (e.g., terrorist taking cover behind a child hostage). Computer simulations were generated. The Marine would respond. Critiques would follow.[68]

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[66] Addicott, *supra* note 27, at 182.

[67] Most of the information on how the Marines handle training and operations is based on interviews with Major Thomas G. Citrano, USMC, an armored infantry company commander with the 1st Marine Division in Iraq from March to September 2003. He fought in the initial war phase of operations, which were followed by peace keeping duties after the fall of Saddam Hussein (Operation Iraqi Freedom and Operation Enduring Freedom respectively). Major Citrano is the author's nephew. Interviews with Maj. Thomas G. Citrano, USMC, 1st Marine Division (July 16 and 17, 2006).

[68] *Id.*

The connection between decent treatment of non-combatants or prisoners and the winning of the war was taught and stressed. The training was given to all ranks. The Marines cracked down on pejorative language (ragheads) or brutal talk (skin the ragheads). Officially it is zero tolerance. Unofficially, it obviously occurs in training and in the war zone. Its unacceptability is stressed constantly.

Basic instruction of officers includes emphasis on the "Medina Doctrine": The commanding officer is criminally responsible for ordering a violation of the law of war or knowing that a crime is about to be committed and having the power to prevent it, and he fails to exercise that power. It's a variation on the standard we applied to General Yamashita. General Yamashita was tried for war crimes because he did not prevent the killing and rape of civilians in Manila by fighters under his command when he knew or *should have known* it was occurring.[69]

Captain Medina was in command at My Lai, claiming to not know what was going on during the massacre as he thrashed around the periphery of the village. F. Lee Bailey got him acquitted of murder for failing to order the killing stopped and acquitted even for dereliction of duty. The present day lesson to company and field grade officers is don't count on F. Lee Bailey to pull a rabbit out of a hat for you. Instead, practice TTCC.

In Iraq, by way of example, the 1st Marine Division showed how this "hearts and minds" tactical discipline was imbued. In the run up training before the invasion, Commanding General James Mattis spoke to each and every assembled unit of his 60,000 Marines and set his rules: First, do no harm; second "we will keep our honor clean" (from the Marine's Hymn). Commanders down to the platoon level trained their Marines on these rules and the law of war issues at least weekly. Once the war started, seldom did a mission, however small, begin without a briefing that included the message we can't win the war by abusing the noncombatants or prisoners.

After the fall of Saddam and the peacekeeping task set in, General Mattis stressed another rule: We must avoid the tipping point. He taught his Marines that meant even small slights and offenses against the Iraqis (rough handling, rough questioning, insults, rudeness) not individually significant could add up to the "tipping point" where we would lose the community we aimed to help. Every Marine under his command heard from General Mattis and repeatedly from commanders down the chain of command about the tipping point.[70]

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[69] Addicott, *supra* note 27, at 169-70.
[70] Interview with Maj. Thomas G. Citrano, USMC, *supra* note 67.

Constant teaching, intense training, and smothering command and control will not stop every murder, rape, or assault on prisoners and non combatants. Where all that TTCC comes together, war crimes should be rare.

IV. PARADOXES. BEFORE A CONSENSUS, PONDER ALL THIS.

(1) Why a law of war? War is violent, brutal and the side which is more violent and brutal usually wins. Why make up rules of "moral" or "immoral" ways of killing in war?

That sentiment is common sense and viscerally satisfying to both the military mind and the civilian in support of any given war. It's also a basis to heap ridicule on war by pacifists whether they are pacifists *ad hoc bellum* or against all wars by religious conviction.

The Law of War is simply the effort to minimize harm and destruction since war will happen anyway. Here is the reasoning for fighting by rules: (a) expectation of reciprocity – enemy will follow the rules also; (b) self interest – don't destroy non-military property that could be the spoils of war – in the U.S. case in Europe and Japan, hold down the cost of what you pay to rebuild during the peace; (c) savage abuse can extend the war and complicate the peace (e.g. some Southerners still talk of Sherman's March to the Sea as if it happened last week); (d) using military assets on non-military targets is an inefficient use of those assets; and (e) common decency or lack of it is the main weaponry of the propaganda war.[71]

In the wired digital world of today, the last point looms large. My Lai's slaughter of innocents slowly exposed in the media hurt that war's effort. At Iraq's Abu Ghraib prison, a young female Army soldier posed for photos degrading Iraqi prisoners (e.g. one in which the female soldier, cigarette dangling from her mouth, points at the exposed genitals of a naked Iraqi man in a line of five naked male prisoners, heads hooded with garbage bags).[72] The instant flood of stories and pictures of that sort of abuse from internet and regular communication channels morphed this "heinous" behavior into a phony My Lai moment. It inflamed the Muslim community and signaled and fueled the first massive domestic political attack on the Iraq War. The military launched no effective counter propaganda attack.

(2) Air war kills lots of innocent civilians. Why put rules on the ground fighter? The application of air power is legal if bombers limit targets to

[71] Addicott, *supra* note 27, at 174-81.
[72] This and similar photos abound on the internet *at* http://www.cbsnews.com/stories/2004/04/27/6011/main614063.html.

valuable enemy military assets or operations. Unavoidable "collateral damage" (e.g., civilians, schools) must be held to a minimum and not intended, just tolerated.

Such is the law of war for the air fighter. It is one part scholastic philosophy's principle of the double effect (sin results only if you intend the evil effect not merely tolerate it) and another part which derives from the criminal law defenses of necessity or choice of evils (military value of target outweighs collateral damage).[73]

This leaves the air fighter insulated from prosecution whether operating from a high altitude bomber or lending close air support to ground fighters. The moral dimension (value of target versus collateral damage) is presumptively within reason. The only potential for prosecution would be the rogue apocryphal pilot who would brag (confess) he overflew the enemy fighters so he could bomb a school to kill children on the playground.

Convictions for murder of Vietnamese civilians bear out this practical immunity for air fighters. In Vietnam there were 41 Army convictions, 27 Marine convictions, 3 Navy convictions and 0 Air Force convictions. Add manslaughter and the combined figures increase to 67 Army, 42 Marines, 5 Navy and 1 Air Force.[74] The Air Force and Navy were primarily involved in air fighting, the Army and Marines in ground fighting.

It may not be fair to the ground fighter, but that's the way it is. The rogue ground fighter leaves evidence and defenses of choice of evils or military necessity or non-culpable negligence that often can be shown as palpable

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[73] The Geneva protocols on air war prohibit direct and intentional targeting of civilians and civilian buildings. Targets clearly military or capable of military application but insinuated into a civilian setting can be bombed, but not "indiscriminately". *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391. Articles 48, 51, 52 and 56 provide the following: there be no bombing to terrorize civilians and "indiscriminate" bombing of military or mixed military/civilian use targets must pass this test; and anticipated civilian damage will not be "excessive in relation to the concrete and direct military advantage anticipated," however, presumptively some targets (e.g., schools, hospitals, churches), are off limits unless they are covers or ruses for military purposes; dams, roads, and other public works are non targets unless the military contribution of the work is "regular, significant, and direct". *Id.* For discussion of the U.S. treatment of Additional Protocol I *see* Colonel Kenneth Watkin**,** *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing*, 15 DUKE J. COMP. & INT'L L. 281 (2005). Application of these imprecise and elastic guidelines gives the bombing authority wide latitude to argue that any particular targeting and bombing is justified.

[74] THE REAL LESSONS OF THE VIETNAM WAR: REFLECTIONS TWENTY-FIVE YEARS AFTER THE FALL OF SAIGON 280, n. 48 (John Norton Moore & Robert F. Turner eds., 2000).

nonsense (e.g. the Chu Lai Marine squad leader raping the mother and bashing the baby's skull).

This paradox can be rooted in the fact the ground fighter kills a person he sees, points his rifle at, or thrusts his bayonet into. There is an intimacy between killer and killed. Without a credible cover story or effective cover up, the potential for prosecution is higher. Intent is discernible. Evidence is discoverable.

Ponder this: Many moralists and law of war experts defend the morality and legality of the fire bombing and atomic bombing of Japan and the fire bombing of Germany. No reasonable defense follows the memorable picture of the Japanese officer, sword raised about to behead a kneeling American prisoner. The beheading is immoral and is murder.

What follows the visual image of Hiroshima fully destroyed next to the grainy video tape image of the beheading of journalist Nick Berg by terrorists or the visual image of the Marine at Chu Lai bashing the head of a three year old? The first image only numbs and has rational apologists. The latter two images inflame and have no apologists except the "it's only infidels" faction in the Mideast and the "it's only gorillas" faction here at home.

In the face of mind numbing moral and legal infliction of mass death and mass destruction in air war, the resulting moral conundrum is whether the whole weight of law of war rules falling on the ground fighter is fair and just. It isn't. It may be the inequity can only be mitigated by generous mercy in the criminal process against the ground fighter.

(3) The good guys are not the bad guys. Show a little appreciation for the military law enforcers: investigators, prosecutors, and defenders. In going after the rogue ground fighter, the prosecuting arm is criticized both by civilians and by many other warfighters. To their critics, they are the meddling equivalent of "Internal Affairs" police officers constantly harassing Starsky and Hutch who have found a "better way" than following the rules to get the job done.

Salute the enforcement branch. They help win the war. War criminals and their vocal advocates help lose the war.

(4) Murder is murder, but it is different in Des Moines than in a war zone where it is more of a function of diminished cognition than of a barbarous heart. It simply **is** different and that is best demonstrated by the array of defenses that can be fairly, reasonably, and persuasively argued: defense of

self or others, following orders, duress, choice of evils, and legal necessity. To this, especially for punishing purposes, add the implicit defense of diminished cognition. The rules of engagement and the law of war get awfully confusing and vague as applied to the ground fighter.[75]

Defense of self or others in war crime prosecution and defense has a hairtrigger to it. The principle is that any reasonable response to any reasonable threat, actual or reasonably perceived, is justified even if resort to lethal means is the reasonable response. Rules of engagement in any local war venue give guidance only and do not control.

It is just to both the United States and the accused that the fact issue of what is "reasonable" is determined by a court-martial composed of military personnel. The likelihood of common sense verdicts is higher than if Berkeley grad students who would always convict or hard hats who would always acquit were the fact finders.

Defense of self or others is a powerful defense for the combat war fighter. With reasonable evidence of the defense at the investigative stage, prosecutorial discretion exercised to not charge or to dismiss must be considered as a matter of simple justice. Then vigorously defend the dismissal in the propaganda arena.

The killing of a rival at a godfather's orders by a young Mafia soldier is simply not the moral equivalent of a reluctant private at My Lai firing his rifle into huddled peasants after repeated demands of a superior officer to "waste

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[75] Article 118, U.C.M.J., states murder is killing without "justification or excuse". MCM, pt. IV, ¶43 (2005). This gives the defense counsel room to develop defenses peculiar to alleged combat zone murders. Diminished cognition is a term coined for this article, not a recognized defense in military law. It does attempt to describe the moral ambiguity of killing in war time at the fuzzy border area between the clearly unlawful and the clearly lawful. In choice of evils, the evil resorted too must be lesser than the evil sought to be avoided and it must be a last resort. S*ee* United States v. Bailey, 444 U.S. 394, 410 (1980), *and for a discussion on the choice of evils doctrine see* 22 CORPUS JURIS SECUNDUM §50 at 57. The U.C.M.J. does not set forth defenses. Choice of evils is not frequently used. The military defense counsel should aggressively pursue such an instruction for the court-martial from the military judge where that concept so phrased advances the defense theory best. James Webb is a United States Senator from Virginia and is a former Secretary of the Navy for President Reagan. As a law student and decorated former Marine platoon and company commander in Vietnam, he discussed this fuzzy moral area for the enlisted men ordered to kill unlawfully. James E. Webb, "*The Sad Conviction of Sam Green: The Case for the Reasonable and Honest War Criminal," Res Ipsa Loquitur*, 26 GEO. REV. OF L. & PUB. INT. 1, at 11 (1974). Green was on his first combat patrol on February 19, 1970 when he obeyed the patrol leader's orders to take part in killing 16 women and children. He was sentenced to five years which was reduced to one year by the convening authority. In July 1975, Green shot and killed himself. Webb worked to get Green a posthumous upgrade of his discharge from dishonorable to general which was granted in 1977. SOLIS, *supra* note 24, at 190.

them," "I mean kill them." To be a murderer under military law, the killer had to actually know the order was illegal or the order would have to be such that any reasonable soldier would know it to be illegal. Of course this is measured against a backdrop that almost always orders are to be followed, not debated. The My Lai acquittals of enlisted men are regrettable, but understandable in a hostile environment similar to Hill 55 where civilians were perceived to be in bed with the enemy.

Likewise the killing of a family of five in Des Moines with knives by a neighborhood improvement team because the family kept diseased dogs, junk cars on blocks, and created disturbance at all hours raises no "choice of evils" defense. However, Senator Bob Kerrey's Seal team, had they been tried at the time, could have asserted that defense to the killing of the family of five to save the mission and avoid exposure to VC. Depending on the persons forming the court-martial, either convictions or acquittals could have followed.

The prosecutor's best argument would have been it was an insignificant mission of marginal military value and butchering old men, women and children "for the mission" was patently unreasonable. The Seals should have simply aborted the mission. The defense might have countered with for want of a nail the horse shoe was lost, then the horse, then the rider, then the battle, and ultimately the war. This is precisely why fellow warfighters, not hard hats or Berkeley grad students, should be the factfinders to sort out and evaluate such arguments.

Within days of Senator Kerrey's "awful night," an event similar on all fours to the Seal's actions to save the mission occurred to a Marine patrol. On March 1, 1969, eight Marines lay in ambush. Three young girls and a boy happened upon the ambush and started to shout to the nearby villagers. The four were seized, bound, and gagged. Two of the Marines led them away to a small bunker and killed them. To cover the deed up, the bunker was later collapsed upon the children (ages eleven to nineteen) with grenades. The two Marines were convicted of premeditated murder and received mandatory life sentences. The sentences were reduced to three years on review.[76]

These situations don't raise the "fog of war" notion at all. The killings are intentional – even trained responses – decided upon and fully willed. There is usually no fog about it.

Philip Caputo grumbles at length about his own prosecution and that of his two enlisted Marines, and captures well the moral dimension of most of

[76] SOLIS, *supra note* 24, at 140.

these war zone murders. His narrative is basically that with search and destroy tactics, declaration of free fire zones, and the vague edges of the rules of engagement and when they apply, determining a just killing from a murder is a matter of forensics and analysis that should not result in a murder charge for the warfighter making the wrong decision.[77]

Had Caputo's Marines raided the VC leaders' hut in the night and killed them on the spot, or set an ambush outside their hamlet and shot them as they walked into the killing zone, the killings would be no crime. A dangerous capture mission followed by killing of disarmed prisoners was murder. Lawyers go figure, but don't put that on the warfighter.

Caputo's position is compelling, but wrong at least in part. A bright line has been drawn on killing prisoners not armed and not engaged in escape or resistance. It is an important line to draw and must be enforced absent a clear choice of evils, necessity situation, or the reasonably believed appearance of escape or resistance.

Much must be granted to Caputo. He moves right past the "fog of war" canard to the heart of the matter. Murder in war so often appears at the edges of attempts at defining bright line rules. The real fault of the warfighter who murders is somewhat like the criminal law concept of diminished intent (e.g.: blind drunk killer). Murder in war could often be more accurately described by a concept of diminished cognition: these are warfighters, not moral philosophers or lawyers.

Diminished cognition allows for the application of the high-minded principles of the UCMJ and Geneva Conventions and yet mitigates culpability. Here the weakened conscience of the warfighter, even if weakened by a native criminal leaning, gets partially absolved. Mitigating his acts are the brutal circumstances of the war and often less than perfect TTCC.

Diminished cognition really just describes the *mens rea* of the typical warfighter who murders. He has a diminished recognition of the wrong he does, the negative impact on the war effort, and how he violated specific rules of engagement.

All this being present, the case can be made that premeditated murder is seldom an appropriate charge. Most of these cases, especially those involving younger lower enlisted, should often be analyzed and ultimately punished under

[77] CAPUTO, *supra* note 20, at 312-26.

UCMJ definitions of voluntary manslaughter, involuntary manslaughter, or culpable negligent homicide, according to their facts.

(5) Medina and Yamashita principles.[78] Military officers are told throughout their careers that they are accountable for all that happens under their command. This is utopian and serves the goal of turning out first rate commanders.

The commander's personal, criminal responsibility, on the other hand, is determined by the Medina Principle (don't order war crimes or fail to stop war crimes you know are about to happen or happening). Criminal liability can also be based on the unforgiving Yamashita Principle (the commander can be charged as a principal with capital murder or rape or other crimes even where he did not, but should have, known of the crimes or didn't do enough to prevent or stop them if known). [79] The risk of injustice is great where prosecutions of commanders are based on accountability, not personal responsibility.

The Medina/Yamashita Principles should not be applied criminally in the case of war crimes except under the following conditions: (1) for a charge of murder, rape, or the like, ordering it done or failing to order it stopped after having actual knowledge of it and a clear, reasonable opportunity to act; (2) for a charge of dereliction of duty, a clear pattern of failing to teach, train, control and command on the factors that contribute to war crimes by those under the officer; and (3) knowingly participating in a cover up.

Weight must be given to the Peers finding that the core reason for the war crime is the actor is a criminal.[80] The United States military in Iraq can proudly point to the rarity of war crimes. To apply the Yamashita Principle criminally to a commander where the commander has followed the TTCC protocol is simply wrong. When a war crime has occurred in a well taught, trained, commanded and controlled unit, it should be treated in its randomness and rarity as proof the system is working and the commander is doing the right thing and a good job.

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[78] Addicott, *supra* note 27, at 169-70.
[79] *See id*.; *See also* In re Yamashita, 327 U.S. 1 (1946). Yamashita filed a direct petition for a writ of habeas corpus in the United States Supreme Court after his trial and conviction for murders and rapes and his death sentence for failing to prevent the murders and rapes by troops under his command in the Philippines in the late stages of the war. The Supreme Court denied his petition. In separate dissents, Justices Frank Murphy and Wiley Rutledge characterized the charging and convicting of murder and rape on evidence amounting at worst to failure of command and control an exercise in vengeance by the victor over the vanquished, not justice. *Yamashita*, 327 U.S. at 27-81.
[80] Addicott, *supra* note 27 at 164.

The initial unfairness of the Yamashita Principle being applied in the well taught, trained, commanded and controlled unit is later compounded in the politics of promotion. Even an adverse fitness report because of the random bad luck that a war crime happens under one's command can hurt military leadership down the road. If a young officer can hit a promotional ceiling by virtue of such random bad luck that his or her Marine committed a war crime in spite of outstanding TTCC, we lose a potential General Mattis and have an officer of unlimited potential retire at age forty-five as a lieutenant colonel. That's a loss.

Use the Medina Principle only where it applies: Abu Ghraib. There, failed leadership still struggling to define proper methods of terrorist interrogation gave little teaching or training and exercised little command and control. Then hapless enlisted persons were made to be scapegoats for the inadequacies of their superiors.[81]

V. CONSENSUS?

Is there a possibility of a consensus forming around the following points?

(1) Murder, rape, assault, and prisoner abuse will happen even in the best disciplined military units. Don't overreact to it. The fate of U.S. limited wars should not rise or fall on either the propaganda value of such crimes to the enemy, or their propaganda value to war critics at home. Rather the military's own propaganda machine should with total transparency get ahead of the story from the first report of a war crime through exoneration by investigation or trial or conviction. Military propaganda efforts should trumpet prevention efforts, enforcement of the Law of War, concern for due process, and all the admirable elements of our military justice operation. It's a teaching moment. It is our counter attack in the propaganda war.

(2) Debate on war should be welcomed. Vigorous debate without ascribing bad motives and criminal accusations should be welcomed. Bomb

[81] In a leadership vacuum, Sgt. Charles Graner and PFC Lynndie England routinely sexually and physically humiliated male Arab prisoners. On their terms, the subjective evil was similar to that of cruel fraternity or athletic team initiations. They received dishonorable discharges and three year (England) and ten year (Graner) sentences. John White, *Reservist Sentenced to 3 Years for Abu Ghraib Abuse*, WASH. POST, Sept. 28, 2005, at A12. They conceded knowing what they did was wrong but stupidly believed it helped the cause (softening up prisoners for authorized interrogators whose limits on "stressful interrogation" had yet to be clearly delineated). The resulting devastating defeat suffered in the propaganda war was not the fault of England and Graner. It was the fault of the commanders who could have easily stopped these practices cold. They would surely recognize the devastating propaganda blow back from such practices if and when exposed. The Army command was either culpably ignorant or feigned ignorance to these "softening up" tactics in the fuzzy world of what's permissible interrogating.

throwers ("Bush is Hitler" or "It's unpatriotic to debate war crimes") should be marginalized to the unreasoning fringe where they belong.

(3) War is political. Debate is inevitable. We should invite contrarian views even from the military. If logic and reason, not partisanship and name calling, frame the debate, this form of politicizing war will be of great value. Public expression of contrarian views from within the military should be encouraged.[82] All this public discussion, especially informed by the military contrarian, will force any given limited war to justify itself from inception through conclusion. This will focus goals, modify tactics, sharpen exit strategies, and derive reasonable terms of peace treaties. Hopefully it would provide a perspective on inevitable war murders that would not allow the justification and prosecution of a war to rise or fall on that issue.

(4) We can trust military law and the command structure to do a reasonably decent job of prevention and enforcement of the law of war. We must support that effort and marginalize the "its only gorillas" and the "you can't discuss our war crimes" crowds. Unwittingly, in undermining the military justice process, these people advance the cause of the enemy.

(5) Be comfortable with acquittals. Well put government cases well defended is the hallmark of military justice. Acquittals by courts of military officers and senior enlisted are usually reason-based and the accused deserves acquittal. The process is devoid of the biased rubber stamp conviction of the Berkeley grad students or biased rubber stamp acquittal of the hard hats.

(6) Favor mercy over punishment. Perceived easy sentences, generous reductions on review, and paroles and pardons are the right thing to do. When the Berkeley grad students carp that a punishment is a "slap on the wrist" and the hard hats grumble "that's cruel and excessive", the punishment is probably about right. 1Lt Calley's case may be an example of mercy gone mad, but that war is over. We have healed.

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[82] For active duty officers, speaking out critically presents the obvious career risks. If done, it must be with discretion and finesse. Being shrill or flamboyant presents even disciplinary risks. UCMJ Art. 88 forbids using "contemptuous words" about the president, vice president, secretaries of defense, and of the service branches. MCM pt. IV, ¶12. (2005) The catchalls, Article 133 (conduct unbecoming an officer) and Article 134 (acts prejudicial to good order and discipline) also tend to quash public criticism from the officer corps. For the country, the risk the military yes-man echoing and then implementing civilian leadership desires is obvious. MCM pt. IV, ¶59, 60. (2005). *See also* COL. H. R. MCMASTER, U.S.A., DERELICTION OF DUTY: JOHNSON, MCNAMARA, JOINT CHIEFS OF STAFF, AND THE LIES THAT LED TO VIETNAM (1997). McMaster, then a Major teaching history at West Point, shows that the U.S. military is capable of withering criticism of three and four star sycophants – at a distance of 30 years. The active duty high ranking war fighter contrarian "firing for effect" when policy could be affected will be called traitor, aider and abettor of the enemy, fool. Some will call him or her what he or she is: a patriotic American. *Id.*

(7) The ground fighter and the military justice system deserve special honor. Given the practical immunity the air fighter has from prosecution as a war criminal, it is the ground fighter's singular burden and special duty performed under the microscope of military law to protect the ethic of the noble warrior in combat. Military law enforcement safeguards and insures the noble warrior mythology is indeed rooted in fact by purging those betraying the myth.

VI. CONCLUSION?

The night of his sentencing was the last I saw of my client who murdered Nguyen Chay. We talked outside the courtroom, a Quonset hut on Hill 327 looking out on rice paddies, Danang, Monkey Mountain, and the South China Sea. In his soft spoken, respectful manner he thanked me. He repeated to me what he told the Court. He knew he'd done wrong and someday he hoped he'd feel he'd done wrong. He said in a promise to no one in particular that when this war was all over he'd live a good life.

We shook hands. He then got into a jeep with his guard and a driver and they went down the road toward the Marine Brig at the base of Hill 327. There he would await transfer to the Navy's prison in New Hampshire where he would serve his sentence.

Over the years, I made two half-hearted attempts to contact him. In 1977, I was taking a deposition in his hometown. I didn't catch up with him, but did talk to his neighbor, who was also his landlord. He described my client as single, quiet, respectful and a good tenant who paid his rent on time.

In 2001, his hometown directory listed his Marine brother at the home where his Mom and Dad had raised the boys. The brother told me my client had married happily, had a daughter, and lived in a nearby town. I did not call him. Nguyen Chay is at rest. My client, whom I described to his court-martial as a good boy at age eighteen, had grown into a good man. I decided not to disturb him. The war was far away and long ago.

Or was it? For those who lived it in or out of uniform, whether they burned hooches in the Central Highlands, or draft cards in Berkeley or Madison and were full of themselves and their "moral" indignation, or fell somewhere in between, the war will be forever as close as memory.

Remember if you would. Just don't wake the "gorillas". Do not disturb this peace we struggle to maintain.

WHO'S IN CHARGE HERE?— INTERNATIONAL CRIMINAL COURT COMPLEMENTARITY AND THE COMMANDER'S ROLE IN COURTS-MARTIAL

Allen J. Dickerson*

"Our Nation expects and enforces the highest standards of honor and conduct in our military . . . . Every person who serves under the American flag will answer to his or her own superiors and to military law, not to the rulings of an unaccountable international criminal court."

– President George W. Bush[1]

I. INTRODUCTION

Although the American military is a potent international institution, discussions of its regulation have been oddly domestic. The court-martial – the single most important institution for disciplining military forces, preventing atrocities and punishing offenders – has seen its jurisdiction and procedures hotly debated, but most often by those in uniform or individuals interested in domestic military policy. This paper aims to internationalize the discussion, recognizing that the discipline of American military forces is of major concern to both international law and U.S. foreign policy. By exploring the interaction between a major innovation in international law,– the International Criminal Court (ICC),– and the extensive clemency powers exercised by military commanders under the laws governing U.S. courts-martial, I hope to demonstrate that a systematic rethinking of American military justice is necessary in light of changed international conditions.

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The Statute of the International Criminal Court was adopted by a vote of 120 to 7 late in the evening of July 17, 1998. For those voting in favor of the

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[1] Remarks to the 10th Mountain Division at Fort Drum, New York, 38 WEEKLY COMP. PRES. DOC. 1228, 1231 (July 19, 2002).

final draft, the lack of unanimity – and the presence of the United States and China among the nations opposed to adoption – was nearly irrelevant. For them and many prominent Non-Governmental Organizations, the mere existence of such a court would help end impunity for major crimes against international law, and would act as a permanent deterrent to despots and tyrants.[2]

The Court as constituted was given substantial powers, as it was intended to have the teeth to act as a true international court, reliant only tangentially on the United Nations and certainly independent of any particular state.[3]

The participants in the Rome Conference recognized that the powers of the court could invite attempts to capture its authority for political ends. Consequently, a series of checks on the jurisdiction of the court were integrated into the Court's statute, including limits on its territorial and subject-matter jurisdiction. The most powerful check on the new institution, however, was the principle of complementarity: the court would not hear any case unless the state or states with municipal jurisdiction were "unwilling or unable genuinely" to prosecute the offender.[4]

Complementarity should be a major cause for relief in the United States. The U.S. government has consistently argued that the far-flung military obligations of the United States, and its role in post-Cold War global security, make it uniquely vulnerable to politically motivated prosecutions before the ICC.[5] With a half-century-old system of military justice dating back to the

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[2] *See, e.g.,* Toni Pfanner, *ICRC Expectations of the Rome Diplomatic Conference,* 322 INT'L REV. RED CROSS 21 (1998) ("an independent and efficient international criminal court would serve as a serious deterrent, saving countless persons in the future"); Press Release, Federal Public Service Foreign Affairs Belgium, Belgium Welcomes the Establishment of the International Criminal Court (Nov. 4, 2002) *available at* http://www.diplomatie.be/en/press/homedetails.asp?TEXTID=168 ("[the Court] will act as a deterrent and will help to promote international humanitarian law and human rights"); Ambassador Juan Gabriel Valdes, Statement by the Permanent Representative of Chile to the United Nations, on behalf of the member states of the Rio Group (Nov. 12, 2001) ("It is our belief that the Court's establishment will also be a powerful deterrent against future authors of such atrocities."). *But see* Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence?,* 167 MIL. L. REV. 156, 188 (2001) (an offender has "about as much chance of being prosecuted as 'winning the lottery'").

[3] I discuss the jurisdictional scheme of the International Criminal Court in depth in the next section, *infra.*

[4] *See infra* note 56, and accompanying text.

[5] *See, e.g.,* Marc Grossman, U.S. Under Sec'y of St. for Pol. Aff., Remarks to the Center for Strategic and International Studies, Washington, DC: American Foreign Policy and the International Criminal Court (May 6, 2002) *available at* http:// www.mtholyoke.edu/acad/intrel/bush/rome.htm ("The United States has a unique role and responsibility to help preserve international peace and security. At any given time, U.S. forces are located in close to 100 nations around the world conducting peacekeeping and humanitarian operations and fighting inhumanity. We must ensure that our soldiers and government officials are not exposed to the prospect of politicized prosecutions

Second World War and with roots in British and Roman law, the United States seems well-positioned to avail itself of the benefits of complementarity.[6] Surely, if complementarity is to mean anything, a system of hundreds of uniformed lawyers and judges dedicated solely to policing the armed forces must signal an "ability and willingness" to prosecute the grave offenses within the ICC's purview.

The United States is justifiably proud of its military justice system. Changes over its history have taken a discipline-centered system rooted in pre-Revolutionary War British law and evolved it in the direction of civilian principles of substantive justice. With the changes inaugurated by the Uniform Code of Military Justice (UCMJ) in 1950, an American court-martial is similar in most respects to a civilian criminal trial. Nonetheless, military law is rooted in the unit discipline that wins – or loses – wars, and this concern, central to military prosecution and absent from civilian criminal law, has been the principal point of contention in debates over the future of military justice. Traditionally, this dispute has taken the form of a conversation between those who want greater commander control over courts-martial, believing this will further the aims of unit cohesion and discipline, and those who favor lessened command influence out of a concern for the procedural rights of accused servicemembers.[7]

This paper suggests a different take on this debate. The emergence of the International Criminal Court and the concept of complementarity provides the possibility of the U.S. system of military justice being exposed to significant international scrutiny. If the U.S. invokes complementarity to block an ICC prosecution, it must be prepared to defend the UCMJ before a world body likely to be skeptical of military justice generally and the United States' version in particular. Exhibit A in the international court's analysis will be the effectiveness of the U.S. court-martial system and the extent to which it is viewed as willing to prosecute Americans for atrocities. And a major component will be the influence those in the accused's chain of command – and therefore those potentially implicated in their crimes under the doctrine of command responsibility[8] – have over the selection of charges, conduct of trials, and punishment of the convicted.

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and investigations."). For a cogent explanation of the ICC's potential utility to less powerful states or non-state actors, see W. Chadwick Austin & Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare,* 39 VAND. J. TRANSNAT'L L. 291 (2006).

[6] The history of our military justice system is addressed in Section III, *infra.*

[7] *See* Section III(A), *infra,* and accompanying citations.

[8] *See* Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998) (hereinafter ICC Statute) (establishing criminal responsibility for commanders who are aware of crimes committed by subordinates, or consciously disregard such knowledge, and

While the question can be viewed from many angles, this paper concentrates on one particular element of command influence in the U.S. military justice system: the right of a commander to reverse or reduce sentences imposed on convicted servicemembers. This example is a telling one for several reasons. First, this power does not affect the conduct or legitimacy of the court-martial itself, but *does* impact an element of particular interest to an international court: sentencing and deterrence. Second, unlike many commander powers that seem to work to the disadvantage of the accused, this power is generally accepted as a merciful and praiseworthy part of the overall system. While many of the ways commanders can influence the administration of justice are objected to on due process grounds, this particular power avoids that challenge. Consequently, it is one of the less-discussed issues whenever the need for revisions to the UCMJ is considered. However, because this authority could serve as a procedural shield for accused servicemembers, it is precisely the sort of command influence most likely to be thoroughly examined by an international court considering prosecution of an American.

Ultimately, this paper has two goals. First, to suggest that elements of the Uniform Code of Military Justice should be re-examined not merely from the point of view of due process, as has been done with great ability,[9] but also by considering the military justice system's role as the primary wall between American servicemembers and trial by the International Criminal Court. Second, this paper is intended to join the growing chorus of voices[10] calling for a systematic review of the U.S. military justice system with an eye toward its interaction with the international community and international law.

II. THE CONTEXT: JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

A. Subject-Matter Jurisdiction

The Court's jurisdiction *ratione materiae* is limited to "the most serious crimes of concern to the international community as a whole."[11] Specifically,

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fail to take all reasonable steps to prevent such crimes or submit the perpetrators to investigation and punishment).

[9] *See* Walter T. Cox III et al., Nat'l Inst. on Mil. Justice—, Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (2001), *available at* http://www.nimj.com/documents/Cox_Comm_Report.pdf. The Cox Commission, chaired by a retired Chief Judge of the United States Court of Appeals for the Armed Forces, independently heard testimony and formulated numerous recommendations that were forwarded to the appropriate committees of the United States Congress. Many of the Cox Commission's recommendations related to concerns over the ability of U.S. military law to "keep pace with . . . standards of procedural justice." *Id.* at 2.

[10] *See, e.g.*, H. F. Gierke, *Five Questions about the Military Justice System*, 56 A.F. L. REV. 249, 259-60 (2005). The author was formerly Chief Judge of the United States Court of Appeals for the Armed Forces.

[11] ICC Statute, *supra* note 8, art. 5(1).

the Court has jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.[12] The first three offenses are defined in the Statute itself. Defining genocide was particularly simple, as the definition is simply borrowed directly from the Genocide Convention of 1948,[13] a formulation recognized as codifying customary international law.[14]

The definitions of crimes against humanity and war crimes, however, are more hotly debated. The definition of crimes against humanity contained in Article 7 of the Rome Statute is significantly broader than that contained in the oft-cited Statutes of the Yugoslav and Rwandan tribunals.[15] Specifically, the acts delineated in Article 7, paragraph 1, include rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence as actions that could trigger the jurisdiction of the Court.[16] The list further includes forced transfer of population, enforced disappearance of persons and apartheid among prohibited acts.[17] Such acts, however, must be committed as part of a "widespread or systematic attack directed against any civilian population, with knowledge of the attack,"[18] and there must be "multiple commission of [the specified act] . . . pursuant to or in furtherance of a State or organizational policy to commit such attack."[19] These last requirements significantly limit the scope of ICC jurisdiction over crimes against humanity, even given the comparatively broad list of offenses in paragraph 1. Because such attacks must be directed against a civilian group, and because there must be a state policy to commit them, it becomes comparatively difficult to prove a charge of crimes against humanity. The numerous elements of the offense, and the evidentiary difficulty of proving them, makes the successful prosecution of a United States soldier or civilian leader for crimes against humanity unlikely.

The Court's jurisdiction over war crimes, however, does not have these heavy evidentiary requirements, and consequently the definition of war crimes

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[12] *Id.*
[13] *See* Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277. The United States has been a party to the Convention since 1988. *See* Office of the United Nations High Commissioner for Human Rights, United Nations Treaty Collection, *available at* http://www.unhchr.ch/html/menu3/b/treaty1gen.htm (last visited June 19, 2007).
[14] The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, ¶ 495 (Int'l Crim. Tribunal for Rawanda 1998), *available at* http://69.94.11.53/default.htm (follow "Cases" hyperlink; then follow "Status of Cases" hyperlink) (noting that the Genocide Convention is "undeniably considered part of customary international law"). *See also* Int'l Ct. of Justice, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion (May 28, 1951), 1951 I.C.J. 15, 23 (declaring the Genocide Convention to be customary international law).
[15] Mahnoush H. Arsanjani, *Developments at the International Criminal Court: The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 31 (1999).
[16] ICC Statute, *supra* note 8, art. 7(1).
[17] *Id.*
[18] *Id.* art. 7(1).
[19] *Id.* art. 7(2)(a).

should be of particular interest to the United States, with its large, widely deployed military. The Rome Statute divides war crimes into four categories:[20] "(a) [g]rave breaches of the Geneva Conventions of 12 August 1949"; "(b) [o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law"; (c) "[i]n the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions"; and "(d) [o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law."[21] United States servicemembers are unlikely to be responsible for war crimes committed in "armed conflict not of an international character," but even the provisions that deal with international conflicts pose problems. Paragraph (b) borrows heavily from the Protocol Additional to the Geneva Conventions of 1949, a 1977 update to which the United States is not a party.[22] The rules contained in paragraph (b) severely restrict a state's discretion to choose the means of combat it considers appropriate to the military situation on the ground by enforcing a particularly high duty of care toward civilians. While many of the rules derived from the First Protocol could be considered binding under customary international law, the Rome Statute still contains innovations – including a provision prohibiting an occupying power from transferring its own people into an occupied territory.[23] Similarly, "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes . . ." is outlawed. While protection of religion, art, science and charitable purposes is based on the Convention for the Protection of Cultural Property of 1954[24] – to which the United States is not, in any event, a party[25] – the language protecting educational sites is an innovation suggested by New Zealand and Switzerland at the Rome Conference itself.[26]

While similar expansions of the scope of crimes against humanity are tempered by the requirement that there be multiple acts and that they be part of

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[20] This organizational structure was adopted to simplify negotiation, but survived to the final draft. Arsanjani, *supra* note 15, at 33.
[21] ICC Statute, *supra* note 8, art. 8(2).
[22] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3. While not a party, the United States is a signatory to Protocol I. *Id. See also* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?,* 90 CORNELL L. REV. 97, 183 n. 444 (2004).
[23] Christopher M. Van de Kieft, *Uncertain Risk: The United States Military and the International Criminal Court,* 23 CARDOZO L. REV. 2325, 2333 (2002).
[24] *See* Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.
[25] *See, e.g.*, John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 A.J.I.L. 831, 850 (1986) and accompanying note.
[26] Arsanjani, *supra* note 15, at 33.

an organized policy,[27] this is not true for war crimes. The final language of the Statute states that "[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."[28] While the Court is guided to take jurisdiction of a suspected war crime only when committed as part of large-scale policy, the words "in particular" make it clear that this is not a requirement. The language does not preclude jurisdiction over a *single* act defined in Article 8(2), and says nothing about the rank or status of the person committing that single act.[29] Indeed, as a severe but legally sound example, the decision by a junior officer to direct fire toward snipers using a religious structure for cover could serve as a basis for a war-crimes indictment under certain circumstances.[30] The lack of textual guidance essentially throws the entire question back on the Court's discretion under Article 17(1)(d) to determine whether a case is of "sufficient gravity to justify" its consideration.

The crime of aggression, the last set forth in the Statute, is not defined. The Rome Statute essentially punts the question, stating that "[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime."[31] Such a definition must take the form of an amendment to the Statute itself.[32] This cannot be proposed until seven years have passed from the entry into force of the Statute, and must be

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[27] ICC Statute, *supra* note 8, art. 7(2)(a).
[28] *Id.* art. 8(1).
[29] *See* Mahnoush H. Arsanjani & W. Michael Reisman, *Developments at the International Criminal Court: the Law-in-Action of the International Criminal Court,* 99 A.J.I.L. 385, 399 (2005) ("Even though both the International Law Commission and the pre-Rome negotiations considered suggestions to limit the competence of the Court to the *leaders* of those responsible for such crimes, the Rome Conference decided otherwise. The negotiators reasoned that the crimes listed in the Statute are so grave that their prosecution cannot be limited to a handful at the top; no one who has committed such crimes should escape prosecution and, if appropriate, punishment."). Arsanjani and Reisman go on to consider how resource scarcity may require the Court to focus on atrocity leadership, and that, perhaps, extension of prosecutions to lower-ranking persons must be done "henceforth, if at all, only episodically or opportunistically." *Id.*
[30] The Court would be required to find that this order had no "military objective." ICC Statute, *supra* note 8, art. 8(2)(b)(ix). However, the potential political fallout from such a situation is clear, and there is no reason to believe that international judges with no experience of combat are better qualified than a U.S. court-martial to decide such a fact-specific question – especially given the ICC's very limited resources and the difficulty of procuring evidence in a combat zone. These are precisely the sorts of concerns that led to limited ICC jurisdiction in the first place. *See* Office of the Prosecutor of the International Criminal Court, Paper on Some Policy Issues before the Office of the Prosecutor *available at* http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf (discussing the need to carefully select targets of investigation given the Office's limited resources and the difficulties of on-the-ground investigations).
[31] ICC Statute, *supra* note 8, art. 5(2).
[32] *See Id.*

passed by a two-thirds vote of the States Parties.[33] Notably strict protections are in place to prevent the majority from forcing an expansion of the core crimes on a minority. If any state opposes an amendment to the definitions of crimes found in articles 5 through 8, "the Court shall not exercise its jurisdiction regarding a crime covered by the amendment *when committed by that State Party's nationals or on its territory.*"[34] This broad exemption significantly undermines concerns that States Parties could be "trapped" by an overly expansive definition of the crime of aggression. In addition, the statute provides that "[i]f an amendment [is] accepted by seven-eighths of States Parties . . . . any State Party which has not accepted the amendment may withdraw from the Statute with immediate effect."[35] This provides yet another protection for States Party against an overzealous expansion of the definition of crimes within the ICC's jurisdiction.

It is essential to note, however, that these protections apply *only* to States Parties. If a party rejects an amendment to the definition of a crime, both its nationals *and* its territory are outside the jurisdiction of the Court with regard to that crime. An example involving two fictional countries may help illustrate the point. If a definition of the crime of aggression is adopted, and State A (a party to the Court) were to reject the amendment, its nationals could not be tried for the crime of aggression *regardless of where the crime occurred.* On the other hand, if State A *were* to accept the amendment, the definition would apply to crimes committed on its territory. If State Y (a non-party) were to commit an act of aggression on State A's territory, State Y's nationals would not be able to avail themselves of the immunity provision available to a State Party. Rather, the Court's jurisdiction over crimes committed on State A's soil would remain intact. However, if State A had chosen *not* to accept the new definition of aggression, State Y's citizens could *not* be tried for any acts of aggression committed on State A's soil.

The hypothetical reveals another point. Because the Court can only exercise jurisdiction over aggression if the state being attacked is a party, states needing the threat of ICC prosecution to secure their territorial integrity are likely to accept whatever definition is offered. These are also precisely the same states that are likely to push for a particularly robust definition of aggression. Strong States Party will consequently be left with a choice: accept a robust definition and ICC jurisdiction over their troops abroad, or reject it, and win immunity for those same troops. Provided a strong state can dispense with the deterrent effect of ICC jurisdiction over its territory, there is little incentive for it to accept *any* definition of the crime of aggression: by rejecting the definition,

[33] *Id.* art. 121.
[34] *Id.* art. 121(5) (emphasis added).
[35] *Id.* art. 121(6).

they win free use of their troops abroad.[36] This is a strong argument for powerful, aggressive states becoming States Party in order to avail themselves of this protection. It is also a potentially serious flaw in the ability of the ICC to exercise jurisdiction over precisely those states most likely to commit a crime of aggression. It is always possible, of course, that the whole system is at least implicitly targeted at the only states that can lose out on this bargain: non-parties.

While much of the Court's subject matter jurisdiction is premised on crimes defined either by widely accepted treaties or customary law, several concerns remain. The most pressing is the scope of the war crimes language in the Statute. Combining a wide range of prohibited acts and minimal checks on the required scope of their consequences, the Court's subject matter jurisdiction provides enormous leverage for the Court to second-guess decisions made in the field. There is nothing, outside of the Court's own self-regulation, to prevent a war-crimes charge for a single targeting of an educational institution. Given the likelihood for international outcry over sufficiently terrible, if honest, mistakes under battlefield conditions, and the unavoidable lack of omniscience in intelligence gathering, the war-crimes jurisdiction of the ICC is ready-made for a political prosecutor. Similarly, the Crime of Aggression has yet to be defined, but the mechanisms for its future definition are fraught with potential for gamesmanship, and should make responsible nations wary of the result.

B. Personal and Territorial Jurisdiction and the Role of Complementarity

The International Criminal Court's jurisdiction may be exercised if "one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

> (a)The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
>
> (b)The State of which the person accused of the crime is a national."[37]

Paragraph 3 states, "[i]f the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may… accept the exercise of

[36] As regards the crime of aggression; the ICC would retain jurisdiction over war crimes, crimes against humanity, and genocide.
[37] ICC Statute, *supra* note 8, art. 12.

jurisdiction by the Court with respect to the crime in question."[38] This jurisdiction is significantly narrower than that suggested by some states. Some proposed a scheme grounded in the concept of universal jurisdiction, which would have shackled the Court with very few constraints concerning jurisdiction *ratione personam* or *ratione territorium.*[39] Even a more modest Korean proposal, which would have allowed jurisdiction if a range of states were parties to the statute – the state having custody of the accused, the state where the crime was committed, the state of the accused's nationality, *or* the state of the victim's nationality[40] – did not end up in the final draft despite significant support during the drafting process.[41] The final statute seems to reflect a compromise with the final United States position, which would have allowed jurisdiction if *both* the territorial state and the national state of the accused were parties to the Statute.[42] In any event, the final version of the Statute gives the ICC jurisdiction over crimes committed on the territory, *or* by the nationals, of ratifying states. Consequently, a state cannot shield its nationals from prosecution for crimes committed on the territory of another state.[43]

The Statute does allow states to block ICC jurisdiction under specific circumstances. First, a state, on becoming a party to the Statute, may invoke a one-time seven-year immunity against prosecutions for war crimes committed by its nationals or on its territory.[44] Second, and more controversial, Article 98 provides that:

> The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.[45]

The United States has interpreted this section as allowing for bilateral agreements whereby a state may promise not to surrender nationals of a foreign

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[38] *Id*. It should be noted that these restrictions apply only to cases where the Prosecutor initiates an investigation on his own authority or on referral of a State Party; cases referred by the United Nations Security Council meet with no such restrictions. *Id.* and art. 13.
[39] Johan D. Van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court,* 14 EMORY INT'L L. REV. 1, 60-61 (2000).
[40] *Proposal Submitted by the Republic of Korea,* U.N. Doc. A/CONF.183/C.1/L.6 (Jun. 18, 1998).
[41] Van der Vyver, *supra* note 39, at 62.
[42] *Proposal Submitted by the United States of America,* U.N. Doc. A/CONF.183/C.1/L.70 (Jul. 14, 1998).
[43] This is true with the exception of the narrow case described above where a State Party rejects an amendment putting forward a definition of the crime of aggression.
[44] ICC Statute, *supra* note 8, art. 124.
[45] *Id.* art. 98(2).

state to the Court.[46] This is by no means a universally accepted interpretation – the European Union for instance views such provisions as inconsistent with the "object and purpose" of the treaty, and hence invalid.[47] While the validity of such agreements has not yet been tested, 17 states[48] have concluded Article 98 agreements promising not to surrender U.S. nationals, suggesting that there is at least some significant support for the United States' position.

Finally, the United Nations Security Council – in a nod to its prime responsibility under the U.N. Charter to safeguard "international peace and security"[49] – may block an investigation or prosecution for a renewable period of twelve months by so "requesting."[50] This provision has in fact been invoked. On June 30, 2002, the United States vetoed a resolution extending the mandate of the U.N. peacekeeping mission to Bosnia.[51] In order to lift its veto, the United States demanded an Article 16 resolution exempting from ICC jurisdiction any peacekeepers of states not party to the Treaty of Rome.[52] After an extensive debate, the Security Council opted to invoke Article 16 to protect "current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation."[53] The Council also expressed an intention to renew the resolution each year,[54] although it was only renewed once.[55]

While Articles 16 and 98 do provide potential limits to the Court's jurisdiction, they rely on specific political action, specifically bilateral

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[46] *See, e.g.*, John R. Bolton, *American Justice and the ICC,* WASH. POST, Dec. 13, 2003, at A21.

[47] "The Assembly considers that these 'exemption agreements' are not admissible under the international law governing treaties, in particular the Vienna Convention on the Law of Treaties, according to which States must refrain from any action which would not be consistent with the object and purpose of a treaty." Eur. Parl. Ass., *Risks for the Integrity of the Statute of the International Criminal Court*, 29th Sess., Res. 1300 (2002), *referencing* Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331, 8 I.L.M. 678 (1969). *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28, 1951); *see also* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: U.S. Bilateral Agreements Relating to ICC*, 97 A.J.I.L. 200, 202 (2003).

[48] This number is current as of January 2003. *See* Murphy, *supra* note 47, at 201.

[49] U.N. Charter art. 39.

[50] ICC Statute, *supra* note 8, art. 16.

[51] *See* Thomas M. Franck & Stephen H. Yuhan, *The United States and the International Criminal Court: Unilateralism Rampant,* 35 N.Y.U. J. INT'L L. & POL. 519, 524 (2003).

[52] *Id.*

[53] S.C. Res. 1422, ¶1, U.N. Doc. S/RES/1422 (July 12, 2002). The decision has been strongly criticized as contrary to the spirit of the Rome Charter. *See generally* Mohamed El Zeidy, *The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422*, 35 VAND. J. TRANSNAT'L L. 1503 (2002).

[54] S.C. Res. 1422, ¶1, U.N. Doc. S/RES/1422 (July 12, 2002).

[55] S.C. Res. 1487, ¶2, U.N. Doc. S/RES/1487 (June 12, 2003). Subsequent attempts by the United States to renew the resolution were unsuccessful.

negotiations and resolutions of the Security Council. The greatest and most pervasive check on ICC jurisdiction is, however, a structural one: the principle of complementarity whereby the Court may conduct a prosecution for the most heinous offenses against international law *if and only if* states are unable or unwilling to do so themselves.

Complementarity is a relatively new principle in international law. The very word was given a radically new meaning by the International Law Commission in its *Draft Statute*,[56] where it was first used to connote complementarity between legal systems.[57] The draft's Third Preambular Paragraph suggested that the Court "be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective."[58] In its commentary on this clause, the ILC noted that the Court would be intended for cases where there would be "no prospect" of an accused being duly tried in national courts, and that it was not intended "to exclude the existing jurisdiction of national courts, or to affect that right of States to seek extradition and other forms of international judicial assistance under existing arrangements."[59] While any complete exploration of the ILC's view of complementarity is complicated by the lack of specific references to it in the actual language of the proposed ICC Statute, this commentary betrays a relatively unambitious vision of the court: the recommendation that the ICC be used only where "trial procedures may not be available or may be ineffective" suggests that only when national courts were *unable* to prosecute would the ICC be an appropriate forum. The particularly high bar that there be "no prospect" of an effective national prosecution would seem to allow states ample opportunity to hedge and stall the functioning of their judicial machinery without triggering the Court's jurisdiction. In essence, the ILC does not appear to have considered the scenario where a state would actively use its judiciary as a shield against ICC jurisdiction, or viewed such action without great alarm, and its vision of complementarity does not, as a result, have the teeth later found in the Rome Statue itself.

Yet, while the ILC's vision of the Court's jurisdiction was undeniably weaker than the Court's final powers under the Rome Statute, complementarity remains one of the cornerstones of the ICC regime[60] and its central jurisdictional

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[56] *Report of the International Law Commission on the Work of its 46th Session,* 46 U.N. GAOR Supp. (No. 10), U.N. Doc. A/49/10 (1994).
[57] Van der Vyver, *supra* note 39, at 66. Professor Van der Vyver points out that the most common technical use of the term prior to the ILC *Draft Statute* was in Roman Catholic teaching, where it was used to "denote a certain symbiosis in the relationship between the sexes." *Id.*
[58] *Id.* at 67.
[59] *Report of the International Law Commission on the Work of its 46th Session, supra* note 56, at 44, para. (1).
[60] ICC Statute, *supra* note 8, art. 1.

innovation.[61] The Tenth Preambular Paragraph of the ICC Statute proclaims that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."[62] Remedying the defect of the ILC Draft, the Rome Statute spells out the practical effect of this complementarity in Article 17, under the heading of "Issues of Admissibility":

> Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that the case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;[63]
>
> (d) The case is not of sufficient gravity to justify further action by the Court.[64]

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[61] The tribunals for the Former Yugoslavia and Rwanda both proceeded on the opposite assumption: that their jurisdiction specifically overrode that of national courts. *Statute of the Tribunal for the Former Yugoslavia*, art. 9(2), S.C.Res. 827, U.N. Doc. S/RES827 (1993); *Statute of the Tribunal for Rwanda*, art. 8(2), S.C. Res. 955, U.N. Doc. S/Res/955 (1994) *available at* http://www.un.org/icty/legaldoc-e/index-t.htm (ICTY) and http://69.94.11.53/ENGLISH/basicdocs/statute.html (ICTR). It should be noted that the ICTY has the authority under Rule 11*bis* of its Rules of Procedure and Evidence to essentially "remand" cases to national courts for prosecution. ICTY R.P. & Evid. 11*bis*, U.N. Doc. IT/32/rev.22 (2001).

[62] ICC Statute, *supra* note 8, preamble.

[63] While the principles of Article 20 enshrine a broader conception of double jeopardy than that available under United States' domestic law, in so far as double jeopardy protection applies to the underlying conduct instead of any particular charge, Paragraph 3 stipulates instances where the principle of *ne bis in idem* will not apply. These include where the purpose of an earlier trial was to shield the defendant from criminal responsibility, or where the proceedings were not conducted independently and impartially or in accordance with due process as recognized by international law. *Cf, e.g.*, United States v. Dixon, 509 U.S. 688, 703-04 (1993) (noting that U.S. double jeopardy protections attach unless each crime contains an element not present in the other, and specifically overruling precedent suggesting that two crimes may not be charged from the same conduct).

[64] ICC Statute, *supra* note 8, art. 17(1).

The statute is clear that national courts have the first right and duty to prosecute perpetrators of international crimes, and that ICC jurisdiction is available only to complement that responsibility. But the ICC is empowered to intervene not only where existing national judicial machinery is insufficient to allow a successful prosecution, but also where national governments are unwilling to fulfill their responsibility to prosecute.

Article 17(2) of the Statute gives the Court concrete guidance should it be forced to evaluate a state's willingness to prosecute:

> In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court…;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.[65]

This language preserves the deference to national courts embodied in the "Issue of Admissibility" section found earlier in Article 17. The standard is set very high: only a complete refusal to prosecute or a fatally flawed proceeding can defeat the state's presumptive right to bar ICC jurisdiction by initiating its own prosecution. Even a refusal or flawed proceeding may only be ignored if a specific intent element is met: the state must be acting *for the purpose* of shielding the relevant individual from criminal liability. This intent element is most strongly evidenced by the language of 12(2)(c), where even a biased proceeding may only be branded an "unwilling prosecution" if it is "inconsistent

[65] *Id.* art. 17(2).

with an intent to bring the person concerned to justice." This question of the state's "intent" is therefore central to the ability of the ICC to take jurisdiction of a case that has already been investigated or prosecuted by a national court.

While the evidentiary bar is certainly set rather high, the provision remains a major expansion of the complementarity provision of the *Draft Statute* since the Court itself would determine whether a national judiciary's actions are "consistent with an intent to bring the accused to justice." In short, while the statute may seem principally concerned with protecting national court jurisdiction, in fact it invites the Court to evaluate national court decisions to a previously unparalleled extent.[66] A national investigation or prosecution prevents ICC jurisdiction only when the ICC itself says it does.

To summarize and recap, ICC jurisdiction may threaten the United States in several ways. First, the expansive definitions of the crimes included in the Rome Statute may impose stricter standards of behavior on United States nationals than those accepted at present by U.S. officials. Second, as a non-party, the U.S. has no say over any future definition of the crime of aggression, and it is always possible that it will be defined so as to implicate actions taken by U.S. forces operating abroad. Third, the ICC's jurisdiction over all crimes committed on the territory of States Party puts U.S. forces at risk whenever they operate on such territory. Finally, the principle of complementarity which is supposed to protect states against unwise or unjust prosecutions by the court is, in practice, a matter for the discretion of the Court. There is, at bottom, no way to ensure that Americans will not be exposed to the ICC's jurisdiction, and thus held to legal standards that the U.S. cannot control.

C. The United States' Reaction: a Policy of Opposition

The United States' reaction to these realities of the Rome Statute was at first mixed. While the United States "had not achieved the silver bullet of guaranteed protection [for U.S. nationals]," the chief American negotiator at the Rome Conference argued that a "sophisticated matrix of safeguards" checked the ability of the Court to initiate politically motivated prosecutions.[67] President Clinton chose to sign the Statute on December 31, 2000 – the last day it was open for signature.[68] In doing so, he expressed hope that "a properly constituted and structured [Court] would make a profound contribution in deterring

[66] As noted above, the ICTY simply supplanted Yugoslav jurisdiction – but did so not as a matter of judicial process, but rather at the command of the U.N. Security Council.
[67] David J. Scheffer, *Staying the Course with the International Criminal Court,* 35 CORNELL INT'L L.J. 47, 63 (2001).
[68] *See* Statement on the Rome Treaty of the International Criminal Court, 37 WEEKLY COMP. PRES. DOC. 4 (Jan. 8, 2001).

egregious human rights abuses worldwide," and emphasized that "the treaty requires that the ICC not supersede or interfere with functioning national judicial systems."[69] However, he noted "significant flaws" – principally that U.S. personnel could still come under the Court's jurisdiction without U.S. ratification – and demanded a "chance to observe and assess the functioning of the court" before acquiescing to its claimed jurisdiction.[70] He characterized the signature as an opportunity to "influence the evolution of the court" while explicitly declining to recommend submission of the treaty for Senate ratification.[71]

The newly elected Bush administration was yet more hostile, evidencing no interest in cooperating with the Court and specifically disavowing any intention of becoming party to the Treaty or abiding by the legal consequences of President Clinton's signature.[72] Congress was even more direct. Then-House Majority Whip Tom DeLay introduced the American Servicemembers' Protection Act (ASPA) in May 2001.[73] Signed into law the next year, ASPA[74] bluntly states that "the United States will not recognize the jurisdiction of the International Criminal Court over United States nationals."[75]

ASPA's anti-ICC rhetoric comes with impressive enforcement mechanisms. Section 2004 prohibits any federal, state, or local agency – including courts – from providing support for or extraditing to the ICC. [76] Similarly, it prohibits agents of the Court from conducting any investigation on American soil and requires the United States to:

> exercise its rights to limit the use of assistance provided under all treaties and executive agreements for mutual legal assistance in criminal matters, multilateral conventions with legal assistance provisions, and extradition treaties, to which the United States is a party, and in connection with the execution or issuance of any letter rogatory, to prevent the transfer to, or other use by, the International Criminal Court of any assistance provided by the United States under such treaties and letters rogatory.[77]

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[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *See* Neil A. Lewis, *U.S. Rejects All Support for New Court on Atrocities,* N.Y. TIMES, May 7, 2002, at A11.
[73] H.R. REP. NO. 107-62, pt. 1 (May 9, 2001).
[74] American Servicemember's Protection Act (ASPA), 22 U.S.C. §7421-33 (2002).
[75] *Id.* §7421.
[76] *Id.* §7423.
[77] *Id.*

ASPA also places severe limitations on when and how American forces may be used abroad if they may be subject to ICC jurisdiction. In addition to barring any transfer of intelligence likely to end up in the Court's hands,[78] the United States is prohibited from giving any military assistance to States Party to the Rome Statute.[79] This requirement may be waived by the President if he finds that it is important to the national interest to do so, or if a foreign state negotiates an Article 98 agreement shielding American forces from ICC prosecution.[80] However, the statute also prohibits absolutely the participation of U.S. forces in United Nations peacekeeping operations unless either (1) the Security Council invokes its Article 16 authority in order to shield American troops or, (2) the countries where U.S. forces will be located do not trigger the Court's territorial jurisdiction.[81]

Finally, and most ominously, 22 U.S.C. §7427 is titled "Authority to Free Members of the Armed Forces of the United States and Certain Other Persons Detained or Imprisoned by or on Behalf of the International Criminal Court." Therein, "the President is authorized to use all means necessary and appropriate to bring about the release" of certain American personnel.[82] While the Act is careful to eliminate "bribes and other inducements" from the tools available to the President in securing the release of a suspect,[83] it is difficult to imagine that action to forcibly free a prisoner of the Court would not be authorized by this section.

The findings of ASPA could not be clearer: the policy of the United States is to shield American troops from the jurisdiction of the International

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[78] *Id.* §7425.

[79] *Id.* §7426. This prohibition does not extend to the member states of the North Atlantic Treaty Organization, major non-NATO allies (Australia, Egypt, Israel, Japan, Jordan, Argentina, South Korea, New Zealand), and Taiwan. *Id.* It is significant that the President is required to investigate the degree to which American forces may be put at risk of prosecution even while engaged in operations in support of such close alliances as these, and to take whatever means he may to minimize this danger through appropriate command and operational control arrangements. *Id.* §7428.

[80] *Id.* §7426. This authority has been exercised on numerous occasions. *See, e.g.,* Presidential Determination No. 2003-27 of June 30, 2003, Waiving Prohibition on United States Military Assistance to Parties to the Rome Statute Establishing the International Criminal Court, 68 Fed. Reg. 41219 (July 11, 2003) (exempting 22 countries by Presidential waiver).

[81] ASPA, *supra* note 74, §7424. *See* Memorandum on Certification Concerning U.S. Participation in the U.N. Mission in Liberia Consistent with Section 2005 of the American Servicemembers' Protection Act, 39 WEEKLY COMP. PRES. DOC. 1439 (October 27, 2003) (certifying that American troops were "without risk" of prosecution by the ICC due to Security Council waiver under Article 16 of the Rome Statute).

[82] ASPA, *supra* note 74, §7427. The relevant persons are "members of the Armed Forces of the United States, elected or appointed officials of the United States Government, and other persons employed by or working on behalf of the United States Government, for so long as the United States is not a party to the International Criminal Court." *Id.* §7432(4).

[83] *Id.* §7427(d).

Criminal Court. It is possible that brute American power may be able to accomplish this objective. But it is also possible that it will not, and in that eventuality the United States may be forced to think in the Rome Statute's own terms. For all ASPA's bluster, the Rome Statute's principle of complementarity may provide a cleaner way around the threat of ICC prosecution: if the United States is willing to undertake a "genuine" investigation and prosecution of military personnel who commit crimes within the jurisdiction of the ICC, by its own Statute the Court will be unable to act. Since military personnel are prosecuted by the military justice system, this poses a question of the ability of that system to forestall ICC jurisdiction under the Rome Statute. If American military law provides for the criminalization of behavior prohibited by the Rome Statute, and if the investigations and prosecutions undertaken by the U.S. military are "genuine" within the meaning of Article 17, then American troops will likely be beyond the ICC's reach.[84]

III. THE PROBLEM: DISTINCTIVE ELEMENTS OF THE U.S. COURT-MARTIAL SYSTEM

American military justice underwent a sea change between the Second World War and the Korean conflict. The separate Articles of War and Articles for the Government of the Navy – passed by the Second Continental Congress and rooted in pre-revolution British military law – were supplanted by the Uniform Code of Military Justice (UCMJ).[85] The old Articles were command-centered, with courts-martial viewed as extensions of the military commander's disciplinary powers instead of as independent tribunals. Their sole purpose was "to secure obedience to the commander".[86] While this was taken for granted during the early periods of the Republic's history, when the standing armed forces were small and not generally based near major population centers, the mobilization associated with World War II and the Cold War made military justice an issue touching a far greater portion of the population.[87] Inevitably, it

[84] While not directed specifically at the U.S. military justice system, Lieutenant Colonel Michael Newton, a member of the U.S. delegation to the Preparatory Commission on the Establishment of an International Criminal Court, has written an excellent article on the Rome Statute's complementarity provisions. He undertakes an especially deep analysis of the interaction between domestic legal systems and ICC jurisdiction. *See* Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court,* 167 MIL. L. REV. 20 (2001).

[85] This historical overview is taken generally from that provided by Brigadier General (Retired) John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition,* 165 MIL. L. REV. 1, 4 (2000).

[86] *Id.* at 3.

[87] During World War II, for instance, more than four million courts-martial were convened, and the resulting social impact was great. Major General William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed?,* 48 A. F. L. REV. 185, 187 (2000).

became a political issue.[88] The UCMJ grew out of a realization that "discipline cannot be maintained without justice," and that the new realities of the service required that justice be modeled on civilian criminal procedure and its emphasis on due process.[89]

In response to these concerns, Secretary of Defense James Forrestal convened a committee in 1948 under the chairmanship of Professor Edmund Morgan, Jr., of Harvard Law School.[90] The committee was responsible for drafting a code that would be "uniform in substance and uniform in interpretation and construction"[91] that would be applied to each of the armed services. The result was the Code submitted to the Congress in 1949 and signed into law in 1950 with only slight modifications.[92]

The Department of Defense was particularly keen to preserve the efficiency of "military functions" in the new Code, with emphasis on the ability of commanders to maintain discipline in the field.[93] The UCMJ established significant rights for servicemembers accused of crimes and limited commanders' control over the outcome of courts-martial. But it did not eliminate the central role of commanders, since that role was considered essential to maintaining discipline among servicemembers. The goal of the UCMJ was to balance this important principle of commander control – and the resulting unit discipline that separates a modern, responsible army from a rag-tag militia – with the interests of the accused to a trial according with today's understandings of due process.[94]

The Code that resulted from these concerns continues to govern the situation today, where commanders continue to play an enormous role in the administration of military justice. They appoint investigating officers; select the court members (the military equivalent of a jury)[95]; decide which parties and witnesses get immunity and review the findings of the court-martial for approval.[96]

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[88] Cooke, *supra* note 85, at 6-7.
[89] Cooke, *supra* note 85, at 8.
[90] S. Rep. No. 81-486, June 10, 1949, at 4.,
[91] *Id.*
[92] Pub. L. No. 81-506, 64 Stat. 108 (1950).
[93] *See* Senate Report, *supra* note 90, at 38 (statement of James Forrestal).
[94] Beth Hillman, *Chains of Command*, LEGAL AFFAIRS, May-June 2002, at 50.
[95] Uniform Code of Military Justice (UCMJ), 10 U.S.C. §825. (2006)
[96] A convening authority may grant immunity to witnesses, but by doing so disqualifies himself from post-conviction review proceedings, a role then taken on by another officer. Both powers, however, are substantial. *See, e.g.,* United States v. Hillmon, 2 M.J. 830 (A.C.M.R. 1976), *see also* United States v. Kennedy, 8 M.J. 577 (A.C.M.R. 1979).

The commander's extensive authority is tempered by significant constraints. First, the convening authority is guided by the advice of his Staff Judge Advocate, an attorney trained in military law who reviews and prepares advice for the commander at each stage of a court-martial. Second, for any serious crime, a military judge presides over the proceedings, ruling on evidence, overseeing the seating of the court members, and with full authority to dismiss charges for multiplicity or considerations of equity, and to enter a finding of "not guilty" if he believes that any charge has not been proven beyond a reasonable doubt.[97] Third, the UCMJ provides criminal penalties for unlawful command influence over the court-martial[98] and allows the military judge to remove a commander from his duties as the convening authority if he is found to be biased.[99] Finally, the U.S. military justice system provides for an extensive appeals process. Any case resulting in punitive discharge or confinement for a year or more is automatically appealed to the service Court of Criminal Appeals.[100] Further appeals may be heard by the United States Court of Appeals for the Armed Forces, an Article I civilian court with five judges appointed for 15-year terms,[101] which is empowered to review the findings of courts-martial *de novo*.[102] Further review is available to the United States Supreme Court by writ of certiorari. It is worth noting that Congress had special confidence in the ability of this appellate hierarchy to temper abuses of command discretion.[103]

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[97] Theodore Essex & Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001): "the Cox Commission,"* 52 A.F. L. REV. 233, 237 (2002).

[98] "No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts." UCMJ, *supra* note 95, §837.

[99] Convening authorities have been removed when there was a perception that their Staff Judge Advocate was biased (United States v. Johnson-Saunders, 48 M.J. 74 (C.A.A.F. 1998)); where the convening authority had personally found probable cause and authorized a search (United States v. Wilson, 1 M.J. 694 (A.F.C.M.R. 1975)); for *potential* personal bias (United States v. Hernandez, 3 M.J. 916 (A.C.M.R. 1977)); and for personal remarks (United States v. Nix, 40 M.J. 6 (C.M.A. 1994)). *See* Essex & Pickle, *supra* note 97, at 246-247.

[100] UCMJ, *supra* note 95, §866. For a review of the post-conviction procedures available in the United States Military, see James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium,* 52 A.F. L. REV. 185, 209-11 (2002).

[101] UCMJ, *supra* note 95, §942.

[102] *Id.* The Court has a particular tendency to heavily examine cases before it, including "traditionally review[ing] meritorious issues which were not assigned by an appellant or his counsel." United States v. Ortiz, 24 M.J. 323, 325 (C.M.A. 1987).

[103] Essex & Pickle, *supra* note 97, at 235.

A. UCMJ Article 60 and Command Clemency

There is significant pressure to further limit the scope of command discretion, but importantly, almost none of it is directed at commanders' ability to grant clemency. Rather, complaints are based in concern for the due process rights of the accused, not out of worries that crimes are being under-prosecuted. The most extensive and authoritative criticism of the role of commanders under the UCMJ came out of a commission created by the National Institute of Military Justice under the chairmanship of Senior Judge Walter T. Cox, III, who had recently stepped down from the position of Chief Judge of the Court of Appeals for the Armed Forces.[104] The so-called Cox Commission's Report criticized the extent of command decision-making in the court-martial process, with special emphasis on the selection of the court members.[105] The concerns largely center on the "impression of unfairness created by the role of convening authorities in military justice."[106] The Report referred to the current practice whereby commanders appoint the members of the court as "an invitation to mischief [insofar as it] permits – indeed, requires – a convening authority to choose the persons responsible for determining the guilt or innocence of a servicemember who has been investigated and prosecuted at the order of that same authority."[107] Finally, the Report opined:

> [t]he combined power of the convening authority to determine which charges shall be preferred, the level of court-martial, and the venue where the charges will be tried, coupled with the idea that this same convening authority selects the members of the court-martial to try the cases, is unacceptable in a society that deems due process of law to be the bulwark of a fair justice system.[108]

While largely concerned with the rights of the accused, the Report still noted that "in order to maintain a disciplinary system as well as a justice system commanders must have a significant role in the prosecution of crime at courts-martial."[109] The Report, and similar complaints,[110] point yet again to the

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[104] Cox III et al., *supra* note 9.
[105] *Id.* at 7. *But see* Essex & Pickle, *supra* note 97, at 244 (noting that the convening authority has a statutory responsibility to pick the "best qualified" persons when selecting the members of a court-martial).
[106] Cox III et al., *supra* note 9, at 7.
[107] *Id.*
[108] *Id.* at 8. This view is by no means universal, however. *See* Christopher W. Behan, *Don't Tug on Superman's Cape: in Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members,* 176 MIL. L. REV. 190 (2003).
[109] Cox III et al., *supra* note 9, at 7.

fundamental tension between the role of commanders as the sources of battlefield discipline, and the need for an independent justice system that protects the accused.

This balance can be found throughout the UCMJ,[111] but is perhaps most striking in the case of Article 60.[112] There, the convening authority[113] is empowered to set aside any finding of guilt by a court-martial, change a finding of guilt on a particular charge to a guilty verdict on a lesser charge, or downwardly modify any sentence imposed by the court-martial.[114] This absolute clemency power is exercised as a "command prerogative involving the sole discretion of the convening authority,"[115] but may only be used to the advantage of the accused.[116] This is its only constraint.

Article 60 gives a very broad discretion to commanders. While they already are tasked with convening courts-martial (and are given the implied authority to choose not to do so) it is quite another thing to allow them to simply disregard the findings of a duly constituted judicial panel. In the civilian context, such authority is granted only to the chief executive (the governor in the case of state offenses, or the President for federal crimes). Even there, the power is granted not by statute, but as a constitutional prerogative rooted in the historical role of the monarch.[117] Here, it is an institutional part of the process: the accused has a *right* to seek review by the convening authority, whose decision must be guided and informed by a report prepared for the purpose – a significant investment of judicial resources that underscores the centrality of

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[110] *See*, *e.g.*, Hillman, *supra* note 94; *see also* Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: the Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice,* 2002 L. REV. M.S.U.-D.C.L.

[111] While the accused enjoyed newfound rights to counsel, an independent "law officer" (later military judge) who could rule on questions of evidence, and an inviolable right to exoneration by a finding of "not guilty," commanders maintain enormous discretion in criminal matters under the UCMJ. Specifically, they determine whether to convene a court-martial, maintain sole jurisdiction over lesser offenses with light penalties, choose the members of a general-court-martial (the equivalent of the jury in a civilian case), and have unrestricted authority to overturn findings of guilt. *See* Senate Report, *supra* note 90, at 38 (statement of James Forrestal).

[112] UCMJ, *supra* note 95, §860.

[113] A term of art designating the military officer who convened the court-martial. Under current law, this privilege is limited to the President, Secretary of Defense, Secretary of the relevant service, or commanding officer of the accused's brigade/fleet (a general or flag officer). Lesser officers may be empowered to convene courts-martial by order of the President or the relevant service Secretary. *Id*. §822.

[114] *Id*. §860(c)(2)-(3).

[115] *Id.* §860(c)(1). The legislative history is explicit in stating that the convening authority "may disprove a finding or a sentence for any reason." Senate Report, *supra* note 90, at 27.

[116] UCMJ, *supra* note 95, §860(e)(2).

[117] *See* Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 236 (2002).

command review of courts-martial. Similarly, while traditional executive clemency is centralized in the chief constitutional executive, here it is devolved at least to the level of a brigade or fleet/base commander. Thus, taking the example of the United States Navy, more than 100 officers have statutory authority to convene courts-martial, and thus Article 60 authority to nullify the findings thereof[118] – and this number could be expanded substantially by order of the Secretary of the Navy.

Most of the concerns over the UCMJ have been with its procedural fairness for the accused. While command discretion does present concerns, little has been said about this institutionalized ability of commanders under the UCMJ to shield those under their command from criminal prosecution.[119] While the ability of commanding officers to maintain discipline and unit effectiveness by summarily punishing their subordinates has been tempered, they retain their ability to govern morale and unit cohesion through the judicious use of leniency. Put simply, the UCMJ's procedural innovations may have rendered the commander's stick less sturdy, but his carrot remains an effective lure.

B. Commanders' Discretion and the Danger of ICC Prosecution

A commander's discretion in matters of military discipline, firmly rooted in the history of military governance, has potentially enormous ramifications for international criminal law. As discussed above, the International Criminal Court is required to defer to investigations or prosecutions undertaken in good faith by governments. In the military context, however, even a good faith prosecution comporting in every way with the letter and spirit of the half-century-old UCMJ will implicate command discretion.

How, then, should this command discretion be characterized? The closest parallel appears to be pardons. In international law pardons are issued after a person has been found guilty of criminal conduct.[120] They remove the punishment attached to a finding of guilt – sometimes after a portion of a sentence has been served. Convening authority action fits this model well: a court-martial has already publicly passed on the guilt of a defendant before Article 60 even comes into play. The central question, then, is whether pardons are consistent with the statute of the ICC. If they are, then the Court will likely defer to an Article 60 action, and consider itself precluded from trying the underlying case. If not, the ICC will view any court-martial where the

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[118] *See* List of U.S. Navy Flag Officers, *available at* http://www.navy.mil/navydata/bios/bio_list.asp (last accessed June 19, 2007).

[119] *See*, *e.g.*, Gierke, *supra* note 10, at 253 (noting several other areas of command influence where action *has* been suggested).

[120] Slye, *supra* note 117, at 235.

convening authority invokes Article 60 as potentially not a "genuine prosecution" within the meaning of the Rome Statute's complementarity provision.

The Rome Statute makes no reference to the possibility of pardons or other forms of clemency such as amnesties. This is a stunning omission given the significant debate over the role of amnesties and similar actions in post-conflict states – and related concerns over the possibility of impunity for those involved in serious crimes in those states and globally.[121] During the drafting of the Rome Statute, attempts to gain ICC jurisdiction over cases involving paroled, pardoned, or amnestied defendants were not successful.[122] Some states believed that the Court should not be allowed to intervene in the political decisions of a State, whereas others did not believe a specific provision was necessary.[123] These latter believed that the Court had sufficient authority under the Rome Statute's admissibility standards to review cases where an amnesty or pardon was undertaken in "bad faith."[124] While some states' ratification instruments especially reserved the right to issue amnesties,[125] the result is that the Rome Statute has no explicit rules on the subject.

However, the text of the admissibility standards does give some guidance. Article 17 can be read as stating that the Court "shall determine that a case is inadmissible where . . . [t]he case is being investigated." This would suggest that, at a minimum, if a state fails even to investigate a charge the case would be admissible. Of course, pardons in general follow not only an

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[121] This is a particularly vibrant debate in the international and human rights law communities and well beyond the scope of this article. This article intends only to show that the debate exists, and that an anti-amnesty side exists for the ICC to join, should it wish to. *See*, *generally*, Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,* 100 YALE L. J. 2537 (1991); Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law,* 87 GEO. L. J. 707 (1999) (discussing a "generalized duty of accountability" in international law); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law,* 78 CALIF. L. REV. 451 (1990); Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence of Amnesty,* 20 HUM. RTS. Q. 843 (1998) (arguing for a general prohibition on amnesties in the case of international criminal offenses but noting several contrary national court decisions); Slye, *supra* note 117, at 177 (arguing that while "international law and the domestic legal practice of states at times permit, and even – in some cases – requires, amnesties" this should not be true for serious human rights violations).

[122] John T. Holmes, *The Principle of Complementarity, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS, 41, 59-60 (Roy S. Lee ed., 1999).

[123] Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law,* 23 MICH. J. INT'L L. 869, 941-42 (2002).

[124] *Id.*

[125] *See* Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem,* 20 AM. U. INT'L L. REV. 293 (2005) (discussing, in particular, the reservation by Colombia). It also bears noting that the first ICC investigation was undertaken in a state, Uganda, that had an amnesty in place. *Id.*

investigation, but an actual finding of guilt. This is especially true in an UCMJ Article 60 context. The Court's jurisdiction over a defendant benefiting from command clemency could not, therefore, be based on this reading of Article 17.

Similarly, the *ne bis in idem* provisions of the Rome Statute's Article 20 provide that "no person who has been *tried* by another court . . . shall be tried by the [International Criminal Court] with respect to the same conduct unless the *proceedings* in the other court" were intended to shield the defendant from criminal liability.[126] This provision clearly put the emphasis on the actual proceeding that led to conviction. Since a pardon *follows* such a conviction, the actual proceeding may have indeed been conducted with the intention of securing conviction and punishment, only to have a later action mitigate that punishment. Read strictly, if the proceeding itself were legitimate and genuine, the ICC would be powerless to act.

Two points, however, suggest otherwise. First, the entire thrust of the Rome Statute is to prevent states from shielding persons responsible for the gravest crimes from criminal responsibility. The Court may very well choose not to read Article 20 so strictly. It can do this in one of two ways: by reading the term "proceeding" broadly to include the appellate and executive action taken on a case, or by reading a subsequent pardon as evidence of the lack of required intent to bring the accused to justice.[127] This last interpretation may be mitigated if the authority overseeing the trial itself is separate from that granting a pardon – as, for example, in a system of divided powers such as the United States' civilian courts.[128] But in the context of Article 60, the UCMJ runs into a serious problem on this front: because the convening authority *both* exercises control over the proceedings (by selecting the court members, choosing the charges, etc.) *and* grants clemency, concerns that the underlying proceedings were intended simply to lead to a pardon and, thus, defeat ICC jurisdiction are at the very least conceivable.[129]

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[126] ICC Statute, *supra* note 8, art. 20 (emphasis added).
[127] *See* Holmes, *supra* note 122.
[128] ICC Statute, *supra* note 8, art. 20(3).
[129] There is also, of course, an independent responsibility to prosecute certain crimes within the jurisdiction of the ICC, such as grave breaches of the Geneva Conventions. A decision to pardon such a grave breach may be seen as particularly good evidence of a desire to shield the accused given the independent obligation under international law to punish and deter such abuses under Common Article I of the Conventions. *See, e.g.,* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31 (Geneva Convention I). Each Geneva Convention includes a provision identical to Article 49 in Geneva Convention I mentioned above. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50, 6 U.S.T. 3217, 75 U.N.T.S. 85 (Geneva Convention II); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Geneva Convention III); Geneva Convention Relative to the Protection of Civilian

The Court, then, will have to fashion a rule in this area. Its judges should be guided first by the suggestions outlined above, namely, that the text and history of the Rome Statute suggest that the criminal proceeding itself should be the focus of the court's inquiry. This is especially true since the Court must look to whether a state court's proceedings were conducted according to "the principles of due process recognized by international law."[130] While states have an independent duty to prosecute those responsible for certain crimes within the jurisdiction of the Court (or extradite them to others),[131] it should be noted that there are few areas where this is true.[132] Importantly, the Court should be informed by the common presence of pardoning powers in the municipal legal systems of states. Thus, while the Court's duty to look at international standards of due process is only one factor to which the Court must "have regard" in determining a case's admissibility, that factor can be seen as weighing in favor of honoring pardons.

However, the teleological arguments from the Rome Statute remain powerful: the ICC was clearly intended to punish the worst individual offenders of international law.[133] Interpretations that make this impossible are likely to be rejected by the Court. But it should be remembered that the Court must determine whether a particular crime is "not of sufficient gravity to justify further action by the Court."[134] Given the likely severe constraints on its resources, the Court will have to be careful in selecting cases of "sufficient gravity," a standard that allows the ICC significant discretion in managing its own docket.

The Court should consider the advantages of trial followed by pardon, including the truth-finding role played by trials, the clear and unambiguous condemnation of the underlying behavior by a competent tribunal, and the real costs to the accused that flow from public conviction. A finding that a person committed grave crimes in the context of war will have a serious effect, will create precedent within the state, and will serve as a deterrent to others who do not want to undergo the ordeal that a public trial on such charges involves. A trial followed by pardon, especially pardon that simply *reduces* rather than eliminates the sentence, is a far sight better than simple impunity. The Court

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Persons in Time of War, Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Geneva Convention IV).

[130] ICC Statute, *supra* note 8, art. 17.

[131] *See* Slye, *supra* note 117.

[132] While the Torture Convention specifically requires states to punish violations of individuals' rights, most human rights treaties do not contain such provisions. *See*, *e.g.*, International Covenant on Civil and Political Rights, 6 I.L.M. 368 (1967); *see generally* Orentlicher, *supra* note 121.

[133] *See* ICC Statute, *supra* note 8, preamble. ("Determined to put an end to impunity for the perpetrators of these crimes") (emphasis in original).

[134] ICC Statute, *supra* note 8, art. 17(1)(d).

may well see this as a significant enough difference – especially given the concerns outlined above concerning the emphasis on the *proceedings* instead of the result, and the prevalence of pardons in municipal legal systems – to concentrate its efforts on cases where no reasonable trial was undertaken, no condemnation was made, and no costs accrued to the lawbreaker. This is especially attractive in the arena of military law where, in addition to the above concerns, issues of unit cohesion, command responsibility, and military discipline support the use of a wider clemency power than is available in a civilian context.

On the other hand, the United States must realize that allowing the convening authority both significant control over the court-martial itself *and* the right to take post-conviction action conflates clemency with the original proceeding. This undermines any argument based on the Rome Statute's concentration on the legitimacy of the underlying proceeding by contaminating it with the subsequent clemency action. Amending the Uniform Code of Military Justice to require that someone other than the convening authority exercise Article 60 powers, or by giving the professional Judge Advocate General's Corps (which operates within a separate chain of command from field officers) greater control over the actual court-martial in such key areas as charge and court-member selection, would go a long way toward ensuring that the ICC will decline jurisdiction over cases where UCMJ Article 60 has been invoked. Consequently, such changes would help bring American military law into line with the rapidly developing demands of international criminal law while simultaneously having the least effect on the principles of command responsibility, unit cohesion, and military discipline that serve a special role in the government of military forces.

IV. CONCLUSION

Traditionally, the level of command influence over U.S. courts-martial has been the result of a compromise. On one hand, commanders argued that their ability to discipline their subordinates was central to unit effectiveness and cohesion. On the other, considerations of humanity and democratic sensitivities argued strongly for a more robust view of military due process. The creation of an International Criminal Court lifts this debate out of its traditional domestic context and injects considerations of international law and the politics of international institutions. If the United States is to give effect to its strong policy of avoiding ICC jurisdiction, it must continue to pursue a range of political and diplomatic strategies. Among these should be an attempt to find safe harbor in the complementarity principle central to the Court's international role. Such a strategy may require us to rethink the terms of our domestic debate over the role of commanders in military justice.

CONVENING AUTHORITY CLEMENCY: IS IT REALLY AN ACCUSED'S BEST CHANCE OF RELIEF?

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I. INTRODUCTION

Currently, following a conviction at court-martial in the military system, a sentence is imposed by either a military judge or the court-martial members. If the sentence is imposed by members, then the military judge overseeing the court-martial has no authority to modify the sentence. Once sentencing is complete, the authority who convened the court martial is required to take action. Prior to taking action, however, the convening authority must consider any and all matters submitted in writing by the servicemember, such as allegations of legal error in the proceedings, letters from family and friends, or clemency recommendations. In taking action, the convening authority may disapprove a finding of guilty, approve a finding of guilty only for a lesser included offense, and disapprove, suspend, mitigate, or remit any part or the entire sentence. This ability to alter the findings and sentence of a court-martial is commonly referred to as the convening authority's clemency power.

The Court of Appeals for the Armed Forces has repeatedly noted that an accused's best chance of relief rests with the convening authority's power to grant clemency.[1] Yet, anyone who has been involved in appellate advocacy for the military or who has had the occasion to read military appellate decisions may have noticed that convening authorities rarely seem to exercise this unique

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[1] *See, e.g.,* United States v. Davis, 58 M.J. 100, 102 (C.A.A.F. 2003); United States v. Wheelus, 49 M.J. 283, 287 (C.A.A.F. 1998); United States v. Wilson, 9 C.M.A. 223, 226 (1958); United States v. Fisher, NMCM 200101235, 2003 CCA LEXIS 75, at *13-*14 (N-M Ct. Crim. App. March 25, 2003).

power. Time and again, the military appellate decisions summarily state: "the convening authority approved the sentence as adjudged." Rarely does one see a statement that the convening authority exercised clemency in reducing or suspending a sentence.

This article is intended to examine the contradictory positions stated above. It starts by examining the roots of the clemency provision in an effort to provide perspective on why it was created. Next, this article examines how, if at all, the clemency provision has been modified, as well as how certain changes in the military justice system have significantly impacted the importance of the clemency provision. Finally, this article analyzes how convening authorities have been using their clemency power in recent years and whether, in practice, the convening authority's power to exercise clemency truly represents an accused's best hope of relief.

II. HISTORY OF THE CLEMENCY PROVISION

The power of the convening authority to exercise clemency is currently codified at Article 60, Uniform Code of Military Justice (hereinafter "UCMJ").[2] Additionally, in the Manual for Courts-Martial (hereinafter "MCM"), the President has established rules specifically governing clemency matters submitted by a convicted servicemember[3] and the convening authority's duty to consider such matters.[4] Currently, the clemency provision as set forth in the MCM is substantially similar to that codified at Article 60, UCMJ. Therefore, the analysis of the history of the clemency provision in this article will focus primarily on the statutory basis for the provision, although occasional references will be made to the MCM.

Throughout our nation's history until the latter half of the 20th century, typically little attention was paid to courts-martial legislation during times of peace.[5] This is due in large part to the fact that courts-martial affected far fewer men and women during peacetime than during times of war and therefore drew far less public attention. Whereas during wartime, involuntary conscription greatly increased the size of the armed forces and the number of courts-martial.[6] Consequently, the most notable and significant changes to legislation governing courts-martial came in the years following World War I and World War II. Since that time, significant changes have been enacted on several more

[2] Uniform Code of Military Justice, art. 60, 10 U.S.C. § 860 (2005) [hereinafter art. 60, UCMJ].
[3] Manual for Courts-Martial, United States, 2005, Rule for Court-Martial 1105 [hereinafter MCM, 2005, R.C.M.].
[4] MCM, 2005, R.C.M. 1107.
[5] JONATHAN LURIE, ARMING MILITARY JUSTICE 46 (1992).
[6] Staff of the House Comm. on Military Affairs, 79th Cong., Investigations on the National War Effort 1-2 (Comm. Print 1946).

occasions. Yet, the more recent changes have not been based on the effects of large world wars and conscription, but rather through a desire to continually improve a system that now more closely tracks its civilian counterpart. Indeed, as it currently stands, our nation's military justice system, "in more ways than not, closely resembles trial in federal district court."[7] Arguably, the practical effects of the convening authority's clemency power have also changed in the face of such substantial modification to the military justice system.

This section will briefly analyze the history of legislation governing courts-martial. Particular attention will be paid to the provisions of law governing the convening authority's power to exercise clemency, as well as pertinent developments in the courts-martial process overall that have had a significant impact on the clemency power.

A. Background on Military Justice in General

1. The Purpose behind a Separate System for Military Justice

Military justice exists to help ensure the nation's security through a well-disciplined military.[8] More specifically, "[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[9] As stated by Judge Robinson O. Everett, former Chief Judge of the Court of Military Appeals:

> In many situations some one individual must be in a position to make choices for a group and have his decision enforced. For this reason, the armed services have a system of rank and command which is designed clearly to place one person in charge when a group action must be decided upon. Of course, for American civilians . . . it is difficult to acquire habits of instantaneous obedience to another person's decisions. Military justice provides a stimulus to cultivate such habits by posing the threat that disobedience of commands will be penalized.[10]

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[7] Maj. Christopher W. Behan, *Don't Tug on Superman's Cape: in Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 192 (2003).
[8] *Id.*
[9] MCM, 2005, Part I, at 3.
[10] Lt. Col. James B. Roan & Capt. Cynthia Buxton, *The American Military Justice System in the New Millennium,* 52 A.F. L. REV. 185, 189 (2002).

Thus, a separate and distinct system for the military grew out of the need for discipline. The Constitution, Congress, and the United States Supreme Court have all recognized this need for a separate system of military justice.[11]

Furthermore, "the reasons for a separate system [of military justice] are primarily grounded on the rationale that world-wide deployment of large numbers of military personnel with unique disciplinary requirements mandates a flexible, separate jurisprudence capable of operating in times of peace or conflict."[12] That is, the military justice system goes wherever the nation's military goes in order to ensure disciplined forces no matter where the location or what the circumstances.[13]

2. The Role of the Commander

The authority of commanders to control discipline within their units is central to the military justice system.[14] Indeed, "[c]ommanders are the foundation of the American military – people who make tough decisions and ensure success. Discipline begins and ends with commander involvement."[15] In order to be effective, military commanders must be assured that their personnel will be disciplined enough to obey orders even in the face of grave danger.[16] As stated by the Navy-Marine Corps Court of Military Review, "[a] major objective of the military justice system is to obtain obedience by subordinates of orders of their superiors. Trial by court-martial is the enforcement mechanism which Congress has provided to assure that obedience is obtained."[17]

Accordingly, since the inception of courts-martial, military commanders have been granted unique control over the process. This facet of military justice is often referred to as "command control." In that regard, command control encompasses the ability of commanders to order an investigation into alleged misconduct, evaluate the results of such investigations, refer charges to courts-martial, convene courts-martial, appoint members to courts-martial, and take action on the findings and sentence of courts-martial. Command control aims to provide military commanders with the flexibility

[11] *See, e.g,* U.S. CONST. amend. V; UCMJ, 10 U.S.C. §§ 801-950 (2005); Dynes v. Hoover, 61 U.S. 65 (1857).
[12] DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE PRACTICE AND PROCEDURE § 1-1 (6th ed 2004).
[13] Roan & Buxton, *supra* note 10, at 190.
[14] *Id.* at 192.
[15] *Id.*
[16] Col. James A. Young III, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91, 97-98 (2000).
[17] United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328, 333 (C.M.A. 1988).

necessary to mete out discipline whenever and wherever the need should arise in order to maintain combat-ready units.[18]

The convening authority's power to exercise clemency is essentially a component of the convening authority's more comprehensive duty to take action on the findings and sentence of all courts-martial.[19] It is during this approval process that the convening authority has the ability to exercise clemency towards a convicted servicemember. Of course, the duty of the convening authority to take action on the findings and sentence is a component of command control as described above. Thus, the historical analysis of the clemency provision below will pay particular attention to the role of commanders in the courts-martial process. In order to fully understand the convening authority's unique power to exercise clemency, it is essential to understand this unique facet of military justice known as command control.

B. Origins: A System of Discipline

The American military justice system essentially finds its roots in the laws of Julius Caesar and the Roman Empire.[20] However, a detailed analysis of Roman military law is unnecessary for the purpose of this article. Suffice to say, it was from the military laws of the Roman Empire that the British system of military justice was eventually developed.[21] In turn, the early laws governing military justice in the United States were adopted directly from the existing British Articles of War when the Continental Congress promulgated the Articles of War of 1775.[22] In fact--and quite ironically considering that America was fighting so vigorously for independence from the British royal crown--the American Articles of War of 1775 were so nearly exact to the existing British Articles of War that several of the Founding Fathers were shocked to see them enacted so easily in Congress.[23] Similar to the British Articles, the American Articles of War of 1775 contained provisions enabling commanders to exercise clemency by pardoning or mitigating punishments ordered by courts-martial. Specifically, the Articles of War of 1775 provided that the general (for a general court-martial) or regimental commander (for a regimental court-martial) "shall

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[18] SCHLUETER, *supra* note 12, § 1-1.
[19] *See* art. 60, UCMJ.
[20] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 17-19 (2d ed. 1920).
[21] *Id.*
[22] *Id.* at 21; *see also Establishment of Military Justice: Hearings on S. 64 Before a Subcomm. of the Comm. on Military Affairs,* 66th Cong. 24-25 (1919) (statement of Maj. J.E. Runcie, United States Army (Ret.)).
[23] *See* S.T. Ansell, *Military Justice*, 5 CORNELL L.Q. (Nov. 1919), reprinted in MIL. L. REV. BICENT. ISSUE 53, 55-56, n.1 (1975) (quoting 3 J. ADAMS, HISTORY OF THE ADOPTION OF THE BRITISH ARTICLES OF 1774 BY THE CONTINENTAL CONGRESS: LIFE AND WORKS OF JOHN ADAMS 68-82).

have full power of pardoning, or mitigating any of the punishments ordered to be inflicted…."[24]

At the same time, the rules governing the Navy initially were not so clear regarding clemency powers. Again, the first set of rules for the American Navy was promulgated in 1775 and was based almost entirely on existing British law.[25] Specifically, the Continental Congress enacted the "Rules for the Regulation of the Navy of the United Colonies of North America.[26] Interestingly, however, as originally promulgated, Article 43 of the Rules provided that "[t]he sentence of a court-martial for *any capital offence* shall not be put into execution, until it be confirmed by the commander in chief of the fleet."[27] Furthermore, Article 44 provided that "[t]he Commander in Chief of the fleet for the time being, shall have power to pardon and remit *any sentence of death* that shall be given in consequence of any of the aforementioned articles."[28] The Rules contained no similar provisions for non-capital offenses. Article 7 of the Rules, however, required that the captain of a vessel "cause the *articles of war* to be hung up in some public place of the ship, and read to the ship's company once a month."[29] As such, Article 7 was inconsistent with Articles 43 and 44. While the Rules did not specifically provide for clemency by a commander in non-capital cases, they also required ships' captains to inform their crews of the articles of war which, of course, specifically provided for such clemency by a convening authority.

The Rules for the Regulation of the Navy remained unrefined until 1799, at which time Congress officially enacted the Articles for the Government of the Navy(AGN).[30] Yet the Articles for the Government of the Navy were still poorly arranged and substantially mirrored the Rules of 1775.[31] One year later, the AGN were revised by a more complete set of articles, including clarification regarding the clemency power.[32] First, the Articles for the Government of the Navy of 1800 were amended to read that the commanding officer of a ship shall cause the *rules for government of the navy* to be hung up in some public place, thereby distinguishing the Articles for the Government of the Navy as separate and distinct from the Articles of War.[33] Second, the

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[24] American Articles of War of 1775, art. LXVII, reprinted in WINTHROP, *supra* note 20, at 953.
[25] *See* EDWARD M. BYRNE, MILITARY LAW (3d ed. 1981).
[26] *See* RULES FOR THE REGULATION OF THE NAVY OF THE UNITED COLONIES OF NORTH-AMERICA (William & Thomas Bradford, 1775, reprinted, Naval Historical Foundation, 1944)
[27] *Id.* art. 43 (emphasis added).
[28] *Id.* art. 44 (emphasis added).
[29] *Id.* art. 7 (emphasis added).
[30] An act for the government of the navy of the United States, ch. 24, 1 Stat. 709 (1799).
[31] JAMES SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE (1953).
[32] An act for the better government of the navy of the United States, ch. 33, 2 Stat. 45 (1800).
[33] *Id.* art. 29 (emphasis added).

revised Articles for the Government of the Navy expanded the clemency power to include any offense, rather than limiting the power to only capital offenses.[34] Finally, the revised Articles extended the power to exercise clemency to all convening authorities.[35] However, the power of convening authorities to exercise clemency was limited to circumstances when the courts-martial were conducted outside of the United States. Otherwise, if the courts-martial took place within the United States, the power to exercise clemency was vested in the President of the United States.[36] Eventually, this limitation was also removed when the Articles for the Government of the Navy were modified in 1918.[37]

Ultimately, in the American military justice system, the convening authority's power to exercise clemency dates back to the earliest laws governing courts-martial. However, once again, it is important to note that these early versions of the laws governing military justice were based on recognition by the Founding Fathers and early representatives in Congress that governance of the military was based on needs far different than those of the civilian society.[38] According to John Adams, who played a vital part in the enactment of the Articles of War of 1775, "[t]here can be no liberty in a commonwealth where the laws are not revered and most sacredly observed, nor can there be happiness or safety in an army for a single hour when discipline is not observed."[39] Adams, a passionate believer in self-government, frequently admitted that the articles were severe. Yet, without strict discipline in the military, he feared "the ruin of our cause and country…."[40]

Furthermore, these early laws incorporated the need for a flexible, separate jurisprudence capable of operating regardless of geographic location in either times of peace or conflict, a characteristic described above.[41] This principle is clearly evident in the distinction that existed in the Articles for the Government of the Navy enacted in 1800 regarding who had the authority to exercise clemency when the naval force was deployed or stateside. The idea of granting the clemency power to lower echelon commanders only while their

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[34] *Id.* art. 42.
[35] *Id.*
[36] *Id.*
[37] An act for the government of the Navy of the United States, 40 Stat. 501 (1918).
[38] *See* Staff of the Sen. Comm. Armed Services, 80th Cong., Courts Martial Legislation: A Study of the Proposed Legislation to Amend the Articles of War (H.R. 2575); and to Amend the Articles to for the Government of the Navy (H.R. 3687; S. 1338) 2 (Sen. Comm. Print 1948) ("At the time these [British and Roman] notions were enacted into law by the American Congress, it was pointed out that the objective of an army is wholly different from the objective of a civilian society; that the objective of military law differs from that of civilian law. … The function of an army or military organization was then, as it remains today, not only to fight wars but to win them.").
[39] LURIE, *supra* note 5, at 7.
[40] *Id.* at 5.
[41] , *See supra* section II(A). SCHLUETER, *supra* note 12, § 1-1.

forces were outside the United States demonstrates the need for commanders to maintain combat ready units. Granting clemency power to the lower level convening authorities while their forces were deployed enabled these convening authorities to return a sailor convicted at court-martial back to service in order to maintain full fighting capabilities, rather than having to rely on a higher commander with whom a deployed squadron may have been unable to communicate. Otherwise, waiting to obtain clemency by the Commander in Chief of the Fleet would severely limit the commander's ability to maintain a unit "ready to fight wars should the occasion arise."[42]

As a result of incorporating the need for a separate and flexible system of jurisprudence, these early laws governing courts-martial demonstrated command control in its purest form. Congress vested near total control of courts-martial in a single commander. In fact, under the Articles of War of 1775, the military commander controlled the entire courts-martial process all the way through execution in cases where death was prescribed by the court. Consequently, a servicemember could be investigated, prosecuted, found guilty, and executed all under the control of a single military commander. Essentially, courts-martial were not a vehicle for justice, but rather a system of discipline. Therefore, the convening authority's clemency power fit within the overall command control aspect of early court-martial legislation.

The Articles of War and the Articles for the Government of the Navy essentially remained intact until the early 1900s. The few modifications made during the 19th century were generally unremarkable. As time progressed, however, the need for change arose. With the massive influx of men and women into military service during World War I, the stage was set. As we shall see, the subsequent changes to the Articles of War and Articles for the Government of the Navy would be marked by one key development in particular: limiting the ability of commanders to control the entire court-martial process. While Congress continually sought to strike a balance between the unique demands of military discipline and military justice, the overall trend was to limit the command control aspect of military justice. This overall trend has arguably had tremendous practical consequences for the convening authority's exercise of the clemency power.

C. World War I Era: A Call for Change

Once enacted, the Articles of War remained relatively unchanged until 1920. Following World War I, however, there was nationwide clamor regarding the military justice system. In a letter to Major General Enoch H. Crowder, the

[42] United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955).

Judge Advocate General of the Army, in 1919, Secretary of War Newton Baker acknowledged being "deeply concerned…over the harsh criticisms uttered upon our system of military justice."[43] According to the House Committee on Military Affairs, "[s]ince the close of the war attention has been frequently called to the fact that our present code is archaic and out of date; that we have not kept pace with other nations in such matters; and that we are going too far back into the past for our plan of administering military justice."[44] More specifically, critics complained that commanders exercised arbitrary discretion, that sentences were excessively severe, that reviewing authorities possessed the ability to send acquittals back to the court, and that the actions taken by the Office of the Judge Advocate General of the Army were ineffectual.[45] Furthermore, it was generally known that Britain had recently modified its system of military justice, the very system from which the American system was born.[46]

Interestingly, the movement to change the military justice system was fueled primarily by a dispute within the military service itself. Specifically, Brigadier General Samuel T. Ansell, the Acting Judge Advocate of the Army, sparked a major controversy when he questioned the legality of two courts-martial that arose in late 1917, commonly referred to as the Houston riot and Fort Bliss mutiny cases.[47] For the purposes of this article, the details of those cases need not be described here. What is important is that General Ansell interpreted Section 1199 of the Revised Statutes of 1878 as granting the power of appellate review over courts-martial to the Judge Advocate General. General Ansell's superiors, Major General Enoch H. Crowder and Secretary of War Newton Baker, both disagreed.[48] Ultimately, at the heart of the Ansell-Crowder dispute was the concept of command control and, in particular, the issue of appellate review in the military system.

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[43] Letter from Newton D. Baker, Secretary of War, U.S. War Department, to Maj. Gen. E.H. Crowder, Judge Advocate General of the Army (March 1, 1919), reprinted in U.S. WAR DEPARTMENT, MILITARY JUSTICE DURING THE WAR 3 (1919).

[44] H.R. Rep. No. 66-940, at 2 (1920).

[45] Letter from Maj. Gen. E.H. Crowder, Judge Advocate General of the Army to Newton D. Baker, Secretary of War, U.S. War Department (March 10, 1919), reprinted in U.S. WAR DEPARTMENT, MILITARY JUSTICE DURING THE WAR 12 (1919).

[46] Hearings on S. 64, *supra* note 22, at 25 (statement of Maj. J.E. Runcie, United States Army (Ret.)).

[47] JOHN M. LINDLEY, A SOLDIER IS ALSO A CITIZEN: THE CONTROVERSY OVER MILITARY JUSTICE, 1917-1920, at 7-36 (Harold Hyman & William P. Hobby eds. 1990).

[48] General Crowder served as Judge Advocate General (JAG) of the Army from 1911 until 1923. In 1917, he also assumed the duties as Provost Marshal General and administered the wartime manpower draft (he had been heavily involved in the drafting of the first Service Selection System). Meanwhile, General Ansell assumed control of the day-to-day duties as "acting" JAG. It was during this time that the Ansell-Crowder dispute arose. *See* LINDLEY, *supra* note 47, at 22-23; and LURIE, *supra* note 5, at 48.

Eventually, in 1919, the Ansell-Crowder dispute turned public after General Ansell was called to testify before the Senate Military Affairs Committee. In a statement before the Senate Military Affairs Committee, he criticized the Army's court-martial proceedings:

> Terrible injustices have been inflicted upon small offenders. The whole system is wrong. I realize that I am maiming an institution to which I belong. But I am doing it so that ample justice may be done the men in ranks. We need more humanity in our judgment of their offenses. We have not shown it. For the sake of our men and their families we must put an end to this cruel system, and we must do it at once.[49]

Shortly thereafter, the *New York World* published a scathing article titled "The Thing That Is Called Military Justice!" outlining numerous instances of military injustice.[50] Meanwhile, the politics of the issue had gained full speed. Aligned with General Ansell was Senator George Chamberlain who, on December 30, 1918 in a Senate speech, stated that "the records of the courts-martial in this [first world] war show that we have no military law or system of administering justice which is worthy of the name of law or justice."[51]

Accordingly, on January 13, 1919, Senator Chamberlain introduced Senate Bill 5320 to establish a revisory power in the Office of the Judge Advocate General and to reduce the discretion of commanders over courts-martial.[52] Ultimately, this bill failed because the Sixty-fifth Congress ended on March 3, 1919. However, in April 1919, Senator Chamberlain submitted Senate Bill 64, a draft revision of the Articles of War.[53] The second Chamberlain Bill (which was actually written by General Ansell) proposed considerable changes in procedure for courts-martial, including: (1) an independent military judge who would select the court members; (2) the right of the accused to have a portion of the panel chosen from his own rank; (3) definite limits on sentences; (4) mandatory and binding pretrial investigations; and (5) the right to legal

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[49] *A Bill to Promote the Administration of Military Justice by Amending Existing Laws Regulating Trials by Courts-Martial, and For Other Purposes: Hearings on S. 5320 Before the Sen. Comm. on Military Affairs,* 65th Cong. 40 (1919) (statement of Brigadier General Samuel T. Ansell).
[50] LINDLEY, *supra* note 47, at 136.
[51] 57 Cong. Rec. 878 (1918).
[52] *See* A Bill to Promote the Administration of Military Justice by Amending Existing Laws Regulating Trials by Courts-Martial, and For Other Purposes, S. 5320, 65th Cong. (1919). Also, an identical version was introduced to the House on February 14, 1919. *See* 57 Cong. Rec. 3405.
[53] Hearings on S. 64, supra note 22, at 5-23. Also, once again, shortly thereafter an identical bill was introduced in the House. Hearings on S.64, *supra* note 22, at 37, 100-102.

counsel.[54] Most notably, S.64 proposed: (1) that the reviewing authority be stripped of the ability to order reconsideration of a finding of not guilty; and (2) that a court of military appeals be established and comprised of three lawyers appointed by the President for life with the authority to automatically review all cases involving death, dismissal, dishonorable discharge, or confinement in excess of six months unless the accused waived the review. Indeed, the overall intent of the Chamberlain Bill was to eliminate the convening authority from the post-trial review process altogether as a means of eliminating command control.[55]

The Chamberlain Bill stalled in Congress primarily because of the voluminous text of testimony, statistics and documents that resulted from the subcommittee hearings.[56] In fact, Senator Chamberlain and his subcommittee counterparts were so confused by the extensive evidence that they turned to the Judge Advocate General, General Crowder, for assistance.[57] As a result, General Crowder submitted another revision of the Articles of War in December 1919, which of course proffered far less drastic changes than S. 64. Shortly thereafter the chairman of the subcommittee, Senator Warren, reported the Chamberlain Bill favorably to the Congress with one amendment. That amendment was essentially the Crowder revision of December 1919.[58] Initially, not even this bill could pass the Senate. However, in May 1920, a bill similar to the amended Chamberlain Bill, known as the Army Reorganization Act of 1920, passed.

Ultimately, what began as a movement to overhaul the military justice system ended as a mere revision.[59] Nevertheless, the Army Reorganization Act of 1920 still resulted in significant changes to the Articles of War. Many of them represented substantial limitations on command control over courts-martial. Specifically, the new articles required an impartial investigation prior to referring charges to trial,[60] provided for a law member to serve on courts-martial,[61] guaranteed counsel for the accused,[62] established the appointment of a judge advocate to serve as a prosecuting attorney,[63] permitted one peremptory challenge of anyone except the law member by both the prosecution and

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[54] Behan, *supra* note 7, at 218-219 (citing Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 6 (1970)).
[55] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the Comm. on Armed Services*, 81st Cong. 840 (statement of Prof. Arthur J. Keeffe).
[56] LINDLEY, *supra* note 47, at 167.
[57] *Id.*
[58] *Id.* at 167-68.
[59] Behan, *supra* note 7, at 218.
[60] Articles of War of 1920, Art. 70, Pub. L. No. 66-242, ch. II, 41 Stat. 759, 787-812 (1920).
[61] *Id.* art. 8.
[62] *Id.* art 17.
[63] *Id.*

defense,[64] and required acquittals to be announced in open court immediately after the court had made its findings.[65] Each of these provisions worked to insulate military accused from the detrimental effects of command control. Furthermore, the Army Reorganization Act of 1920 offered a positive development in the way of appellate review. While the Act fell short of establishing a military court of appeals, it did establish of a Board of Review located in the Office of the Judge Advocate General under Article 50 ½.[66]

Perhaps the most important modification to the Articles of War under the Army Reorganization Act of 1920 was the removal of the provision which previously allowed a reviewing authority to return a record of trial for reconsideration of an acquittal, a finding of not guilty, or of a sentence with a view towards increasing its severity.[67] This change has been described as the single most important amendment to the Articles of War in 1920.[68] According to Edmund M. Morgan, an Army colonel at the time who would later become a law professor at Harvard and would later chair the committee appointed to create a uniform code of military justice in the 1940s, before the reviewing authority was stripped of such authority, he "had practically absolute command not only over the personnel of the court, but over the findings and sentence of the court."[69] By limiting the convening authority's ability to return a court-martial case for reconsideration, the amended Articles of War now definitively required the convening authority to either accept the court's findings and sentence (with limited exceptions), or exercise clemency regarding the sentence.[70] Indeed, this change represented one of the most significant steps in the direction of limiting command control.

Interestingly, the commotion and public treatment of the Army military justice system during the World War I era escaped the Navy.[71] This is most likely because the Secretary of the Navy possessed fairly extensive review powers, unlike any authority in the Army higher than the convening authority.[72]

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[64] *Id.* art. 18.
[65] *Id.* art. 29.
[66] *Id.* art. 50 ½.
[67] *Id.* art. 40.
[68] *Staff of the House Comm. on Military Affairs, 79th Cong., Investigations on the National War Effort* 5 (Comm. Print 1946).
[69] Hearings on S.64, *supra* note 22, at 1379.
[70] The convening authority was still required to actually approve the findings. That is, the convening authority could only approve findings supported in law and fact. Thus, if the evidence in the case only supported a finding of guilty for a lesser included offense, then the convening authority could only approve a finding of guilty for the lesser included offense. Given the legal nature of this duty, the convening authority was entitled to assistance from the staff judge advocate. *See* Articles of War of 1920, *supra* note 60, arts. 46, 47, and 50 ½.
[71] LURIE, *supra* note 5, at 129.
[72] *Id.*

This issue of appellate review vested in higher military authority was, of course, at the heart of the Ansell-Crowder dispute.[73] This disparate treatment did not escape General Crowder who wondered "[w]hy…has not the storm broken out against the Navy? The answer is, I imagine, because the Judge Advocate General of the Navy was more alert in instructions and admonitions given courts than ourselves."[74] That is, in General Crowder's opinion, the Army and the Navy had "'practically the same [military justice] system,'" yet the Navy was applauded and the Army was "submerged with vindictive criticism." General Crowder viewed the Navy's ability to escape criticism as a result of the Navy Judge Advocate General taking time to instruct, admonish and caution his courts against injustice, something General Crowder believed the Army had "'made less use of [its] opportunities than [the Navy]'" to do.

D. World War II Era: Creation of a Unified System

Again, the Articles of War and the Articles for the Government of the Navy remained relatively unchanged until the late 1940s, and they governed the military justice systems of the Army and Navy respectively through World War II. Yet, once again, during and following the war there was nationwide clamor regarding the military justice system.[75] Veterans of the second World War, particularly those conscribed against their will, resented being subject to a system of justice so different that the civilian system and so dependent on command control.[76] Once again, Congress recognized that the vulnerability of the Americans drafted into service meant it was "imperative, morally speaking, for Congress and the War Department to seek the greatest possible assurance that what is officially called military justice be justice indeed, and that it be adjusted, if adjustments prove necessary, to conform as closely as possible to the standards of individual rights which are established as part of our civil heritage in a democratic state."[77] This time the call for change would result in a uniform code governing all services. Significantly, and not surprisingly, at the heart of the movement was the issue of command control.

The Navy was unable to escape "the storm" this time around. In a period of four years, from 1943 to 1947, the Navy received no less than seven reports assessing the quality of military justice in the Navy.[78] Of course, among

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[73] *Id.*
[74] *Id.* (quoting Enoch Crowder Papers, reel 5, folder 144 (May 5, 1919)).
[75] *See Bills to Amend the Articles of War: Hearings on Sundry Legislation Affecting the Naval and Military Establishment Before the Subcomm. of the Comm. on Armed Services*, 80th Cong., 2166-2175 (1947); *see also* LURIE, *supra* note 5, at 128.
[76] Index and Legislative History, Uniform Code of Military Justice, at Preface (50th Anniversary ed. 2000).
[77] Investigations on the National War Effort, *supra* note 6, at 1.
[78] LURIE, *supra* note 5, at 130.

these assessments, the role of the convening authority was an issue of frequent concern. For example, in 1943, the Navy received its first report from a board headed by Arthur A. Ballantine, former Undersecretary of the Treasury, commenting on the exercise of clemency by convening authorities following courts-martial.[79] Specifically, the report focused on the fact that Navy courts-martial frequently issued severe sentences with the understanding that the convening authorities would subsequently recommend clemency.[80] This allegation mirrored criticism by General Ansell in 1919 that such a practice "throws a responsibility upon others which properly belongs with the court."[81] Furthermore, the report commented on the tension between a system of justice and the purpose behind command control.[82]

In 1947, the Navy received an even more extensive and thoughtful analysis in the Report of the General Court-Martial Sentence Review Board, chaired by Professor Arthur J. Keeffe and administered by Felix Larkin.[83] Once again, the Keeffe report latched on to the role of the convening authority. Regarding the fact that the reviewing authority was typically the same officer who convened the court-martial, the Keeffe report noted that "it is 'humanly impossible for a person, no matter how high his purpose, to dissociate himself from his prior actions and opinions…[,] and to view it later as though he were seeing it for the first time.'"[84] The board noted that the practical result was that the convening authority, rather than the court, actually fixed the sentences. While the convening authority could exercise clemency, all too often such action consisted of "'merely reducing the sentence to something that approached what it should have been in the first place.'"[85] The Keeffe board, much like the Chamberlain Bill in 1920, ultimately recommended that the only way to correct

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[79] *Id.* at 131 (citing BALLANTINE REPORT, "ORGANIZATION, METHODS, AND PROCEDURE OF NAVAL COURTS" (1943) in FELIX LARKIN PAPERS 11).
[80] *Id.*
[81] *Id.*
[82] "An even more serious issue for the committee was the extent to which the navy system was able to 'distinguish between the maintenance of discipline and the administration of justice,' providing 'a workable plan under which the two factors are accorded proper relative importance.' Here the committee found much room for improvement.
The navy procedure 'might well provide greater independence to the judicial function.' Because the convening authority not only ordered the accused to trial, but also selects his 'judges,' and because they supposedly would not convene a court-martial 'unless reasonably convinced of his guilt, acquittal may be considered tantamount to an expression of disagreement with a superior officer.' Having pointed to the underlying tension between a justice system and a well established structure, the report emphasized that its statements were 'without any criticism whatsoever of the integrity and sense of fairness of officer personnel[,] and with the belief that substantial justice is generally afforded.'" *Id.* at 131-32 (quoting BALLANTINE REPORT (1943), at 15, 23, and 24).
[83] *Id.* at 130, n.13 (citing Report of the [Navy] General Courts-Martial Sentence Review Board (1947) in FELIX LARKIN PAPERS 77 [hereinafter RGCMSRB]).
[84] *Id.* at 142-43 (quoting RGCMSB, at 192).
[85] *Id.* at 143 (quoting RGCMSB, at 193).

such deficiencies was to separate the reviewing authority from the convening authority, or even to abolish the review altogether and to leave appellate review to higher authority. For those who opposed such a step on the grounds that it "might be destructive of discipline," the Keeffe board acknowledged as much by noting that once a case has been referred to court-martial, "it ceases to be a mere disciplinary matter, and from that time on the process of law should be paramount, and command control should cease."[86]

Meanwhile, the Army convened its own advisory committee under Dean Arthur T. Vanderbilt, Dean of New York University and soon to become Chief Justice of the New Jersey Supreme Court.[87] While the investigative efforts of the Vanderbilt committee initially appeared extremely impressive, the ultimate report was hardly innovative in that its recommendations were substantially similar to the changes first recommended by General Ansell and Senator Chamberlain more than 25 years earlier.[88] Of course, the Vanderbilt report echoed the oft repeated criticisms regarding command control when it stated that "the command frequently dominated the courts in the rendition of their judgment."[89] Accordingly, the Vanderbilt report suggested that the convening authority be specifically forbidden from reprimanding courts and their members and that reviewing authority be vested in the Judge Advocate General of the Army.[90]

In the end, the above discussion represents a mere portion of the overall analysis of military justice that occurred between 1943 and 1947. Ultimately, two bills were introduced to Congress, one by the Army and one by the Navy, each of which recommended substantial changes to the Articles of War and Articles for the Government of the Navy respectively. Yet, each bill still differed in substantial ways. For example, the proposed amendments to the Articles for the Government of the Navy were radical in that they proposed vesting the power to review the legality of courts-martial proceedings, the findings, and the sentence in an authority higher than the convening authority, while the Army bill left such powers with the convening authority. Interestingly, the Navy specifically directed that the convening authority shall "retain full clemency power and there shall be no restoration of originally imposed punishment once such clemency has been exercised."[91] The fact that the Navy desired to retain full clemency power at the convening authority level, despite simultaneously proposing fairly radical changes to the post-trial review

[86] *Id.* at 143 (quoting RGCMSB, at 193).
[87] *Id.* at 137.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] Courts Martial Legislation, *supra* note 38, at 21.

process, demonstrates the historical importance attached to the convening authority's clemency power. The House of Representatives passed the Army bill (known as the Elston Act); however, the bill stalled in the Senate. Neither house took action on the Navy bill.

Before any further action could be taken on either bill, the National Security Act of 1947 unified all military services under the Department of Defense.[92] Soon thereafter, in 1948, Secretary of Defense James Forrestal ordered the creation of a committee to draft a uniform code that would govern all military services, and he appointed Edmund Morgan as the committee chair (hereinafter "the Morgan Committee"). Interestingly, Secretary Forrestal was well aware of Morgan's support for General Ansell and opposition to General Crowder during 1918-1919. Indeed, Forrestal considered Morgan's role in the earlier movement for reform to be "an asset rather than a liability" in the renewed movement for change.[93] In a way, Forrestal preemptively legitimized the reforms that the committee would soon recommend by affirmatively selecting someone so prone to recommend substantial changes.

The Morgan Committee conducted a seven-month study in which it considered the Articles of War, the Articles for the Government of the Navy, the Federal Code, the penal codes of various states, and voluminous reports on military and naval justice.[94] The end result was House Resolution 4080, a bill to establish the Uniform Code of Military Justice. On May 6, 1950, President Truman signed the Uniform Code of Military Justice into law. The bill had passed without even a roll call in either the House or Senate. In the end, Congress enacted the bill almost exactly as the Morgan Committee had drafted it.

Of course, the UCMJ had not been passed without criticism. And not surprisingly, the public and political reaction centered on the issue over command control. Secretary Forrestal seemingly tried to preempt the criticism when he forwarded the bill to Congress by highlighting the provisions that were "designed to prevent undue control or interference with the administration of military justice."[95] Additionally, when Professor Morgan introduced the bill for hearings before the House Armed Services Committee, he explained:

> Because of the military nature of courts-martial, we have left the convening of the courts, the reference of the charges,

[92] National Security Act of 1947, ch. 343, §§ 2-311, 61 Stat. 495 (1947) (codified as amended at 50 U.S.C. §§ 401-442 (2005)).
[93] LURIE, supra note 5, at 144.
[94] S. Rep. No. 81-486, at 4 (1949).
[95] H.R. Rep. No. 81-491, at 38 (1949).

> and the appointment of members to the commander. For the same reason, we have preserved the initial review of the findings and the sentence by the commander.
>
> Having done this, we examined ways and means of restricting the commander to his legitimate functions. We have tried to prevent courts-martial from being an instrumentality and agency to express the will of the commander.
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> To make the action of courts-martial and the procedure for review free from his influence we have set up an impartial judge for the court-martial, made it mandatory that lawyers represent the parties in the general court-martial cases, required the commander to consult before and after with his staff judge advocate or law specialist, and prohibited him from either censuring or reprimanding the court.
>
> We have set up a system which resembles the independent civilian court, but we have placed it within the framework of military operations. At the trial and in the review of facts the men who function as counsel, trial judge, and intermediate appellate judges will be skilled in law and in military matters. They will be independent of command and subject to a supreme civilian tribunal on questions of law.

Yet, the critics still assailed the UCMJ for its failure to eliminate command control by entirely removing commanders from the court-martial process. Richard Wels, Chairman of the Special Committee on Military Justice of the New York County Lawyers' Association, stated that "[t]here is no question that this bill retains command control in all of its ugly aspects."[96] While he recognized that "the commanding officer must and should be able to place a man on trial and control and direct the prosecution," he urged that "the judicial machinery itself must be in the hands of an independent judicial system…."[97] The American Bar Association "urgently recommend[ed] the passage by Congress…of legislation separating military justice from command…."[98] Finally, even representatives of the military supported such a

[96] *A Bill to Unify, Consolidate, Revise and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before Senate Comm. on Armed Services,* 81 Cong. 206 (1949) (statement of Richard H. Wels, Chairman, Special Committee on Military Justice of the New York Lawyers' Association).
[97] *Id.* at 207
[98] *Id.* at 61.

position. General R.C. Harmon, Judge Advocate General of the Air Force, testified before the Senate Subcommittee on Armed Services that "there should be all of the elimination of command influence that can be brought about in the bill."[99] He elaborated that "the administration of military justice generally should be completely taken away from command…so that the commanding officer has decided that [a man] is to be investigated for [an offense] and various steps going up to court-martial after that. I do not believe that command should exert any influence then in trial and completion of the case from that point."[100]

Ultimately, Congress certainly recognized and echoed the specific concern over command control. Indeed, the House of Representatives Committee on Armed Services considered command control as "[p]erhaps the most troublesome question which [it] considered."[101] In this regard, the Committee explained:

> [W]e have included numerous restrictions on command. The bill provides that the convening authority may not refer charges for trial until they are examined for legal sufficiency by the staff judge advocate or legal officer; authorizes the staff judge advocate or legal officer to communicate directly with the Judge Advocate General; requires all counsel at a general court-martial trial to be lawyers or law graduates and, in addition, to be certified as qualified by the Judge Advocate General; provides a law officer who must be a lawyer whose ruling on interlocutory questions of law will be final and binding on the court and who must instruct the court on the presumption of innocence, burden of proof, and elements of the offense charged; provides that the staff judge advocate of the convening authority must examine the record of trial for sufficiency before the convening authority can act on a finding or sentence; provides legally qualified appellate counsel for an accused before a board of review and the Court of Military Appeals; establishes a civilian court of military appeals, completely removed from all military influence or persuasion; and makes it a court-martial offense subject to this code to unlawfully influence the action of a court-martial.[102]

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[99] *Hearings on S. 857 and H.R. 4080*, *supra* note 96, at 290 (statement of Gen. R.C. Harman, Judge Advocate General of the Air Force).
[100] *Id.* at 290-91
[101] H.R. Rep. No. 81-491, at 7 (1949).
[102] *Id.* at 7-8.

In response to those who urged Congress to separate military justice from command, the House Committee explained:

> We fully agreed that such a provision might be desirable if practicable, but we are of the opinion that it is not practicable. We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace, and, regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict the conduct of our military operations.

Clearly, while Congress retained certain provisions of command control, it certainly intended to establish (or retain) some checks on military authority in the courts-martial process. Not surprisingly, the power of the convening authority to exercise clemency in the post-trial approval phase survived as a part of the UCMJ.

As enacted under the UCMJ, the clemency provision was based on multiple articles. First, Article 60 provided:

> After every trial by court-martial the record shall be forwarded to the convening authority, and action thereon may be taken by the officer who convened the court, an officer commanding for the time being, a successor in command, or by any officer exercising general court-martial jurisdiction.[103]

Second, Article 64 provided:

> In acting on the findings and sentence of a court-martial, the convening authority shall approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he in his discretion determines should be approved. Unless he indicates otherwise, approval of the sentence shall constitute approval of the findings and sentence.[104]

Collectively, Articles 60 and 64 represented the convening authority's responsibility to approve the findings and sentence of a court-martial, including the power to exercise clemency by approving only so much of the findings and

[103] Uniform Code of Military Justice, Pub. L. No. 81-506, art. 60 (1951).
[104] *Id.* art. 64.

sentence "as he in his discretion determines should be approved." Important to note is the degree to which Congress desired to ensure that the convening authority's ability to act was a discretionary power. The Congressional Hearings on this matter demonstrate the importance placed on ensuring that convening authorities understood that the approval of the findings and sentence was, in fact, in their discretion. As initially proposed by the Morgan Committee, Article 64 did not include the phrase "as he in his discretion" immediately preceding the word "determines."[105] Following a discussion on the clarity of the original version, Senators Elston and Brooks wanted to ensure that the language of Article 64 was "very clear."[106] Accordingly, the "discretion" phrase was added to make clear that clemency was "a discretionary matter with the convening authority as to what he shall do with any sentence which comes before him for review." [107]

The clemency provision undoubtedly remained alive because it is an element of command control that benefits the accused. According to Robert Smart, an attorney serving on the House Armed Services Committee, the clemency provision was intended to enable commanders to suspend the sentences of those convicted in order to prepare for combat.[108] If the men "made good" then the commander would remit their sentences.[109] According to Smart, "[t]hat is the intent of it and it works for the benefit of the accused."[110]

In another crucially important provision in the UCMJ, Article 67 established appellate review by a civilian Court of Military Appeals. This court was unique in that it was established outside the Department of Defense and it was staffed with "highly qualified civilians."[111] Congress specifically sought to set the compensation for the judges high enough to attract well-qualified attorneys.[112] While one may initially ask how the establishment of this court pertains to the convening authority's post-trial responsibilities, the answer is more readily apparent in the amendments to the UCMJ in the years following 1950, particularly in 1983.[113] In passing the 1983 amendments, Congress specifically recognized the careful watch over military justice being conducted by the Court of Military Appeals. Because of the Court's diligence, Congress felt compelled to limit the convening authority's role in the post-trial process.

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[105] *Hearings on H.R. 2498*, *supra* note 55, at 1182-85 and 1266-67.
[106] *Id.* at 1182-85.
[107] *Id.* at 1266.
[108] *Id.* at 1185.
[109] *Id.*
[110] *Id.*
[111] H.R. Rep. No. 81-491, at 32 (1949).
[112] *Id.*
[113] *See infra*, § II(E).

The creation of the Court of Military Appeals was truly a remarkable step in the history of our military justice system.

E. 1951 to Present: The Continued Civilianization of Courts-Martial

Following the initial enactment of the UCMJ, there have been several significant amendments to the Code. Specifically, the Military Justice Act of 1968 and the Military Justice Act of 1983 enacted the most substantial revisions. These amendments continued the trend toward limiting the scope of command control.

The Military Justice Act of 1968 introduced a key feature to the modern-day court-martial and a substantial step in the "civilianization" of the courts-martial process: the military judge.[114] The military judge was a significant evolution of the "law officer" in general courts-martial and an entirely new protection in special courts-martial.[115] Prior to 1968, general courts were presided over by the "law member," and special courts were presided over by the president of the court (senior member), who was usually not a lawyer and was usually unassisted by any lawyer.[116] Indeed, for those who practiced military law prior to 1968, many had become accustomed to the thought of a servicemember being sentenced to six months in prison at a special court-martial with no lawyer present in the courtroom.[117]

According to the Senate Armed Services Committee, the Military Justice Act of 1968 was:

> an attempt to improve some of the procedures and increase the substantive safeguards in courts-martial. In brief, the bill…amends the Uniform Code of Military Justice to streamline court-martial procedures in line with procedures in U.S. district courts, to redesignate the law officer of a court-martial as a 'military judge' and give him functions and powers more closely allied to those of Federal district judges, to increase the availability of legally qualified counsel to represent the accused in courts-martial, to redesignate appellate boards of review as 'courts of military review' and change somewhat their structure, to increase the independence of military judges and members and other

[114] Military Justice Act of 1968, Pub. L. No. 90-632, 80 Stat. 1335 (1968).
[115] H.F. "Sparky" Gierke, *Five Questions About the Military Justice System*, 56 A.F. L. REV. 249, 254-55 (2005).
[116] *Id.*
[117] *Id.* at 250.

> officials of courts-martial from unlawful influence by convening authorities and other commanding officers, and to increase the postconviction safeguards and remedies available to the accused.[118]

Cleary, the Military Justice Act of 1968 was an extension of Congress' continuing desire to ensure courts-martial were conducted in a manner that appropriately protects the rights of accused servicemembers while continuing to support the needs of military discipline. And clearly, continuing to reduce the specter surrounding command control was an issue at the heart of changes.

In 1983, Congress substantially revised the UCMJ once again. This time the Military Justice Act of 1983 made significant changes to the post-trial responsibilities of the convening authority, including the clemency process.[119] In fact, the Military Justice Act of 1983 represents the culmination of years of criticisms surrounding command control and the convening authority's ability to affect the findings and sentence of courts-martial.

Under the Military Justice Act of 1983, Articles 60 and 64 of the older UCMJ were merged, and Article 60 under the 1983 amendment became the sole statutory provision governing the submission of clemency matters and the convening authority's role in taking action on courts-martial.[120] Under the prior law, the convening authority was required to make a determination as to the legal sufficiency of the proceedings.[121] Thus, the convening authority was required to approve both the findings and the sentence. In order to assist the convening authority, the Staff Judge Advocate or legal officer was required to prepare a detailed legal review of the court-martial. The Military Justice Act of 1983 eliminated the requirement for the convening authority to insure the legal sufficiency of the proceeding. In doing so, the Senate Armed Services Committee noted:

> When laymen presided over all courts-martial and lay officers served as counsel, there was a clear basis for requiring legal review in the field and requiring action on the law by the convening authority. This is less the case today when virtually all special and general courts-martial are tried before military judges and qualified attorneys and all cases are subject to review by qualified attorneys. Moreover, as a result of court decisions, the staff judge advocate's review has become a

[118] S. Rep. No. 90-1601, at 4503-4504 (1968).
[119] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983).
[120] *Id.* § 5(a)(1), §§ 860, 864.
[121] Uniform Code of Military Justice, arts. 60, 64, 10 U.S.C. §§ 860, 864 (1982).

> cumbersome document which produces a substantial strain on legal resources, often is too lengthy to be of use to the convening authority, and can constitute an independent source of appellate litigation even when the underlying case is otherwise free of error.[122]

Congress intended to eliminate these problems by leaving the legal review of courts-martial to the appellate courts.[123] As a result of the Military Justice Act of 1983, the convening authority was no longer required to approve the findings of courts-martial, although he retained the ability to dismiss charges, modify findings (from guilty to not guilty or from guilty of a specification to guilty of a lesser included offense, but not vice versa), and order rehearings as a matter of discretion. Further, while the convening authority was still required to act on the sentence of every court-martial, "a review of the legality of the sentence is not required…because action on the sentence 'primarily involves a determination as to whether the sentence should be reduced as a matter of command prerogative (e.g., as a matter of clemency) rather than a formal appellate review.'"[124]

The message delivered by Congress through the Military Justice Act of 1983 regarding the post-trial responsibilities of the convening authority was clear. The convening authority had finally been reduced to a limited role post-trial. In a letter from Secretary of Defense Caspar Weinberger to the Senator Melvin Price, Chairman of the House Committee on Armed Services, Secretary Wienberger stated: "The bill emphasizes that the convening authority's post-trial role primarily involves clemency matters rather than a formal appellate review."[125] In enacting these changes to the UCMJ, the Committee on Armed Services reflected on the origins of the UCMJ. In discussing the enactment of the UCMJ, the committee noted that "[p]erhaps the most troublesome matter before the Congress in examining the Uniform Code of Military Justice legislation proposals in 1949 was the issue of command control - - and rightly so."[126] The committee continued by noting that "[t]he decisions of the Court of Military Appeals over the past 30 years show careful monitoring of these issues."[127] Thus, in modifying the convening authority's role post-trial and essentially reducing it to a role of clemency, Congress recognized the extent to which command control had effectively been reduced by the numerous

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[122] S. Rep. No. 98-53, at 7 (1983).
[123] *Id.* at 7, 19; *see also* H.R. Rep. No. 98-549, at 15 (1983).
[124] Andrew S. Effron, *Post-Trial Submissions to the Convening Authority Under the Military Justice Act of 1983*, ARMY LAW., July 1984, at 59, 59-60 (quoting H.R. Rep. No. 98-549, at 15 (1983)).
[125] H.R. Rep. 98-549, *supra* note 123, at 18.
[126] *Id.* at 13.
[127] *Id.*

modifications to the courts-martial process throughout the years, such as the creation of an independent, civilian appellate review process.

Furthermore, the Military Justice Act of 1983 essentially codified the right of a convicted servicemember to request clemency from the convening authority.[128] Throughout history until this point, the convening authority undoubtedly possessed the authority to approve whatever portion of the sentence he deemed appropriate. Yet never, until the Military Justice Act of 1983, did servicemembers possess *a statutory right* to submit clemency matters to the convening authority.[129] In theory, this amendment was yet another step in the overall transformation of the clemency provision from a commander's tool to a more pure source of relief for a convicted servicemember. Indeed, the clemency provision as modified in 1983 seemed to enhance the opinion expressed by the Court of Military Appeals that clemency was accused's best chance at post-trial relief. In theory, the clemency provision was looking more and more like a true process for clemency, rather than a tool of commanders in the field. However, as we shall see, theory and practice do not always mesh.

F. Summary: The Modern Court-Martial

The laws governing courts-martial have been modified dramatically since their initial enactment. According to some, the military justice system has undergone considerable "civilianization," and as a result, the modern court-martial closely resembles a trial in federal district court.[130] In fact, this has arguably been the goal throughout the process. Article 36, UCMJ, specifically provides that the President may prescribe rules for pre-trial, trial, and post-trial procedures "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter [10 U.S.C. §§ 801 et seq.]."[131] According to the drafters of the Manual for Courts-Martial, the 1984 revision of the MCM "was to conform to federal practice to the extent possible," except where specifically required otherwise by the UCMJ.[132]

While the system is still designed for a commander to convene a court-martial and for that commander to subsequently review and take action on the

[128] Military Justice Act of 1983, Pub. L. No. 98-209, sec. 5(a)(1), § 860(b), 97 Stat. 1393 (1983).
[129] Later, in 1996, the right of an accused to submit clemency matters was modified to require any such submissions to be in writing. *See* Military Justice Amendments of 1996, Pub. L. No. 104-106, sec. 1132, § 860(b), 110 Stat. 186 (1996).
[130] Behan, *supra* note 7, at 192.
[131] Art. 36, UCMJ.
[132] MCM, 2005, Introduction to Drafters Analysis of the Rules for Court-Martial, app. 21.

court-martial, so many protections have been incorporated into the system that the duties of a convening authority are now more transparent than ever. Significant changes to military justice include the establishment of a military judge with substantial responsibilities, the requirement for qualified counsel for both the accused and the government, restrictions on pre-trial investigations, the creation of peremptory challenges of members, the Military Rules of Evidence, limitations on the convening authority's post-trial duties, and the creation of multiple levels of appellate review independent of the convening authority, including a strong civilian court. Each of these changes represents a separate and distinct check on command control which means the court-martial process is undoubtedly running more fairly today than when it was first created or even when the UCMJ was first passed.

The limiting of command control has not been motivated out of a desire to merely strip convening authorities of their unique powers, but rather by the desire to guarantee due process rights under the Constitution and avoid the specter of unlawful command influence, "the mortal enemy of military justice."[133] Yet, even throughout the civilianization of military justice, the power of the convening authority to exercise clemency has survived.

III. ANALYSIS OF THE PRACTICAL EFFECTS OF THE MODERN CLEMENCY PROVISION

The fact that the convening authority's power to exercise clemency has persevered in the American military justice system for 230 years through times of substantial change, including changes made directly to the convening authority's post-trial duties, seemingly speaks volumes towards its validity. At the same time, however, modern day commanders are undoubtedly aware of the civilianization of military justice that has occurred over the years. To many commanders, the actual conduct of courts-martial may appear nearly identical to civilian courts, despite the fact that they convene them. Furthermore, modern day commanders are well aware of the independent appellate review process. The substantial modifications that have occurred within the military justice system present an interesting question regarding the convening authority's role in the court-martial process, particularly in reference to the convening authority's power to exercise clemency. Specifically, given the fact that modern day commanders are undoubtedly aware of the civilianization of military justice, to what extent do they exercise their clemency power? How often do convening authorities actually exercise clemency while approving courts-martial?

[133] *See* United States v. Rivers, 49 M.J. 434, 443 (C.A.A.F. 1998);United States v. Gleason, 43 M.J. 69, 73 (C.A.A.F. 1994); United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).

A. Statistical Analysis of Clemency as Exercised by Convening Authorities

Among the chief complaints during the World War I era was that the sentences prescribed by courts-martial were too severe, resulting in reductions by review boards in at least 75 percent of the cases examined.[134] This was due, in large part, because of the massive mobilizations required to man the military services in support of the war, in particular an influx of inexperienced officers.

> These new officers, not sitting easily in the saddle, and feeling unsure of themselves (1) are prone as commanding officers to resort too readily to courts-martial, and (2) as court martial judges they display ignorance of military law and traditions, uncertainty of themselves, undue fear of showing leniency lest they be thought weak or unmilitary, and a tendency to avoid responsibility by giving severe…sentences, accompanied with recommendations to clemency, attempting thereby to shoulder onto higher authority the responsibility for determining the proper quantum of punishment; a responsibility which our system contemplates shall be assigned and discharged by the court-martial judges themselves.[135]

While the boards of review referenced above clearly differ from convening authorities, the point to be taken from the statistics cited is that there was clearly a need for someone in the review process to exercise clemency. Congress recognized such need as a result of the tendency for courts-martial to hand down excessive sentences.

Similar criticism of the military justice system surfaced during the World War II era call for change. First, many critics (and even proponents) of the UCMJ recalled the horror stories of the World War I era. Second, there were those who even argued that convening authorities directed certain sentences to be handed down so that they might exercise clemency for purposes of appearance in front of their units. For example, Arthur E. Farmer, Chairman of the Committee on Military Law, War Veterans Bar Association, stated the following:

> I have also heard an officer say, and this is not a unique experience, "Gentlemen, when you pass sentence on the

[134] LURIE, *supra* note 5, at 128.
[135] *Id.* at 46-47 (quoting William C. Rigby, Draft Report on Court Martial Procedures, in Records of the Judge Advocate General, NARC, RG 153, entry 26, box 20. N.p. (1919)).

> accused, you will give him the maximum sentence. Clemency is my function, and I want the men in the command to look to me for clemency, so that when I cut down the sentence they may have more confidence in me."[136]

While such descriptions of the manner in which convening authorities exercised clemency do not seem to apply to today's military justice system, the question remains: how is clemency used today?

In order to assess the manner in which modern day convening authorities have been exercising their clemency power, I conducted a review of more than 800 courts-martial. This research was specifically limited to Navy and Marine Corps courts-martial. The cases were examined at the Navy-Marine Corps Appellate Defense Division (Code 45), as well as at the Navy-Marine Corps Court of Criminal Appeals. Therefore, the sample examined really only represents courts-martial eligible for appellate review (that is, those cases in which the servicemember was sentenced to one year or more in confinement and/or a Bad Conduct Discharge). However, this limitation does not adversely affect the pool of cases represented by the tested sample because the number of cases eligible for appellate review does not differ tremendously from the total courts-martial conducted, ignoring summary courts. The 807 courts-martial examined all took place between 1999 and 2004.[137] During this period there were 15,040 general and special courts-martial conducted which included 527 acquittals, for a total of 14,513 convictions at general and special courts martial. During this period there were 10,675 records of courts-martial docketed with the Navy-Marine Corps Court of Criminal Appeals which is 3838 courts-martial less than the total number conducted. Thus, the 807 courts-martial reviewed are representative of a pool that comprises 74% of all courts-martial conducted.[138]

In the end, the entire sample examined represents 7.6 percent of the pertinent pool. Thus, the following results are based on a decent-sized representative sample. Of the total 807 special and general courts-martial examined, the convening authority exercised clemency only 35 times. That is, clemency was exercised in only 4 percent of the courts-martial reviewed.

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[136] *Hearings on S. 857 and H.R. 4080*, *supra* note 96, at 87 (statement of Arthur E. Farmer, Chairman, Committee on Military Law, War Veterans Bar Association).

[137] The special courts-martial were all BCD specials. That is, there were zero non-BCD special courts-martial from 1997 to 2004.

[138] One must also consider the cases where the convening authority exercised clemency to reverse the finding of guilty or to reduce/disapprove the sentence to less than one year confinement and/or no bad conduct discharge. In such cases, appellate review at the NMCCA would not be required. Therefore, these cases were not accounted for in the representative sample; however, in all likelihood, the number of such cases is extremely small.

Meanwhile, appellants submitted clemency matters to the convening authority in approximately 33% of the cases reviewed.

Of the 807 case files examined, 500 of them were courts-martial docketed in either 2003 or 2004. This represents 15.5% of the total courts-martial docketed for appellate review during 2003 and 2004. As such, this particular sample is a fairly large representative sample. Of the 500 cases reviewed, the convening authority exercised clemency only 10 times. Thus, clemency was exercised in a mere 2 percent of the courts-martial reviewed for 2003 and 2004.

Clearly, the modern day convening authority rarely exercises clemency. Military commanders today are undoubtedly keenly aware of the civilianization of the courts-martial process. In that regard, commanders recognize that the process is now governed by extensive legislation, in addition to substantial case law from the appellate courts. Of course, commanders know that courts-martial are subject to a process of direct appellate review, and so it seems as though convening authorities are highly unlikely to exercise clemency in the absence of compelling reasons. Meanwhile, several other significant considerations deserve our attention at this point.

B. Significant Factors to Consider When Analyzing the Modern Clemency Provision

1. Court-Martial by Members vs. Court-Martial by Military Judge Alone

Again, among the chief complaints during the World War I era was that the sentences prescribed by courts-martial were too severe, resulting in reductions by review boards in at least 75 percent of the cases examined.[139] Court-martial panels of young, inexperienced officers displayed "a tendency to avoid responsibility by giving severe…sentences, accompanied with recommendations to clemency, attempting thereby to shoulder onto higher authority the responsibility for determining the proper quantum of punishment…"[140]

The modern court-martial, however, has become accustomed to the presence of a military judge. Not only has the modern court-martial become accustomed to the military judge's presence, but trial by military judge alone has become the norm. Of course, trial by military judge alone was unavailable to a

[139] LURIE, *supra* note 5, at 128.
[140] *Id.* at 46-47 (quoting William C. Rigby, Draft Report on Court Martial Procedures, in Records of the Judge Advocate General, NARC, RG 153, entry 26, box 20. N.p. (1919)).

military accused prior to 1968. The significance of this development in military justice cannot be overlooked when analyzing the convening authority's power to exercise clemency.

An analysis of the number of courts-martial by members versus the number of courts-martial by military judge alone for the period from 1997 until 2004 reveals that the tides have changed considerably since the creation of the military judge. Specifically, from 1997 to 2004, the Navy and Marine Corps conducted 21,085 general and special courts-martial. 19,160 of those courts-martial were trials by military judge alone. That is, 91 percent of all courts-martial during those eight years were conducted by military judges rather than members.

The significance of this fact is quite simply that the accused servicemember was sentenced by a military judge in 91 percent of all courts-martial between 1997 and 2004. Today's military judges are highly qualified attorneys with tremendous experience and training in military justice. Clearly, their qualifications to determine sentences, not to mention their independence from the convening authority, place them in a far greater position than the inexperienced officers serving as members during World War I. The logical result is that convening authorities have far less reason to exercise clemency knowing that experienced and highly qualified military judges are rendering the sentences.

Furthermore, even where the remaining nine percent of courts-martial in those eight years were conducted before members, the concerns from the World War I and World War II eras have been abated by certain developments in military justice, such as peremptory challenges and challenges for cause of panel members. Indeed, members may be dismissed based solely on their sentencing philosophy.[141] Thus, modern day defense counsel surely attempt to root out prospective members who may potentially demonstrate "an actual bias by [their] inelastic attitude toward sentencing."[142] Consequently, because of developments like peremptory challenges, convening authorities today have far less need to second guess the validity of sentences rendered by members in the modern military justice system.

2. Pre-trial Agreements

Also of particular importance to the analysis of the convening authority's power to exercise clemency is the development of pre-trial agreements in military justice. The pre-trial agreement has been in use since

[141] United States v. Giles, 48 M.J. 60, 63 (C.A.A.F. 1998).
[142] *Id.* at 63.

1953, although it was not included in the Manual for Courts-Martial until 1984. Specifically, R.C.M. 705 authorizes and governs the use of pre-trial agreements. Meanwhile, there is no provision in the UCMJ governing their existence or use.

Generally speaking pre-trial agreements enable an accused to enter into an agreement with the convening authority. As part of an agreement with the convening authority, an accused may agree to plead guilty and/or to fulfill other terms and conditions,[143] in return for a promise by the convening authority to refer the charges to a certain level of court-martial, to withdraw charges or specifications, and/or most importantly to take specified action on the adjudged sentence, *e.g.*, approve no sentence in excess of a specified maximum, to suspend all or part of a sentence, or to mitigate certain forms of punishment into less severe forms.[144] Typically, accused servicemembers do plead guilty, and typically, convening authorities agree to sentences that are considerably less than those authorized by law.[145]

In a way, pre-trial agreements between an accused and the convening authority essentially represent a mutual agreement on clemency prior to the trial. They represent "pre-fabricated" clemency. Common sense begs the question: why would a convening authority ever exercise clemency in the form of disapproving, suspending, or mitigating the findings and/or sentence after agreeing to what he or she purportedly felt was an appropriate result? To be sure, the convening authority is bound by the terms of a pre-trial agreement once he or she approves it. The United States Court of Appeals for the Armed Forces has recognized that the creation of pre-trial agreements has possibly affected "the quantum of post-trial clemency."[146] In *United States v. Wheelus*, the court noted that while it believes post-trial clemency still plays a vital role in the military justice system, to what extent the practice of modern pre-trial agreements has altered "the quantum of post-trial clemency" is unknown.[147]

Of the 807 cases reviewed for clemency,[148] 535 of them contained pre-trial agreements that included provisions pertaining to the findings and/or sentence. That is, in 66 percent of the representative sample, the accused servicemember and the convening authority came to a mutual agreement regarding what the final result should be in terms of the findings and/or the sentence. The point here is clear: the evolution of pre-trial agreements has substantially altered the face of military courts martial. "[I]n fact, most new trial

[143] MCM, 2005, R.C.M. 705(b)(1).
[144] MCM, 2005, R.C.M. 705(b)(2).
[145] United States v. Wheelus, 49 M.J. 283, 287 (C.A.A.F. 1998).
[146] *Id.*
[147] *Id.*
[148] *See supra* section III(A).

and defense counsel begin their trial experience with guilty plea cases involving pre-trial agreements before moving on to contested cases."[149] Guilty-plea courts-martial governed by detailed pre-trial agreements have become the norm. Consequently, convening authorities clearly have less need to exercise clemency.

3. Appellate Litigation and the Clemency Provision

Yet another important factor to consider when analyzing the modern clemency provision is the development of appellate litigation in the area of post-trial error and post-trial delay. Post-trial delay, in particular, has become increasingly more frequent in the recent years. In 1998, the Court of Appeals for the Armed Forces stated that "[p]ost-trial processing errors abound."[150]

One recent case at the Navy-Marine Corps Court of Criminal Appeals highlights the potential problems that can result from the requirement for convening authorities to review courts-martial and from the right of an accused to submit clemency matters. In *United States v. Wilson*, the military judge convicted the appellant of wrongful use of marijuana and breaking restriction, in violation of Articles 112a and 134, UCMJ.[151] On appeal the NMCCA set aside the original convening authority's action and ordered a new action and a new legal officer's review, returning the record of trial to the Judge Advocate General for remand to an appropriate convening authority for a new post-trial review process.[152] According to the court, it took "that course of action because the plethora of errors in those two important post-trial documents negated any presumption of regularity we might normally apply in post-trial circumstances."[153] In remanding the case, the court highlighted the specific problems existing in the original convening authority's action and legal officer's review.[154]

Following the second post-trial review, the NMCCA was once again displeased with the convening authority's action and legal officer's review. Indeed, the court made no attempt to hide the fact that it was "far from pleased with the post-trial processing of this case."[155] Among the problems in the new documents was the convening authority's failure to note that he considered both

[149] Maj. Mary M. Foreman, *Let's Make a Deal! The Developments of Pretrial Agreements in Military Criminal Justice Practice*, 170 MIL. L. REV. 53 (2001).
[150] United States v. Wheelus, 49 M.J. 283, 287 (C.A.A.F. 1998).
[151] United States v. Wilson, NMCCA 2000014, 2004 CCA LEXIS 33 (N-M Ct. Crim. App. Feb. 10, 2004).
[152] *Id.* at 2.
[153] *Id.*
[154] *Id.*
[155] *Id.* at 9.

clemency packages that the legal officer indicated the appellant had submitted.[156] The court contemplated remanding the case for a *third* post-trial review by the convening authority but declined to do so "in the interest of judicial economy."[157] According to the court, "[o]f primary concern in this case is the inordinate amount of time that has elapsed since the appellant's court-martial without the completion of the review process, when the delay is due in large part, plain and simply, to administrative carelessness."[158]

Interestingly, the *Wilson* court concluded that the appellant had received a fair and complete review of his clemency request, during both the original submission and the second post-trial review.[159] This conclusion highlights the conflict between the convening authority's clemency power and the recent development in post-trial processing errors as an appellate assignment of error. In *Wilson*, the appellant received a fair and complete review of his clemency request according to the NMCCA. Yet, on appeal, the appellant alleged error in the review of his clemency submissions, and the total post-trial review process took more than four years to complete. This amounts to an incredible waste of judicial resources. The requirements in place as a result of the clemency provision can result in appellate litigation even when the accused has received a fair and complete review of his or her clemency submissions.

In May 2005, the Navy-Marine Corps Appellate Government Division (Code 46) had 148 cases awaiting a reply brief due in the next 60 days to NMCCA.[160] Of the 148 cases, 38 of them included an assignment of error by the appellant alleging unreasonable post-trial delay.[161] In fact, in 15 cases, unreasonable post-trial delay was the *only* assignment of error.[162] That is, 25 percent of the cases included an assignment of error alleging unreasonable post-trial delay, and 10 percent of them included unreasonable post-trial delay as the only assignment of error. Of course, not every assignment of error alleging unreasonable post-trial delay is attributable to the convening authority's clemency power. Yet, as demonstrated by *United States v. Wilson*, the clemency step certainly represents a point in the process where errors can be made. As revealed above,[163] convening authorities today exercise clemency extremely infrequently. Judicial waste resulting from post-trial processing errors and post-

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[156] *Id.* at 2.
[157] *Id.* at 7.
[158] *Id.* at 7-8.
[159] *Id.* at 9.
[160] E-mail from Rear Admiral Bruce MacDonald, Commander Naval Legal Service Command, to various commanders of Trial Service Offices and Naval Legal Service Offices (May 30, 2005, 10:10 EST) (on file with author).
[161] *Id.*
[162] *Id.*
[163] *See supra* section III(A).

trial delay has seemingly begun to far outweigh the benefit of the convening authority's clemency provision.

4. Modern View of the Convening Authority in Britain and Canada

Finally, another consideration in analyzing the role of the convening authority, albeit a far less direct consideration, is the fact that several nations have recently sough to modernize their systems of military justice.[164] According to the Cox Commission, a commission established by the National Institute of Military Justice to review and provide comments on the military justice system in light of the 50th anniversary of the UCMJ, "[t]his modernization has focused on both increasing the impartiality of court-martial procedures and respecting the human rights of servicemembers."[165] Indeed, certain countries have gone so far as removing the convening authority from the appellate review process altogether. While this fact plays little direct role in the American military justice system, it certainly indicates the attitudes of our foreign neighbors regarding the role of the convening authority in modern military justice.

Reform efforts have affected military justice in Australia, India, Ireland, Israel, Mexico, and South Africa as well as in the United Kingdom and Canada.[166] Most importantly, in Britain, the role of the convening authority was abolished almost ten years ago in the Armed Forces Act following a landmark decision in *Findlay v. United Kingdom*.[167] The functions of the convening authority in the British military justice system have been distributed between three separate entities: the prosecuting authority, the court-martial administration officer, and the reviewing authority. Of particular importance, the British military justice system no longer requires the findings and sentence of a court-martial to be approved by a commander. Instead, the sentence stands as adjudged subject only to a system of automatic review. It is instructive that the predecessor to our own system of military justice has developed in such a manner.

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[164] See Report of the Cox Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001), *available at* http://www.badc.org/html/militarylaw_cox.html.
[165] *Id.*
[166] EUGENE R. FIDELL, A WORLD-WIDE PERSPECTIVE ON CHANGE IN MILITARY JUSTICE, IN EVOLVING MILITARY JUSTICE, 209-217 (Eugene R. Fidell & Dwight H. Sullivan eds. 2002) (analyzing military-legal reform in countries around the world).
[167] Ann Lyon, *After Findlay: A Consideration of Some Aspects of the Military Justice System*, in EVOLVING MILITARY JUSTICE, *supra* note 166, at 218-29; *see also* Findlay v. United Kingdom, 24 EUR. CT. H.R. 221 (1997).

IV. CONCLUSION

In theory, the power of the convening authority to exercise clemency does, indeed, represent an accused's best chance of sentence relief. This is because the convening authority cannot change a finding of not guilty to guilty, nor remand a not guilty finding for further consideration, nor increase the sentence. The convening authority can only disapprove or disapprove in part, or approve the sentence. Theoretically, he or she can only help the accused. In that sense, the accused gets a "second bite of the apple."[168]

Practically speaking, however, the power of the convening authority does not necessarily represent the accused's best hope of sentence relief. Despite the fact that the convening authority's power to exercise clemency has survived myriad changes to the American military justice system, the practical effects of the power have been altered dramatically. The dramatic changes to the courts-martial process have substantially limited the necessity of a clemency provision with the convening authority. Time and again Congress has sought to limit command control. Presently, command control has effectively been reduced to its most limited form in our history. This has been accomplished through either the elimination of certain powers formerly available to convening authorities or the establishment of inherent protections, such as the creation of a law member who was later granted additional powers elevating him to a status very similar to a civilian district court judge. In yet another example of substantial change to the military justice system, the military appellate courts have truly redefined the nature of military justice.

Arguably, the very basis for creating the clemency power in convening authorities has all but vanished. Yet, perhaps even more important is the fact that convening authorities simply are not exercising their clemency powers to any noticeable extent. Two pertinent factors in this regard are the fact that the overwhelming majority of courts-martial today are conducted before a military judge alone and the fact that pre-trial agreements have also become commonplace. Each of these considerations is highly relevant in attempting to determine why convening authorities are exercising clemency in less than 5% of the cases they convene. Practically speaking, the hope of receiving clemency from the convening authority is extremely slim.

Of course, the natural inclination is to retain the provision anyway. How can it possibly hurt a convicted servicemember? Quite simply the answer is that so long as the clemency provision remains a part of the military justice

[168] Major Bradley J. Huestis, *You Say You Want a Revolution: New Developments in Pretrial Procedures*, ARMY LAW., April / May 2003, at 17, 20.

system it cannot directly harm a convicted servicemember. The convening authority cannot increase the severity of the sentence or alter a finding from not guilty to guilty. He or she can only work to lessen the blow for the convicted servicemember. Nevertheless, given its infrequent use, determining the continued value of the clemency provision may require an analysis of its other effects, such as the extent to which clemency issues are alleged as error on appeal. Furthermore, a deeper analysis of the entire process of convening authority approval of courts-martial may reveal similar appellate litigation effects. Perhaps the clemency provision is but a part of a larger systemic problem, specifically that the requirement for the convening authority to take action on the findings and sentence of a court-martial is outdated. Unfortunately, these issues are beyond the scope of this article. In the meantime, however, our servicemembers may be interested to know that if the power of the convening authority to exercise clemency represents an accused's best hope of relief, then there is not much hope.

DEPARTMENT OF DEFENSE'S SEXUAL ASSAULT POLICY: RECOMMENDATIONS FOR A MORE COMPREHENSIVE AND UNIFORM POLICY

Lieutenant Commander Ann M. Vallandingham, JAGC, USN*

I. EXECUTIVE SUMMARY

According to the FBI and the Department of Defense("DoD"), sexual assault is one of the most under-reported crimes in the U.S. and the military. Under Secretary of Defense David Chu states, "[w]hile we want to sustain good order and discipline by holding those who assault . . . accountable for their actions, first and foremost we want victims to come forward for help." The restricted reporting option under the DoD's sexual assault policy allows victims to report the crime to certain specified individuals without triggering an investigation. Although the policy addresses confidential reporting, DoD should issue a reformed sexual assault policy incorporating the recommendations stated herein to provide a more comprehensive and uniform option to victims.

First, the policy must specify the level in the command to be notified of a restricted report of sexual assault. Restricted reporting requires Sexual Assault Response Coordinators (SARCs) to report non-identifying information of a restricted report of sexual assault to the "senior commander." The Services, however, have inconsistently defined "senior commander" for this purpose. Furthermore, the policy uses the term "senior commander" to refer to two separate roles, one for purposes of serving as the responsible authority for overseeing the Sexual Assault Response Program (SAPR) and the other role of serving as the official to be provided non-identifying information of a restricted report. The policy needs to clearly define "senior commander" for each of these distinct purposes in order to have a comprehensive policy among the Services, which is especially important in an era of joint operations.

The level in the command to be notified of a restricted report needs to be defined as the General Court-Martial Convening Authority (GCMCA) and

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the Senior Mission Commander for deployed units. The policy does not provide any assurances the victim's privacy will be protected. Reporting at the GCMCA level removes any nexus to the incident at lower level commands. Data shows that women are more likely to be a victim of sexual assault. Considering women make up approximately 15% of active duty military personnel, it is highly probable the victim will be identified within her level of the command, especially at small commands or ones with few females.

Further, to account for command responsibility, lower level commands can be notified via yearly statistics. Installation commanders can be notified for public safety concerns.

Secondly, the sphere of individuals under the policy to whom the victim can confidentially report the incident needs to be expanded. Military and civilian data suggest there is an increased risk of sexual assault among young members. Additionally, research shows that support from friends and other "first responders" helps victims recognize a crime has occurred and encourages them to report. A solid confidential reporting option must require that commands provide lower ranking, E-5 to E-6, initial points of contact. The United States Naval Academy provides such a program, wherein appointed midshipmen serve as conduits to refer victims to support services. These lower-ranking points of contacts are less intimidating, more accessible, and more visible.

Lastly, restricted reporting must be available to military dependents and DoD civilian employees. Persons' reporting options should not be limited because they do not fit into a specific class of victims, especially considering the DoD may be their sole resource for healthcare. Furthermore, broadening the category of victims will increase reports, providing a more accurate depiction of the crime's frequency of occurrence.

A reformed policy incorporating these three proposals is necessary to provide a uniform, practical and credible confidential reporting option. These reforms must be made for DoD to accomplish its first priority--encouraging victims to come forward for support.

II. FACTORS ASSOCIATED WITH SEXUAL ASSAULT

An analysis of the factors associated with sexual assault, its victims and perpetrators, and the military is necessary in order to evaluate the practicality and effectiveness of the recommendations made herein concerning the current DoD restricted reporting option available to victims. By nature of its unique culture, there are factors associated with the military that often exacerbate the

consequences of sexual assault. An understanding of these factors, particularly in association with other common characteristics related to sexual assault incidents, is necessary to evaluate the recommendations set forth herein.

A. The Facts About Sexual Assault

Sexual assault is one of the most under-reported violent crimes in the United States and also in the military.[1] Research shows that approximately only 16 percent of sexual assaults are reported to law enforcement authorities.[2] It is estimated, however, that someone is sexually assaulted every two minutes in America.[3] Furthermore, one in six American women and three percent of American men are estimated to be victims of attempted or completed rape during their lifetime.[4] Although there is a low likelihood the victim will report the incident, there is research showing a prevalence of sexual assault within the

[1] DEAN G. KILPATRICK ET AL., RAPE IN AMERICA: A REPORT TO THE NATION, Nat'l Victim Center & the Crime Victims Research and Treatment Ctr., Dep't of Psychiatry and Behavioral Sciences, Med. Univ. of South Carolina, at 5 (Apr. 23, 1992); U.S. DEP'T OF DEF., DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM 10 (6 Oct. 2005) [hereinafter DOD DIR. 6495.01]. There is no consistent definition for the term "sexual assault" used by the references cited herein. Therefore, for a specific definition used by a reference cited herein, see that particular source. Within this article, however, the term "sexual assault" refers to and includes "intentional sexual contact, characterized by use of force, physical threat or abuse of authority or when the victim does not or cannot consent. It includes rape, nonconsensual sodomy (oral or anal sex), indecent assault (unwanted, inappropriate sexual contact or fondling), or attempts to commit these acts." DOD DIR. 6495.01, at 8. The author recognizes that rape and sexual assault are not gender specific crimes. Throughout this article, however, for the interests of brevity, the author will use feminine and masculine pronouns for the victim and perpetrator, respectively, as reflected by rates of prevalence.

[2] KILPATRICK ET AL., *supra* note 1, at 5; Christine Hansen & Kate B. Summers, *A Considerable Sacrifice: The Costs of Sexual Violence in the U.S. Armed Forces*, MANIFESTA 38, 40 (Spring/Summer 2005). Similarly, campus authorities and/or law enforcement officials only become aware of less than five percent of all completed and attempted rapes of college students. U.S DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT, 3 (Dec. 2005) [hereinafter SEXUAL ASSAULT ON CAMPUS]. Sources, including military and civilian, tend to differ on estimates of rape and have produced inconsistent estimates on the prevalence of rape. There are several reasons for the difficulty in obtaining accurate estimates of rape, such as differing definitions for rape and sexual assault. Dean G. Kilpatrick & Kenneth J. Ruggiero, *Making Sense of Rape in America: Where do the Numbers Come From and What Do They Mean?* Charleston, SC: Nat'l Crime Victims Research and Treatment Ctr., Med. Univ. of South Carolina, Sept. 2004, at 1-2; Christine Hansen & Kate B. Summers, *A Considerable Sacrifice: The Costs of Sexual Violence in the U.S. Armed Forces*, MANIFESTA, 38, 38-39 (Spring/Summer 2005).

[3] MINNESOTA DEP'T OF PUB. SAFETY, OFFICE OF JUSTICE PROGRAMS, STATISTICAL ANALYSIS CTR., OJP FACT SHEET, SEXUAL ASSAULT (Dec. 2003) (citing Rape, Abuse, Incest National Network (RAINN)).

[4] *Id.*

military[5] and suggesting that female servicemembers face a higher risk of sexual assault as compared to their civilian counterparts.[6]

Comparisons of Navy and civilian sexual assault data show that, "there is a[n] increased risk of sexual assault among young members, between acquaintances, and in association with substance abuse, particularly alcohol."[7] Youth, particularly females, are at greater risk of sexual assault.[8] Data collected for the years 2002 and 2003, showed that the majority of active duty victims of sexual assault in the Air Force and the Navy were between the ages of 17-24

[5] In 2005, DoD reported there were 2,374 reports of sexual assaults among the military involving a servicemember as a victim or as a perpetrator. Of the 1,386 completed investigations, there were 1,075 servicemember victims. DEP'T OF DEF., CALENDAR YEAR 2005 REPORT-- SEXUAL OFFENSES INVOLVING MEMBERS OF THE ARMED FORCES, 1, *available at* http://www.defenselink.mil [hereinafter DoD CY2005 REPORT]. In 2004, there were 1,700 reports of alleged sexual assaults involving servicemembers, and there were 989 servicemember victims involved in the 1,232 completed investigations. DEP'T OF DEF., CALENDAR YEAR 2004 REPORT-- SEXUAL OFFENSES INVOLVING MEMBERS OF THE ARMED FORCES, 1, *available at* http://www.defenselink.mil [hereinafter DoD CY2004 REPORT]. Note, in June 2005, DoD's sexual assault policy provided victims of sexual assault a restricted reporting option allowing them to report the incident to specified persons without triggering the investigative process, which should be a factor considered when evaluating the increase in reports. DOD DIR. 6495.01, *supra* note 1.

Additionally, data collected by the DoD showed that "[t]he rates of alleged sexual assault across DoD were 69.1 and 70.0 per 100,000 uniform service members for 2002 and 2003, respectively." DEP'T OF DEF. CARE FOR VICTIMS OF SEXUAL ASSAULT TASK FORCE, TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT 20 (Apr. 2004) [hereinafter CVSATF REPORT]. Note, at the time of this article, DoD data for sexual assault incidents occurring in 2006 was not available.

In contrast, surveys conducted by the Veterans' Administration have proven to be far higher than the official military estimates. Data collected by the Veteran's Administration found that "[o]f the almost 3 million veterans screened between March 2002 and October 2003, approximately 20.7% of females and 1.2% of male veterans screened positive for a history of military sexual trauma." CVSATF REPORT, at 58. Another study conducted on over 3600 female veteran hospital patients found that between 1994 and 1995, 23% of the women reported that they had been victims of sexual assault at some point during their military careers. CVSATF REPORT, at 58. Also, out of 558 women veterans of the Vietnam and Persian Gulf eras whom were interviewed during a 2003 study, 28% reported that they had experienced one or more rapes or attempted rapes while serving in the military. CVSATF REPORT, at 57-58. This data is consistent with other research that reported: "[A] survey of women who served in the Persian Gulf War indicated that they were ten times more likely to be sexually assaulted than their civilian counterparts." Alina M. Suris et al., *A Survey of Sexual Trauma Treatment Provided by VA Medical Centers*, 49 PSYCHIATRIC SERVICES, 382-84 (Mar. 1998), *available at* http://www.psychservices.psychiatryonline.org/cgi/content/full/49/3/382.

[6] Suris et al., *supra* note 5; s*ee also* Lee Martin, M.A. et al., *Prevalence and Timing of Sexual Assaults in a Sample of Male and Female U.S. Army Soldiers*, 163 MIL. MED. 213, 214 (1998).

[7] *Before the H. Armed Serv. Comm. On Sexual Assaults in the Military*, 108th Cong. (2004) (statement of William A. Navas, Jr., Assistant Secretary of the Navy, Manpower and Reserve Affairs).

[8] CVSATF REPORT, *supra* note 5, at 59.

years-old.[9] In comparison, the average age of sexual assault victims in the Army for the years 2002 and 2003, respectively, was 22 and 23 years.[10]

The perpetrator of a sexual assault is more likely to be an acquaintance of the victim rather than a stranger.[11] In fact, more than 70 percent of sexual assault victims know their offenders.[12] This is consistent with military data, as over 60 percent of all rape and approximately 80 percent of all sexual assault allegations within the Navy are date rape type sexual assaults.[13] In the majority of sexual assault incidents involving an active duty servicemember victim, the perpetrator is another active duty servicemember.[14] The alleged offender is also more likely to be male.[15] Additionally, sex offenders tend to be repeat offenders, and depending on the particular typology of the perpetrator, "behavior may escalate in intensity and frequency over time."[16]

Military and civilian research has also consistently shown that alcohol use is a factor in approximately half of all sexual assault cases.[17] Furthermore, sexual assaults within the military typically occur in living quarters and often on a military installation. According to the testimony of the Honorable William A. Navas, Assistant Secretary of the Navy for Manpower and Reserve Affairs, before the House Armed Services Committee on Sexual Assaults in the Military in June 2004, "44 percent of sexual assaults [in the Department of the Navy] occurred in living quarters on military installations."[18] Assistant Secretary Navas added that 79 percent of the cases which did not occur in an area under military control, still took place within living quarters.[19]

Research has suggested that some military members have been predisposed to factors or possess characteristics that place them at higher risk of

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[9] *Id.* at 59-60.
[10] *Id.* at 60.
[11] Hansen & Summers, *supra note 2*, at 40; CVSATF REPORT, *supra* note 5, at 60.
[12] U.S. Navy GMT, Sexual Assault Victim Intervention (SAVI) Program, http://njssms/GMT%200602/lessons/sexual_assault/html/11/51.htm (last visited Mar. 3, 2006) (on file with author).
[13] *Id.*
[14] *See* DoD CY2005 REPORT, *supra* note 5; DoD CY2004 REPORT, supra note 5.
[15] CVSATF REPORT, *supra* note 5, at 20.
[16] Sabrina Garcia, M.A., & Margaret Henderson, M.P.A., *Blind Reporting of Sexual Violence*, FBI LAW ENFORCEMENT BULL. 12, 15 (June 1999); KILPATRICK ET AL., *supra* note 1, at 4.
[17] CVSATF REPORT, *supra* note 5, at 60.
[18] *Before the H. Armed Serv. Comm. On Sexual Assaults in the Military*, 108th Cong. (2004) (statement of William A. Navas, Jr., Assistant Sec'y of the Navy, Manpower and Reserve Affairs).
[19] *Id.* The Assistant Secretary also testified that this figure is "consistent with a national survey of college women (citing Fisher Cullen and Turner 2000), which shows almost all of the completed rapes of college women occurred on campus, in living quarters."

experiencing a sexual assault than their civilian counterparts.[20] Characteristics of low socio-cultural and organizational power, such as age, education, race/ethnicity, marital status, paygrade and years of active duty service, are associated with an increased likelihood of sexual assault.[21] Many military members also have a history of potentially traumatic experiences, which is then coupled with combat exposure or other stressful experiences.[22]

B. Victim Impact of a Sexual Assault

It is widely believed that, excluding murder, rape is perhaps the most traumatic of violent crimes for victims.[23] Sexual assault can have a powerful short-term and long-term impact on a victim's ability to cope.[24] The incident often destabilizes a victim's sense of control, safety and well-being.[25] This is further enhanced if the victim lives in the same building, serves within the same command, and/or visits the same base support and recreational facilities as the perpetrator.[26] Within the military, sexual assault often involves continued victim-assailant contact after the incident.[27]

Furthermore, research clearly shows a prevalence of Post-Traumatic Stress Disorder (PTSD) associated with victims of sexual assault.[28] Research has found that, "[w]omen veterans reporting a history of sexual assault are nine times more likely to have PTSD. If childhood abuse occurred, women veterans are seven times more likely to have PTSD.[29] Post-traumatic stress symptoms commonly experienced by victims of rape include anxiety, depression, and intrusive thoughts.[30] Several studies have also indicated that the rate of depression is twice as high for females with a military rape history.[31] A national survey of women found that one-third of rape victims contemplated suicide or

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[20] Lee Martin et al., *Psychological and Physical Health Effects of Sexual Assaults and Nonsexual Traumas Among Male and Female United States Army Soldiers*, BEHAVIORAL MEDICINE, 1 (Spring 2000). The article discusses that certain groups of servicemembers "appear to come disproportionately from homes of somewhat lower socioeconomic status than comparable young men and women who do not enter the military." *Id.*

[21] Hansen & Summers, *supra* note 2, at 39; CVSATF REPORT, *supra* note 5, at 61-62.

[22] Hansen & Summers, *supra* note 2, at 39; CVSATF REPORT, *supra* note 5, at 61-62.

[23] CVSATF REPORT, *supra* note 5, at 67.

[24] *Id.* at 32; Mary P Koss., *The Impact of Crime Victimization on Women's Medical Use*, 2 JOURNAL OF WOMEN'S HEALTH 1, 67-72 (1993).

[25] CVSATF REPORT, *supra* note 5, at 32.

[26] *Id.*

[27] Hansen & Summers, *supra* note 2, at 40.

[28] CVSATF REPORT, *supra* note 5, at 67; Hansen & Summers, *supra* note 2, at 42.

[29] Hansen & Summers, *supra* note 2, at 42.

[30] Marie Tessier, *Sexual Assault Pervasive in Military, Experts Say*, WOMEN'S E NEWS, Mar. 30, 2003, *available at* http://www.womensenews.org/article.cfm?aid=1273.

[31] Hansen & Summers, *supra* note 2, at 42.

experienced PTSD or major depression.[32] In contrast, less than 10 percent of women whom were not victims of crime reported such experiences.[33] Rape victims are also more likely to develop post-traumatic stress in other situations.[34] The majority of sexual assault victims experience the onset of PTSD symptoms within one month of the incident. Some victims, however, do not display symptoms up to six months later.[35]

Not only does rape have the highest annual victim cost of any crime,[36] but within the military, "[h]ealth care utilization and costs of services is higher among women reporting an assault while on active duty."[37] The healthcare costs resulting from a sexual assault include short-term medical care, mental health services, lost productivity, and pain and suffering.[38] Beyond the psychological impact, research suggests that more acute and chronic physical health problems are experienced by rape victims than women who are not victimized.[39] Victims of sexual assault have shown an increase in their visits to physicians as long as up to two years after the incident.[40] Women who are sexually assaulted while on active duty are also more likely to report chronic health problems, prescription medication use for emotional problems, and decreased health-related quality of life problems decades after experiencing the sexual assault during their military service.[41] Additionally, rape victims show a higher rate of drug and alcohol consumption and increased likelihood of having drug and alcohol-related problems.[42] Victims of sexual assault are also prone to revictimization.[43]

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[32] CVSATF REPORT, *supra* note 5, at 67.
[33] *Id.*
[34] Tessier, *supra* note 30.
[35] Hansen & Summers, *supra* note 2, at 42.
[36] TED R. MILLER ET AL., VICTIM COSTS AND CONSEQUENCES: A NEW LOOK, U.S. Dep't of Justice, Office of Justice Programs, Nat'l Inst. of Justice , at 1 (Jan. 1996) (The Report notes that the majority of these costs are related to medical and mental health care, and "if rape's effect on the victim's quality of life is quantified, the average rape costs $87,000-many times greater than the cost of prison. . . . When pain, suffering, and lost quality of life are quantified, the cost of rape-$127 billion . . . .").
[37] Hansen & Summers, *supra* note 2, at 42.
[38] MILLER ET AL., *supra* note 36, at 67.
[39] Rebecca Campbell & Sharon M. Wasco, *Understanding Rape and Sexual Assault: 20 Years of Progress and Future Directions*, 20 JOURNAL OF INTERPERSONAL VIOLENCE 127, 128 (Jan. 2005).
[40] Mary P. Koss, *The Impact of Crime Victimization on Women's Medical Use*, 2 JOURNAL OF WOMEN'S HEALTH 67, 67-72 (1993).
[41] Hansen & Summers, *supra* note 2, at 43.
[42] DEAN G. KILPATRICK, PH.D., THE MENTAL HEALTH IMPACT OF RAPE, Nat'l Violence Against Women Prevention Research Center, Med. Univ. of South Carolina (2000), *available at* http://www.musc.edu/vawprevention/research/mentalimpact.shtml..
[43] Mark A. Cohen, *Measuring the Costs and Benefits of Crime and Justice,* NAT'L INSTITUTE OF JUSTICE, MEASUREMENT AND ANALYSIS OF CRIME AND JUSTICE, 4 CRIMINAL JUSTICE 263, 290 (2000), *available at* http://www.ncjrs.org/criminal_justice2000/vol_4/04f.pdf.

Health care costs can also arise from treatment of family, friends, and significant others of the victim, as research indicates that coping with the aftermath of a rape can cause significant stress upon them.[44] Therefore, sexual assault can have detrimental public health consequences resulting from the impact it places on family members, co-workers, and treatment personnel.[45] Sexual assault victims, however, are likely to eventually seek counseling, and there are several treatments that have proven effective.[46]

Experts have identified military sexual trauma as a major deployment and readiness issue.[47] DoD has responsibility for approximately 3.2 million military and civilian employees who serve from or are deployed to more than 6,000 locations within the United States and more than 146 foreign countries.[48] Incidents of sexual assault are detrimental to unit cohesion, unit morale and military readiness.[49] Therefore, DoD's role in preventing such violence and preserving the safety, health and justice of its servicemembers contributes to securing national defense.[50]

C. Barriers to Reporting

Not only is sexual assault one of the most under-reported violent crimes in our society, but also in the military.[51] Women who do report the crime often go for days, weeks, months or even years before they confide in a family member, friend, a rape crisis counselor, much less go to the police.[52] Additionally, research of college students within the United States has found that those students who were sexually assaulted reported that they were most likely to tell their friends first.[53] Although actual false allegations do occur, on a

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[44] Campbell & Wasco, *supra* note 39, at 128.
[45] *Id.*
[46] *Id.*; SHERRY A. FALSETTI, PH.D. & JEFFREY A. BERNAT, PH.D., PRACTICE GUIDELINES: RAPE AND SEXUAL ASSAULT, EMPIRICAL TREATMENTS FOR PTSD RELATED TO RAPE AND SEXUAL ASSAULT, Nat'l Crime Victims Research and Treatment Ctr., Nat'l Violence Against Women Prevention Research Ctr., MUSC (2000), *available at* http://www.musc.edu/vawprevention/advocacy/rape.shtml.
[47] Tessier, *supra* note 30.
[48] CVSATF REPORT, *supra* note 5, at 4.
[49] NAT'L ADVISORY COUNCIL ON VIOLENCE AGAINST WOMEN AND THE VIOLENCE AGAINST WOMEN OFFICE, TOOLKIT TO END VIOLENCE AGAINST WOMEN, THE ROLE OF THE U.S. MILITARY IN PREVENTING AND RESPONDING TO VIOLENCE AGAINST WOMEN, ch. 15, at 1 (2001), *available at* http://www.toolkit.ncjrs.org/default.htm.
[50] *Id.*
[51] DOD DIR. 6495.01, *supra* note 1, at 10.
[52] Sharon Hunter et al., *Equal Justice? Not yet For Victims of Sexual Assault*, CONNSACS (2000), *available at* http://www.consacs.org/library/justice/html.
[53] U.S DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NAT'L INST. OF JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT, 6 (Dec. 2005).

statistical basis, however, they are infrequent, even less so than false allegations in other types of cases.[54]

Major concerns identified by victims relevant to their reluctance to report the sexual assault include being blamed by others and having their families and other people find out about the sexual assault.[55] Another significant barrier to reporting is " the victim's fear of punishment for some of the victim's own actions leading up to or associated with the sexual assault incident."[56]

According to the April 2004 Task Force Report on Care for Victims of Sexual Assault (CVSA), one of the most significant barriers to reporting by military sexual assault victims was thought by many to be the perceived lack of privacy and confidentiality within the DoD.[57] The Task Force Report further states that barriers preventing uniformed victims from reporting an alleged sexual assault in a timely fashion or at all include: "[c]oncerns that that they will not be believed[;] [f]eelings of embarrassment and stigma[;] [a]mbiguity about what constitutes sexual assault[;] [c]oncerns that the criminal justice system is largely ineffective at responding to or preventing such incidents[; and] [f]ear of reprisal from the offender."[58] Military victims also fear that the alleged assailant, whom is often superior in rank and command, may be more likely to be believed.[59] The Task Force also found that, generally, servicemembers were not aware of the full spectrum of reporting options available to them and felt that reporting outside the chain of command would be viewed as "jumping the chain of command" and disloyal to the unit.[60] Servicemembers also stated that "a victim is more likely to report a sexual assault to a friend/junior enlisted than to a superior in their chain of command."[61]

III. THE DOD'S SEXUAL ASSAULT POLICY

A. The Development of a DoD-Wide Sexual Assault Policy

1. The Care for Victims of Sexual Assault Task Force

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[54] Hunter et al, *supra* note 52.
[55] KILPATRICK ET AL., *supra* note 1, at 4-5.
[56] Memorandum for the Secretaries of the Military Dep'ts. Under Sec'y of Defense, David S. Chu, subject: Collateral Misconduct in Sexual Assault Cases (JTF-SAPR-001) (12 Nov 2004).
[57] CVSATF REPORT, *supra* note 5, at 30. The Task Force conducted focus groups at military sites in the United States and overseas, having personal contact with more than 1,300 individuals. *Id.* at 2-3.
[58] *Id.* at 28.
[59] Hansen & Summers, *supra* note 2, at 40.
[60] CVSATF REPORT, *supra* note 5, at 29.
[61] *Id*. at 29.

In February 2004, DoD established the CVSA Task Force, which conducted an extensive review of all sexual assault policies and programs among the Military Services and DoD.[62] Two primary findings of the CVSA Task Force were that DoD did not have an effective policy relating to sexual assaults nor a common definition of terms permitting the necessary level of discourse on the subject.[63] The CVSA Task Force's recommendations served as the framework for developing the current DoD sexual assault policy.[64]

2. The Joint Task Force for Sexual Assault Prevention and Response

Among their recommendations, the CVSA Task Force stated the need to establish a single point of accountability for sexual assault policy within DoD. As a result, the Joint Task Force for Sexual Assault Prevention and Response (JTF-SAPR) was established in October 2004 and served as the temporary single point of accountability for sexual assault matters in the DoD.[65] JTF-SAPR was responsible for crafting and implementing DoD wide policies and programs to prevent sexual assault, enhance support to victims of sexual assault, and improve offender accountability.[66] JTF-SAPR was subsequently replaced by the Sexual Assault Prevention and Response Office (SAPRO), which, since June 2006, serves as DoD's "single point of responsibility for sexual assault policy matters," except for certain legal processes and criminal investigative policy matters.[67]

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[62] CVSATF REPORT, *supra* note 5, at 1. Among the various approaches taken by the eight-member Task Force, they conducted focus groups, conducted literature review and established a hotline. *See id.* at 1-3. Other DoD task forces which have reviewed and assessed the issue of sexual assault within the DoD include the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies (the "Academies Task Force") and the Fowler Commission. The Secretary of Defense announced in September 2004 the appointment of the Academies Task Force, pursuant to the National Defense Authorization Act of 2004. The Academies Task Force was to assess and make recommendations regarding how the Department of the Army and the Department of the Navy addressed sexual harassment and assault, respectively, at the United States Military Academy and the United States Naval Academy. Previously, in 2003, as directed by Congress, the Secretary of Defense appointed a panel, known as the "Fowler Panel," which was headed by former Congresswoman Tillie K. Fowler, to review sexual misconduct allegations at the United States Air Force Academy. DEF. TASK FORCE ON SEXUAL HARASSMENT & VIOLENCE AT THE SERV. ACADEMIES, REPORT OF THE DEF. TASK FORCE ON SEXUAL HARASSMENT & VIOLENCE AT THE SERV. ACADEMIES, 1 (June 2005) [hereinafter ACADEMIES TASK FORCE REPORT].

[63] CVSATF REPORT, *supra* note 5, at 20-21.

[64] DoD CY2004 REPORT, *supra* note 5, at 3.

[65] *Id.*

[66] *Id.*

[67] DEP'T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM PROCEDURES 3-4 (23 June 2006) [hereinafter DOD INSTR. 6495.02]. SAPRO is responsible for "[d]evelop[ing] programs, policies, and training standards for the prevention, reporting, response, and program accountability of sexual assaults involving Service members . . . ." *Id.* at 4.

JTF-SAPR's first priority was to develop the new DoD-wide sexual assault policy.[68] The policy was to achieve two objectives: (1) "ensuring victims of sexual assaults are protected, treated with dignity and respect, and provided support, advocacy and care;" and (2) supporting "effective command awareness and prevention programs, and law enforcement and criminal justice activities that will maximize accountability and prosecution of sexual assault perpetrators."[69]

Additionally, the Ronald Reagan National Defense Authorization Act for Fiscal Year 2005 (dated October 28, 2004) required DoD policy address confidential reporting of incidents of sexual assault.[70] According to the CVSA Task Force's April 2004 Report, one of the most significant barriers to reporting by military sexual assault victims was thought by many to be the perceived lack of privacy and confidentiality within the DoD.[71] Therefore, although DoD policy prefers complete reporting in order to provide victims' services and accountability actions, DoD recognizes the possible barrier such policy could present and the need for a confidential reporting option.[72] As the Assistant Under Secretary for Personnel and Readiness, Dr. David Chu stated: "While we want to sustain good order and discipline by holding those who assault their fellow service members accountable for their actions, first and foremost we want victims to come forward for help."[73]

In January 2005, DoD issued its sexual assault policy framework in a series of Directive-Type Memoranda (DTMs).[74] The memoranda included a

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[68] DoD CY2004 REPORT, *supra* note 5, at 3.
[69] Memorandum, Deputy Sec'y of Def., to Secretaries of the Military Dep'ts, subject: Confidentiality Policy for Victims of Sexual Assault (JTF-SAPR-009) (16 Mar. 2005), at para. 2, [hereinafter Confidentiality Policy Memo].
[70] *Id.* at para. 1.
[71] CVSATF REPORT, *supra* note 5, at 30.
[72] Confidentiality Policy Memo, *supra* note 69, at para. 2.
[73] Dep't of Def., Office of the Assistant Secretary of Defense (Public Affairs), *DoD Issues Confidentiality Policy for Sexual Assault Victims*, News Release No. 267-05, (18 Mar. 2005), *available at* http://www.democraticunderground.com.
[74] Memorandum, Under Sec'y of Defense for Personnel and Readiness, to Sec'ys of Military Dep'ts,, et al., subject: Collateral Misconduct in Sexual Assault Cases (JTF-SAPR-001) (12 Nov 2004) [hereinafter JTF-SAPR-001 Memo]; Memorandum, Under Sec'y of Def. for Personnel and Readiness, to Sec'ys of Military Dep'ts, et al., subject: Increased Victim Support and a Better Accounting of Sexual Assault Cases (JTF-SAPR-002) (22 Nov 2204); Memorandum, Under Sec'y of Def. for Personnel and Readiness, to Sec'ys of Military Dep'ts, et al., subject: Data Call for CY 04 Sexual Assaults (JTF-SAPR-003) (22 Nov 2004); Memorandum, Under Sec'y of Def. for Personnel and Readiness, to Sec'ys of Military Dep'ts, et al., subject: Review of Administrative Separation Action Involving Victims of Sexual Assault (JTF-SAPR-004) (22 Nov 2004) [hereinafter JTF-SAPR-004 Memo]; Memorandum, Under Sec'y of Def. for Personnel and Readiness, to Sec'ys of Military Dep'ts, et al., subject: Commander Checklist for Responding to Allegations of Sexual Assault (JTF-SAPR-005) (15 Dec 2004) [hereinafter JTF-SAPR-005 Memo]; Memorandum, Under Sec'y of Def. for Personnel and Readiness, to Sec'ys of Military Dep'ts, et al., subject: Dep't of Def.

myriad of organizational and training requirements, such as deferring the adjudication of collateral misconduct, development of a system to review administrative discharges of sexual assault victims, and guidelines for commanders to follow when responding to a sexual assault allegation.[75] Additionally, as mandated by Congress in October 2004, DoD issued a directive-type memorandum specifically developing a new sexual assault and prevention policy providing for a confidential reporting option, which became effective in June 2005.[76] The Department then published a DoD Directive in October 2005, consolidating and refining the overarching policy contained in the DTMs.[77]

B. A Victim's Reporting Options Under the DoD's Sexual Assault Policy

1. The Restricted Reporting Option

As of June 2005, DoD's sexual assault policy provides servicemembers[78] who are victims of sexual assault[79] a confidential reporting option.[80] The Acting Director of the DoD Sexual Assault Prevention and Response Office, Kay Whitley, stated: "The department's new confidentiality policy 'represents a major cultural shift' . . . explaining that victims may now

(DoD) Definition of Sexual Assault (JTF-SAPR-006) (13 Dec 2004); Memorandum, Under Sec'y of Def. for Personnel and Readiness, to Sec'ys of Military Dep'ts, et al., subject: Training Standards for DoD Personnel on Sexual Assault Prevention and Response (JTF-SAPR-007) (13 Dec 2004); Memorandum, Under Sec'y of Def. for Personnel and Readiness, to Sec'ys of Military Dep'ts, et al., subject: Response Capability for Sexual Assault (JTF-SAPR-008) (17 Dec 2004); Memorandum, Under Sec'y of Def. for Personnel and Readiness, to Sec'ys of Military Dep'ts, et al., subject: Collaboration with Civilian Authorities for Sexual Assault Victim Support (JTF-SAPR-010) (17 Dec 2004); Memorandum, Under Sec'y of Def. for Personnel and Readiness, to Sec'ys of Military Dep'ts, et al., subject: Training Standards for Sexual Assault Response Training (JTF-SAPR-011) (17 Dec 2004); Memorandum, Under Sec'y of Def. for Personnel and Readiness, to Sec'ys of Military Dep'ts, et al., subject: Training Standards for Pre-Deployment Information on Sexual Assault and Response Training (JTF-SAPR-012) (undated).

[75] JTF-SAPR-001 Memo, *supra* note 74; JTF-SAPR-004 Memo, *supra* note 74; JTF-SAPR-005 Memo, *supra* note 74.

[76] Confidentiality Policy Memo, *supra* note 69.

[77] DOD DIR. 6495.01, *supra* note 1.

[78] "Service Member" is defined as, "[a]n active duty or National Guard or Reserve service member performing active or inactive service (as defined in Section 101(d)(3) of title 10, United States Code . . .) or a member of the Coast Guard (when the Coast Guard is operating as a Service of the Department of the Navy)." DOD DIR. 6495.01, *supra* note 1, at 8.

[79] "The term [victim] encompasses all persons eligible to receive treatment in military medical treatment facilities . . . ." The restricted reporting option, however, "is only available to those sexual assault victims who are service members . . . ." DOD DIR. 6495.01, *supra* note 1, at 9.

[80] Confidentiality Policy Memo, *supra* note 69. "[C]onfidentiality or confidential reporting is defined as allowing a member of the DoD to report a sexual assault to specified individuals. This reporting option gives the member access to medical care, counseling and victim advocacy, without initiating the investigative process." Confidentiality Policy Memo, *supra* note 69, at para. 1.

opt for restricted reporting '. . . which allows the victim 'to receive medical treatment and support without triggering the investigative process.'"[81]

The restricted reporting option "is intended to give a victim additional time and increased control over the release and management of his/her personal information, and to empower him/her to seek relevant information and support to make more informed decisions about participating in a criminal investigation."[82] It is further intended to give victims a greater sense of trust that their needs are of primary concern to the command and to help them eventually decide to pursue an investigation.[83] Such a system that promotes privacy and confidentiality, according to subject-matter experts, can have a positive impact in victims coming forward to report an assault and provide information about the assault.[84]

Under restricted reporting, a victim may report or disclose that she is the victim of a sexual assault to a Sexual Assault Response Coordinator (SARC), a victim advocate (VA), or a healthcare provider (HCP) on a requested confidential basis.[85] This option does not affect privileged communications a victim may have with a chaplain independent of this policy or any privileges recognized under the Military Rules of Evidence.[86] This confidential reporting option provides a victim "access to medical care, counseling, and victim advocacy, without requiring those specific officials to automatically report the matter to law enforcement or initiate an official investigation."[87] Protected communications include "[v]erbal, written, or electronic communications of personally identifiable information concerning a sexual assault victim or alleged assailant provided by the victim to the Sexual Assault Response Coordinator (SARC), Victim Advocate (VA), or healthcare provider related to his or her sexual assault."[88]

The victim's report and any details provided to these specified individuals will not be reported to law enforcement to initiate the official investigative process unless the victim consents or there is a qualifying

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[81] *House Subcommittee Examines Sexual Assault in the Military*, 11 THE SOURCE ON WOMEN'S ISSUES IN CONGRESS NO. 19, Women's Policy, Inc. (June 30, 2006).
[82] Dep't of Def., Office of the Assistant Sec'y of Def. (Public Affairs), *DoD Issues Confidentiality Policy for Sexual Assault Victims*, News Release No. 267-05 (18 Mar. 2005), *available at* http://www.dod.gov/releases/2005/nr20050318-2247.html.[hereinafter News Release No. 267-05].
[83] *Id.*
[84] DOD DIR. 6495.01, *supra* note 1, at 10; *see also* KILPATRICK ET AL., *supra* note 1.
[85] DOD DIR. 6495.01, *supra* note 1, at 11.
[86] *Id.*
[87] DOD INSTR. 6495.02, *supra* note 67, at 12. "Official investigative process" refers to "[t]he formal process a commander or law enforcement organization uses to gather evidence and examine the facts and circumstances surrounding a report of sexual assault." DOD DIR. 6495.01, *supra* note 1, at 8.
[88] DOD DIR. 6495.01, *supra* note 1, at 7.

exception provided for in the policy.[89] Instead of reporting the assault to law enforcement or the command, the HCP and VAs will provide treatment and services and report the incident to the SARC,[90] as the SARC "[s]erves as the central point of contact at an installation or within a geographic area to oversee sexual assault awareness, prevention and response training."[91]

It is important to note, however, that the restricted reporting option may be limited or not available to a servicemember due to reporting requirements mandated by a specific state's law. Although "[t]his will vary by state, territory, and/or overseas local agreements," restricted reporting "may not be an option if the sexual assault occurs outside of the military installation or if the victim first reports to a civilian facility and/or civilian authority."[92] Additionally, health care professionals may be required under state law to report the sexual assault incident to civilian authorities.[93]

For purposes of public safety and command responsibility, the SARC shall provide the senior commander, within 24 hours of the sexual assault report, or within 48 hours if required by extenuating circumstances in deployed environments, with non-identifying personal information of a restricted report of sexual assault.[94] A senior commander is "an officer, usually in the grade of 0-6 or higher, who is the commander of a military installation, base, post or comparable unit, and has been designated by the respective Military Service to oversee the [Sexual Assault Prevention and Response] SAPR program."[95] The policy, however, does not specify if "senior commander" is in relation to the alleged victim or the alleged offender.[96] Further definition and designation of a senior commander for this purpose is left to the discretion of the individual Services.

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[89] *Id.* at 12-14. Note, this refers strictly to the protection provided to the victim under the confidential reporting option with regards to communications concerning the sexual assault to the specified individuals, but does not alter nor affect any requirements or privileges under the Military Rules of Evidence.

[90] Sexual Assault Response Coordinators are designated by the individual Military Service and may be a military member, DoD civilian employee, or DoD contractor. DOD INSTR. 6495.02, *supra* note 67, at 16.

[91] DOD DIR. 6495.01, *supra* note 1, at 8.

[92] DOD INSTR. 6495.02, *supra* note 67, at 12; *see also* NATIONAL CENTER FOR THE PROSECUTION OF VIOLENCE AGAINST WOMEN, APRI, RAPE REPORTING REQUIREMENTS FOR COMPETENT ADULT VICTIMS, SUMMARY OF LAWS RELEVANT TO RAPE AND SEXUAL ASSAULT REPORTING FOR THE VICTIMIZATION OF COMPETENT ADULTS (June 15, 2006), *available at* http://www.nhpeas.ang.af.mil/hro/SAPRP/SAPRUSawsummary.pdf [hereinafter RAPE REPORTING REQUIREMENTS SUMMARY].

[93] DOD INSTR. 6495.02, *supra* note 67, at 17; *see also* RAPE REPORTING REQUIREMENTS SUMMARY, *supra* note 92.

[94] DOD INSTR. 6495.02, *supra* note 67, at 16; DOD DIR. 6495.01, *supra* note 1, at 12.

[95] DOD DIR. 6495.01, *supra* note 1, at 8.

[96] DOD DIR. 6495.01, *supra* note 1; DOD INSTR. 6495.02, *supra* note 67.

Informing senior commanders with non-identifying information relating to the alleged sexual assault, preserves the victim's anonymity while providing the senior commander a more accurate picture of the sexual violence within his/her command.[97] This, in turn, will increase a commander's ability to provide a safe environment contributing to the "well-being and mission-readiness" of all of his/her members.[98]

Non-identifying information refers to the victim and alleged assailant of a sexual assault and only includes information about the incident and individuals that enables their identity to remain anonymous.[99] In contrast, personal identifying information includes such information as the person's name or other descriptions (e.g., identity by position, rank or physical characteristics) about the individuals or circumstances that could reasonably reveal the victim's or alleged assailant's identity.[100] The non-identifying information is case-specific, and SARCs are cautioned to give careful consideration as to which details are provided to the senior commander, particularly at units or other locations where there are a limited number of females assigned.[101]

The policy includes specific exceptions to the restricted reporting option which may permit disclosure of confidential information by the protected sphere of persons and/or permit the initiation of an investigation.[102] For example, although senior commanders cannot use the information provided to them by a SARC under restricted reporting "for investigative purposes or in a manner that is likely to discover, disclose, or reveal the identities being protected," when a command or law enforcement official learns of a sexual assault from a source independent of the restricted reporting avenues, an official investigation may be initiated based on such independently-acquired information.[103] Victims will be notified that disclosure of information regarding a sexual assault to persons other than those officials protected under the restricted reporting option may result in the initiation of the official investigative process.[104] Regardless, the reporting procedures require that the SARCs be notified of all incidents of reported sexual assault.[105] SARCs are responsible for maintaining information regarding the number of sexual assaults reported in order to permit them to perform trend analysis.[106]

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[97] DOD DIR. 6495.01, *supra* note 1, at 12.
[98] *Id.*
[99] DOD DIR. 6495.01, *supra* note 1, at 7; DOD INSTR. 6495.02, *supra* note 67, at 13.
[100] DOD DIR. 6495.01, *supra* note 1, at 7; DOD INSTR. 6495.02, *supra* note 67, at 12-13.
[101] DOD DIR. 6495.01, *supra* note 1, at 7; DOD INSTR. 6495.02, *supra* note 67, at 12-13, 16.
[102] DOD DIR. 6495.01, *supra* note 1, at 12-13.
[103] *Id.* at 13-14.
[104] *Id.* at 14.
[105] DOD INSTR. 6495.02, *supra* note 67, at 22.
[106] *Id.* at 4, 17-18.

2. The Unrestricted Reporting Option

The unrestricted reporting option allows a victim to report an incident of sexual assault and receive medical care and counseling and have an official investigation of her allegation.[107] This reporting option, unlike restricted reporting, is available to all victims of sexual assault, which includes all persons eligible to receive treatment in a military medical treatment facility for a sexual assault.[108] Additionally, a victim may make an unrestricted report of an alleged sexual assault to any person in the existing reporting channels, e.g., chain of command, law enforcement, a SARC, or a VA.[109] Although the victim's report and any information provided regarding the sexual assault is reportable to law enforcement and may be used to initiate the official investigative process, details regarding the sexual assault incident, however, will only be provided to those personnel who have a legitimate need to know.[110]

A victim who initially elects to make a restricted report of the alleged sexual assault may later change to unrestricted reporting.[111] Therefore, "[e]vidence shall be stored until a victim changes to unrestricted reporting, but may not exceed 1 year from the date of the victim's restricted report of the sexual assault."[112]

IV. RECOMMENDATIONS FOR A MORE COMPREHENSIVE AND PRACTICAL POLICY

Although DoD's current sexual assault policy provides a confidential reporting option, for many victims this option is neither comprehensive nor practical. As General McClain, former JTF-SAPR Commander, stated: "It is critical that the same policy be applied across the Department of Defense. . . . Otherwise, we could have different forms of confidentiality, or even different access to services, varying by location. That would not only be confusing, . . . but also inequitable."[113] This article presents three recommendations for refinement to DoD's current sexual assault policy in order to provide a more comprehensive and practical policy in support of DoD's dual objectives to

[107] DOD DIR. 6495.01, *supra* note 1, at 9, 11.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 11.
[111] *Id.* at 8.
[112] DOD INSTR. 6495.02, *supra* note 67, at 19.
[113] Terri Lukach, *General Explains New DoD Sex-Assault Policy*, Air Force Link, American Forces Press Service, Mar. 22, 2005, *available at* http://www.defenselink.mil/news/MAr2005/20050322_282.html.

encourage sexual assault victims to come forward and receive support and treatment and also to hold perpetrators accountable.[114]

A. Define the "Senior Commander" as the General Court-Martial Convening Authority (GCMCA) for Purposes of Notification of a Restricted Report

1. The Two Roles of the "Senior Commander"

DoD's sexual assault policy requires each military Service establish and implement a Sexual Assault Prevention and Response (SAPR) Program.[115] As part of this program, the Services are to designate a "senior commander," which is defined as, "an officer, usually in the grade of 0-6 or higher, who is the commander of a military installation, base, post or comparable unit, and has been designated by the respective Military Service to oversee the SAPR program."[116] As further directed, each Military Service has established the position of Sexual Assault Response Coordinator (SARC), whom reports to the Military Service-designated senior commander and "[s]erves as the central point of contact at an installation or within a geographic area to oversee sexual assault awareness, prevention and response training."[117] The SARC is also required to provide the senior commander with non-identifying information of a restricted report of a sexual assault.[118] The policy thereby establishes two separate roles for the senior commander: (1) to oversee the SAPR program, and (2) to receive from the SARC non-identifying information of a restricted report of a sexual assault. The Services, in turn, have designated a senior commander for each distinct purpose.

Among the Services, the installation commander has been designated as the senior commander for the purpose of serving as the authority responsible for implementing and overseeing the SAPR Program for their designated area of responsibility.[119] The Services, however, have inconsistently defined senior

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[114] Confidentiality Policy Memo, *supra* note 69.
[115] DOD DIR. 6495.01, *supra* note 1; DOD INSTR. 6495.02, *supra* note 67.
[116] DOD DIR. 6495.01, *supra* note 1, at 8; *see also* DOD INSTR. 6495.02, *supra* note 67, at 15.
[117] DOD DIR. 6495.01, *supra* note 1, at 8; *see also* DOD INSTR. 6495.02, *supra* note 67, at 15-16, stating that the SARC, at the Service's discretion, may be a military member, DoD civilian employee, or DoD contractor.
[118] DOD INSTR. 6495.02, *supra* note 67, at 16.
[119] U.S. DEP'T OF THE AIR FORCE, POLICIES AND PROCEDURES FOR THE PREVENTION OF AND RESPONSE TO SEXUAL ASSAULT [hereinafter Dep't of Air Force Policies and Procedures], *available at* http:www.hill.af.mil/sapr/Links/AF%20SAPR%20Policy.doc (last visited Feb. 28, 2007); U.S. DEP'T OF ARMY, Reg. 600-20, SEXUAL ASSAULT PREVENTION AND RESPONSE PROGRAM ch. 8 (7 June 2006) [hereinafter AR 600-20]; OPNAVINST 1752.1B, subject: Sexual Assault Victim Intervention (SAVI) Program 11 (29 Dec. 06) [hereinafter OPNAVINST 1752.1B]; Message, R 12143OZ APR 05, Commandant of the Marine Corps, subject: Sexual Assault Prevention and

commander for purposes of the official to be notified by the SARC of a restricted report of sexual assault.[120] This results in various discrepancies, such as which commands and what levels of the command are provided non-identifying information. For example, the Navy guidelines require the installation SARC to provide the victim's commander and the installation commander, if the incident occurred on an installation, with non-identifying information of a restricted report of sexual assault.[121] On the other hand, the Army guidelines only require the SARC to provide non-identifying information to the installation commander.[122]

2. Defining "Senior Commander" for Purposes of Notification of a Restricted Report

The policy requires SARCs to report non-identifying information of a restricted report of sexual assault to the "senior commander" for purposes of public safety and command responsibility.[123] Furthermore, the policy adds, "[c]ommanders have a responsibility to ensure community safety and due process of law, but they must also recognize the importance of protecting the privacy of victims under their command."[124] The Services, however, are not required to, and some do not, provide non-identifying information concerning a restricted report of a sexual assault incident to the alleged victim's or alleged offender's command.[125] The policy also does not state whether the SARC is to report this non-identifying information to the senior commander of the alleged victim, the alleged offender, or both.[126]

To effectively serve the objectives of maintaining command awareness and public safety while protecting the alleged parties' confidentiality, the policy needs to define senior commander specific to the purpose of serving as the authority to be notified by the SARC of a restricted report. For this purpose, senior commander needs to be defined as the General Court-Martial Convening

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Response Program Department of Defense (DoD) Updates [hereinafter SAPR Updates Message]; Message, R 251500Z MAY 05, Commandant of the Marine Corps, subject: Sexual Assault Response Coordinator (SARC) Training [hereinafter SARC Training Message].

[120] Dep't of Air Force Policies and Procedures; AR 600-20; OPNAVINST 1752.1B; SAPR Updates Message; SARC Training Message.

[121] OPNAVINST 1752.1B, at encl 3 at 4.

[122] AR 600-20, at 74.

[123] DOD DIR. 6495.01, *supra* note 1, at 12.

[124] Confidentiality Policy Memo, *supra* note 69, at para. 3.

[125] DOD DIR. 6495.01, *supra* note 1; Dep't of Air Force Policies and Procedures, *supra* note 119; AR 600-20, *supra* note 119; OPNAVINST 1752.1B, *supra* note 119; SAPR Updates Message, *supra* note 119; SARC Training Message, *supra* note 119.

[126] DOD INSTR. 6495.02, *supra* note 67, at 16.

Authority[127] (GCMCA) of the alleged victim's and alleged offender's command (if that information is available) and the installation commander if the incident occurred on the installation.[128] Considering the majority of sexual assault incidents involve a servicemember victim and a servicemember offender, it is important to provide non-identifying information to both parties' senior commander.[129] To account for lower-level command awareness and responsibility, those commands can be notified via yearly statistics.[130]

Notifying the victim's and alleged assailant's GCMCA allows for more appropriate and timely preventive measures to be taken within the command while minimizing the likelihood of compromising the identity of the victim or alleged offender. The GCMCA level is in a more optimal position than a lower level unit or the installation commander to ensure a specific unit or command takes appropriate preventive action, receives training in a timely manner, and assess their command's climate and culture for contributing factors. Additionally, the GCMCA level further protects confidentiality of the parties by allowing training and safety measures to be implemented as appropriate among all levels within the command and preventing one unit from being singled-out. By notifying the installation commander of incidents occurring on the installation, it allows for any safety and environmental concerns to be addressed. The installation commander's ability to oversee the Program will not be impacted by limiting the reports of which he will be notified, as knowledge of a restricted report is not necessary in order for him to complete his oversight of the SARC and the SAPR Program.

Although the GCMCA is within the victim's and alleged offender's chain of command, notifying this level within the command minimizes any nexus to the victim or alleged offender, thereby reducing the likelihood of identification of either party. This is particularly important considering the majority of alleged victims are junior personnel.[131] It is extremely important for SARCs to scrutinize the non-identifying information which would be provided the GCMCA in order to minimize the likelihood of identification of either party,

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[127] "Those exercising general courts-martial convening authority are typically division or corps commanders in the Army, commanders of numbered air forces or major commands in the Air Force, Navy regional commanders, or Marine Corps general officers in command." CVSATF REPORT, *supra* note 5, at 6.

[128] This definition for "senior commander" is recommended in addition to the policy's current definitions and requirements. It does not alter the reporting requirements of the SARC in regards to a restricted report, except by clarifying the specific authority to be notified.

[129] *See* DoD CY2005 REPORT, *supra* note 5; DoD CY2004 REPORT, *supra* note 5. Note, at the time of this article, DoD data for sexual assault incidents occurring in 2006 was not available.

[130] For specific Service data collection and reporting requirements, *see* DOD INSTR. 6495.02, *supra* note 67, at 7.

[131] CVSATF REPORT, *supra* note 5, at 59-60.

especially considering the majority of victims are female[132] and women make up approximately 15 percent of active duty military personnel and about 17 percent of the National Guard and Reserves.[133]

For afloat commands, the GCMCA will be notified, even if the incident occurred on a vessel under the cognizance of a lower level within the command. The GCMCA will have discretion to take appropriate action to address safety and environmental concerns, as would the installation commander, but at a level in the command to not compromise the identity of either party and further maintain the integrity of the restricted reporting option. As previously noted, this is of particular concern on a small vessel, where there is a minimal number of personnel.

Additionally, the policy further needs to clarify that deployed environments present a unique environment and heightened concerns, which require the senior mission commander and the installation commander of the alleged victim and alleged offender, as applicable, to be provided non-identifying information in all circumstances of a restricted report. This is necessary to optimize a timely and appropriate response for appropriate preventive action of a future threat and address any area-specific concerns.[134]

The policy's current definition of "senior commander," defined as the responsible authority to oversee the SAPR program, should remain in the policy. Such designation provides a neutral Program Manager overseeing the SAPR program, which minimizes the likelihood of command influence on the Program. This is especially true considering the Service's have currently removed this role from an alleged victim's or alleged offender's command to the extent possible by designating the installation commander as the SAPR program manager.

B. Provide Peer Resources

1. The Role of Peer Resources

In order to be provided the restricted reporting option, a victim must report the incident to a sexual assault response coordinator, a victim advocate, a healthcare provider, or a chaplain.[135] Furthermore, under restricted reporting,

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[132] CVSATF REPORT, *supra* note 5, at 56-59.
[133] Pamela Martineau & Steve Weigand, *Assault Policy Altered; Military Increases Victim Confidentiality*, SACREMENTO BEE, Mar, 19, 2005.
[134] Area-specific concerns include not only safety and environmental factors, but also issues related to the military's relationship with the host country.
[135] DOD DIR. 6495.01, *supra* note 1, at 11.

the victim is not able to discuss the sexual assault with another military member, to include their friends, without imposing an obligation on that person to report the crime.[136] The CVSA Task Force found that, "[g]enerally, junior enlisted personnel are not aware of the full range of reporting options available to them."[137] Focus group participants further added that "[r]egardless of the entry point for reporting . . . there is a critical need for education and training on where to report . . . ."[138] Even when a victim is aware of the option of reporting to a victim advocate, some victims may still fear losing confidentiality and choose to disclose information to a third-party.[139] Servicemembers also stated that "a victim is more likely to report a sexual assault to a friend/junior enlisted than to a superior in their chain of command."[140]

Under the current reporting structure, it is very unlikely the victim will have immediate or direct access to one of the protected persons to whom she can report. The success of the structure is very dependent upon education and awareness of the reporting options at all levels within DoD. SARCs serve at the installation level.[141] As for victim advocates, depending upon the Service and a victim's location, i.e., deployed, they may not be available at the victim's unit or command level, but rather only at the installation level.[142] Although victim advocates provide an initial level to which victims may report a sexual assault and receive pertinent information, they are often too remote, unknown or intimidating to the victim, especially in larger commands or ones with few junior personnel or females. Even if the victim is aware of the local victim advocate, she may feel intimidated to discuss the incident, especially in those Services where the advocate is required to be a superior rank to junior enlisted members.[143] Also, not every level of the command will be manned with a chaplain or healthcare practitioner. Therefore, there is no assurance that one of the persons to whom a victim can make a restricted report is available at the victim's command or even at the same level within the command as the victim.

Peer resources, however, could provide a level of initial reporting within the command to victims. They would be more accessible and less intimidating to victims than victim advocates, especially in commands with a

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[136] *Id.* at 11, 14.
[137] CVSATF REPORT, *supra* note 5, at ix.
[138] *Id.* at 29.
[139] Garcia & Henderson, *supra* note 16, at 14.
[140] CVSATF REPORT, *supra* note 5, at 29.
[141] DOD DIR. 6495.01, *supra* note 1.
[142] Dep't of Air Force Policies and Procedures, *supra* note 119*;* AR 600-20, *supra* note 119; OPNAVINST 1752.1B, *supra* note 119; SAPR Updates Message, *supra* note 119; SARC Training Message, *supra* note 119.
[143] For Service specific requirements, *see* Dep't of Air Force Policies and Procedures, *supra* note 119*;* AR 600-20, *supra* note 119; OPNAVINST 1752.1B, *supra* note 119; SAPR Updates Message, *supra* note 119; SARC Training Message, *supra* note 119.

substantial number of junior enlisted. Use of such a third-party confidant allows a victim to maintain a comfortable distance from the law enforcement process while still conveying information to the appropriate officials.[144] Providing peer resources to serve as a safe haven to victims has been suggested by experts as significantly beneficial to the victim.[145]

Peer resources would serve as an integral part of the restricted reporting process.[146] According to the CVSA Task Force, servicemembers stated that they would "more likely report a sexual assault to a friend/junior enlisted than to a superior in their chain of command."[147] Peer resources provide that lower-level point of contact for the victim, which is important considering the majority of victims are junior personnel.[148] Additionally, research suggests that between 61-77 percent of reported rapes are reported by someone other than the victim, or if reported by the victim, are reported as a direct result of the decision or advice of a third person.[149] Peer resources can validate to the victim that the assault was in fact a crime, thereby, increasing the likelihood of a victim reporting the assault immediately.[150]

DoD's sexual assault policy needs to be expanded to require all Special Court-Martial Convening Authorities (SPCMCA) to appoint one member between the ranks of E-5 to E-6 to serve as a peer resource for their command.[151] The sole purpose of a peer resource is to serve as a conduit and refer a victim to a protected person (SARC, VA, HCP, or chaplain) in order for the person to obtain treatment and information, such as reporting options and other resources. Peer resources will be granted limited confidentiality in order to permit a victim to report an incident of sexual assault without requiring the peer resource to notify the chain of command. The peer resource will not enter into a discussion of the circumstances with the victim, but will immediately

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[144] Garcia & Henderson, *supra* note 16, at 14.

[145] CVSATF REPORT, *supra* note 5, at 30. The term "safe haven" refers to "a place to receive confidential advice, referrals for needed medical and social services, and to feel safe and protected from physical and verbal attacks." *Id.*

[146] In 1999, Congress asked the National Institute of Justice to find out what policies and procedures schools use to prevent and respond to reports of sexual assault. The study found that most administrators consider sexual assault peer educators to be conducive to reporting. Only about one in five schools, however, offers this type of program. SEXUAL ASSAULT ON CAMPUS, *supra* note 2, at 9.

[147] CVSATF REPORT, *supra* note 5, at 29.

[148] *Id.* at 22, 59-60.

[149] Hunter et al., *supra* note 52. "In a national sample of college women, less than 5% of the rapes/attempted rapes were reported to law enforcement. However, in about two-thirds of the rapes, victims told someone, most often a friend." CVSATF REPORT, *supra* note 5, at 63.

[150] Garcia & Henderson, *supra* note 16, at 14.

[151] Commanders at all levels within the command may appoint more than the required number of peer resources as they deem appropriate.

refer the victim to one of the persons to whom she can make a restricted report.[152]

This duty will be on a volunteer-basis, and upon command endorsement, the peer resource will undergo screening and approval through the installation SARC. The SPCMCA will then appoint the member as a peer resource clearly defining the duties and responsibilities of the peer resource and any potential administrative and disciplinary consequences for breach of confidentiality.[153] The peer resource will undergo extensive training, as do the victim advocates, which will be overseen and implemented by the installation SARC.[154]

By serving within the victim's command and among their ranks, the peer resource will be more visible, accessible and less intimidating to junior enlisted victims of sexual assault than victim advocates, especially those advocates available only at the installation level. This is especially true for commands and in deployed environments where many of the junior enlisted members work within the same work space, serve duty together, share meals in the same area, and sleep in the same area. It is important to provide both victim advocates and peer resources as each has a distinct purpose and qualifications.

2. The United States Naval Academy's GUIDE Program

The United States Naval Academy (USNA) has instituted such a policy by providing a unique SAVI (Sexual Assault Victim Intervention) GUIDE (Guidance, Understanding, Information, Direction, and Education) Program, involving midshipmen serving as peer resources for sexual assault victims.[155] According to a 2004 DoD IG Survey, several female victims of sexual assault did not report the assault because they "'feared ostracism, harassment, or ridicule by peers.' The Academies are small, enclosed communities, which further intensifies the impact of a negative response from peers for an age group already highly sensitive to peer opinion."[156] Similarly, commands or units with a substantial number of junior enlisted can foster such an environment

[152] The peer resource will also inform the victim of the limited confidentiality.
[153] The exceptions for breach of confidentiality as outlined in the current policy will also be applicable to the peer resources. *See* DOD DIR. 6495.01, *supra* note 1, at 13.
[154] The training for a peer resource would be similar to that of a victim advocate, but with more emphasis on the narrow role of a peer resource.
[155] Naomi Sullivan, *Cmdr. Hammond takes over as Sexual Assault Response Coordinator for Academy*, TRIDENT (July 7, 2006). Providing peer victim guides within the SAVI Program is specific to the Naval Academy and is not a part of the regular Navy's SAVI Program. ACADEMIES TASK FORCE REPORT, *supra* note 62, at N-4.
[156] ACADEMIES TASK FORCE REPORT, *supra* note 62, at 9.

contributing to a victim's fear of such negative response from peers. Therefore, the USNA's GUIDE Program can serve as a peer resource model.

Midshipmen serving as SAVI (Sexual Assault Victim Intervention) GUIDEs "are midshipmen volunteers who serve as peer resources as well as instructors on sexual assault prevention and response topics."[157] They complete a 20-hour Department of the Navy victim advocacy course and 10-15 hours of annual refresher training, which is overseen by a trained SAVI advocate.[158] "They serve as first points of contacts, educators, and provide a constant presence in the Brigade. They refer victims of sexual assault to other support and legal resources. "[159] Although each company has at least one GUIDE, sexual assault victims at the USNA can utilize other reporting avenues such as the SAVI Coordinator or a SAVI Advocate.[160] Under this Program, the Superintendent of the Naval Academy has established policy that affords certain SAPR Program personnel, specifically midshipmen GUIDEs, limited confidentiality.[161]

The GUIDEs are required to notify the Brigade SAVI Coordinator within 24 hours of receiving a report that a sexual assault has occurred.[162] GUIDEs provide the Coordinator with the victim's identity and the circumstances surrounding the incident.[163] The Brigade SAVI Coordinator is responsible for reporting to the command that an incident has occurred and non-identifying information, which will maintain confidentiality of the victim, unless or until the victim chooses to make a formal report.[164]

C. Expand the Sphere of Protected Victims under the Restricted Reporting Option

The Assistant Under Secretary for Personnel and Readiness, Dr. David Chu stated: "While we want to sustain good order and discipline by holding those who assault their fellow service members accountable for their actions,

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[157] *Id.* at N-10.
[158] *Id.*
[159] *Before the H. Armed Serv. Comm. On Sexual Assaults in the Military*, 108th Cong. (2004) (statement of William A. Navas, Jr., Assistant Sec'y of the Navy, Manpower and Reserve Affairs).
[160] ACADEMIES TASK FORCE REPORT, *supra* note 62, at N-4, N-10(referencing COMDTMIDINST 1752.1C (Sept. 27, 2004); USNAINST 1752.2 (Sept. 27, 2004). "The SAVI Coordinator is an . . . officer responsible for managing the SAVI Advocates and SAVI GUIDEs. SAVI Advocates are officers and senior enlisted personnel on the staff who are trained to assist victims of sexual assault. SAVI GUIDEs are midshipmen trained to serve as peer resources." *Id*. at 12.
[161] ACADEMIES TASK FORCE REPORT, *supra* note 62, at N-6 (citing COMDTMIDNINST 1752.1 C (Sept. 27, 2004)).
[162] *Id.* at N-4, N-6.
[163] *Id* at N-6.
[164] *Id.*

first and foremost we want victims to come forward for help."[165] The restricted reporting option, however, is only available to those sexual assault victims who are servicemembers.[166] For a more effective and equitable policy, the protected sphere of victims needs to be expanded to include all adult victims of sexual assault eligible to receive treatment in military medical treatment facilities,[167] including civilians and contractors who are eligible to receive military healthcare outside the United States on a reimbursable basis. Encouraging these victims of sexual assault to come forward will also provide the DoD with a more accurate representation of the crime.[168]

1. The Military Health Services System

The Military Health Services System (MHSS) encompasses the DoD's hospitals, clinics, and medical personnel.[169] TRICARE is the military's healthcare program, whose comprehensive benefits and low-cost makes it an attractive option for beneficiaries.[170] Currently, approximately 9.2 million beneficiaries are eligible to receive medical care through the Defense Health Program.[171] Of those beneficiaries, 1.8 million are currently active duty, 2.5

[165] News Release No. 267-05, *supra* note 82.
[166] DOD DIR. 6495.01, *supra* note 1, at 9. "Service member" is defined as "[a]n active duty or National Guard or Reserve Service member performing active or inactive service . . . or a member of the Coast Guard (when the Coast Guard is operating as a Service of the Department of the Navy)." *Id.* at 8.
[167] Dependents of active duty personnel are "entitled upon request, to . . . medical and dental care" on a space-available basis at a military medical facility. Medical and Dental Care for Dependents: General Rule, 10 U.S.C. § 1076(a)(1) (2005). Further, "a member or former member of a uniformed service who is entitled to retired or retainer pay . . . may, upon request, be given medical and dental care in any facility of any uniformed service" on a space-available basis. Medical and Dental Care for Members and Certain Former Members, 10 U.S.C. § 1074(b) (2005).
[168] It has been suggested that one policy flaw is that it covers only women in uniform and does not extend to civilian employees of the Department of Defense or to spouses or children of military members, as discussed by Anita Sanchez, spokeswoman for the Miles Foundation. The Miles Foundation is a nonprofit group that aids victims of domestic violence and sexual assault in military families. Martineau & Weigand, *supra* note 133.
[169] RICHARD A. BEST, JR., MILITARY MEDICAL CARE SERVICES: QUESTIONS AND ANSWERS, CONGRESSIONAL RESEARCH SERVICE, THE LIBRARY OF CONGRESS, CRS ISSUE BRIEF FOR CONGRESS, IB93103, at CRS-2 (Aug. 7, 2003), *available at* http://www.lugar.senate.gov/CRS%20reports/Military_Medical_Care.pdf. The primary mission of the MHSS is to maintain the health of military personnel. *Id.*
[170] DEP'T OF DEF., OFFICE OF MANAGEMENT AND BUDGET, FOCUSING ON THE NATION'S PRIORITIES, FY 2007, at 69 (2006). "The average out-of-pocket costs for an under age 65 military retiree and family is about $1,000 per year with TRICARE Prime (managed care) and about $1,500 with TRICARE Standard (fee-for-service) coverage. A similar Federal employee family pays on average $3,100 per year under the most popular Federal Employee Health Benefits managed care plan and $4,650 per year under the most popular fee-for-service plan." *Id.*
[171] Cindy Williams, *An Elixir for the Military's Health Care Woes*, WASH. POST, THINK TANK TOWN July 23, 2006; s*ee also*, JOHN WHITLEY, MEDICAL COST GROWTH, SYMPOSIUM PRESENTATION, 38TH

million are dependents of active duty members, and 4.9 million are retirees or dependents of retirees.[172] Clearly, a substantial number of non-active duty beneficiaries utilize the DoD healthcare system. Since non-active duty beneficiaries of the military healthcare system are not provided the restricted reporting option, they may fear disclosure of the sexual assault incident and choose not to report and forego treatment. Therefore, as the sole healthcare provider and option for many non-active duty beneficiaries, the military needs to expand the protected sphere of victims under the sexual assault policy in order to satisfy its goal of encouraging victims to come forward.

The military's healthcare program delivers care through internally provided direct care and services purchased from the private sector.[173] Direct care, in-house produced care, is provided worldwide through 75 military hospitals and medical centers and 461 medical clinics.[174] Care which is purchased from the private sector is provided within the United States, which is divided into three TRICARE regions and contracts, and overseas, which has one TRICARE region and contract.[175] The DoD's managed healthcare program outside the United States is referred to as the TRICARE Overseas Program (TOP).[176] This healthcare program consists of three areas: TRICARE Europe, TRICARE Pacific, and TRICARE Latin America and Canada.[177] If a military treatment facility is not available to a beneficiary overseas, they must seek care from a host nation hospital.[178]

Although non-active duty personnel are provided healthcare services within the United States and overseas through Tricare, by not providing them confidentiality under the sexual assault policy, DoD is encouraging them to seek treatment at other medical facilities in order to maintain such discretion concerning the incident. This is of concern particularly overseas where the victim could seek treatment from a host nation facility, which may not provide adequate care and services comparable to a military facility.[179]

ANNUAL DEP'T OF DEF. COST ANALYSIS SYMPOSIUM, Williamsburg, Virginia (Feb. 17, 2005), *available at* http://www.dodcas.osd.mil.

[172] Williams, *supra* note 171; *see also*, WHITLEY, *supra* note 171.

[173] WHITLEY, *supra* note 171.

[174] *Id.; see also* BEST, *supra* note 169, at CRS-2.

[175] BEST, *supra* note 169, at CRS-2-5.

[176] DEP'T OF DEF., TRICARE OVERSEAS, http://www.tricare.mil/overseas/faq.cfm (last visited Feb. 28, 2007).

[177] *Id.*

[178] TRICARE MANAGEMENT ACTIVITY, 2 TRICARE HEALTH MATTERS, ISSUE 1, *TRICARE Coverage While Traveling Overseas,* at 1 (Feb. 2006), *available at* http://www.hnfs.net/bene/home/Bulletins+and+Newsletters.htm.

[179] WORLD HEALTH ORGANIZATION, THE WORLD HEALTH REPORT 2006, WORKING TOGETHER FOR HEALTH (2006).

2. Decreased Long-Term Healthcare Costs

Encouraging victims to come forward and seek treatment immediately or soon after the sexual assault incident will advance their recovery time and decrease long-term healthcare costs. A victim's recovery is influenced by the initial care she receives.[180] Research has indicated "that the speed with which survivors of sexual assault receive services is linked to the speed of their recovery."[181] Furthermore, rape survivors who received immediate medical and counseling services reported fewer symptoms of PTSD and were more likely to successfully continue their jobs.[182]

Having more victims come forward and seek treatment soon after the incident will also promote mission readiness. Victims of sexual assault experience several short-term and long-term effects that can impact their personal relationships.[183] Advancing the recovery time for a victim will promote stability and minimize the impact on her family and friends, who could be military members.[184] Treatment of the victim can also detect such health concerns as HIV, sexually transmitted diseases, and pregnancy.[185] Furthermore, sexual assault victims also have an increased propensity for alcohol and substance abuse.[186] Initial treatment of the victim can help minimize such behavior having a detrimental or indirect impact on the military environment or servicemembers within the victim's family or circle of friends.

Some may be concerned about an immediate rise in healthcare costs due to an increase in treatment and services being provided as a result of offering the restricted reporting option to more victims. There is already, however, concern regarding the projected rise in healthcare costs, but it has been associated with various factors, such as constant premiums and copays since 1995.[187] "DoD's healthcare spending has gone from about $12 billion in 1990

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[180] Linda M. Petter & David L. Whitehill, "*Management of Female Sexual Assault*," 58 AMERICAN FAMILY PHYSICIAN (Sept. 15, 1998), *available at* http://www.aafp.org/afp/980915ap/petter.html.
[181] STOP VIOLENCE AGAINST WOMEN, A PROJECT BY MINNESOTA ADVOCATES FOR HUMAN RIGHTS, "*Sexual Assault Advocacy Program*," University of Minnesota, Human Rights Library, (Feb. 1, 2006) (citing STUDY FINDS RAPE CRISIS PROGRAMS DO WORK, VIOLENCE AGAINST WOMEN 38-1 (Joan Zorza ed., 2002)), *available at* http://www.stopvaw.org/Sexual_Assault_Advocay_Program.html.
[182] *Id.*
[183] CVSATA REPORT, *supra* note 5, at 32; Mary P. Koss, *The Impact of Crime Victimization on Women's Medical Use*, 2 JOURNAL OF WOMEN'S HEALTH 67, 67-72 (1993).
[184] STOP VIOLENCE AGAINST WOMEN, *supra* note 181.
[185] Petter & Whitehill, *supra* note 180.
[186] *Id.*; *see also* KILPATRICK,ET AL., *supra* note 1, at 7.
[187] *Before the Personnel Subcomm. of the H. Armed Serv. Comm. On Def. Health Program*, 109th Cong. (Mar. 29, 2006) (statement of General Robert Magnus, Assistant Commandant of the U.S. Marine Corps) [hereinafter Statement of General Robert Magnus]; *see also* BEST, *supra* note 169.

to about $26 billion in 2003-in part, to meet additional demand resulting from program eligibility expansions for military retirees, reservists, and the dependents of those 2 groups and for the increased needs of active duty personnel involved in conflicts in Iraq, Bosnia, and Afghanistan."[188]

Further, absent changes in policy, healthcare costs are expected to rise to $64 billion by 2015, which would represent 12 percent of DoD's budget. [189] These rising costs, however, are being addressed through review of the healthcare policy and rigorous empirical examination of DoD medical costs.[190] In consideration of the other factors affecting rising healthcare costs, the immediate financial increase caused by expanding the class of victims under the DoD's sexual assault policy will not compromise the current military healthcare system nor DoD's warfighting capabilities into the future due to a financial burden. In fact, immediate treatment of victims decreases long-term health care costs and prevents several indirect detrimental repercussions to mission readiness.

3. DoD's Domestic Abuse Policy Expands the Sphere of Victims Under the Restricted Reporting Option

DoD has expanded the sphere of protected victims under the restricted reporting option for victims of domestic violence. The restricted reporting option "is limited to adult victims of domestic abuse . . . who [are] eligible to receive military medical treatment, including civilians and contractors who are eligible to receive military healthcare outside the Continental United States on a reimbursable basis . . . ." [191]

Some have suggested, however, that while domestic abuse and sexual assault are similar policies, similar reporting may not be appropriate. They claim that unlike domestic violence, "the perpetrator of a sexual assault does not usually reside with the victim; therefore unreported incidents are less likely to place a victim in a situation for further abuse."[192] Although the perpetrator may not reside with the sexual assault victim, it is likely they know one another, use

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[188] GOV'T ACCOUNTABILITY OFFICE, 21ST CENTURY CHALLENGES: REEXAMINING THE BASE OF THE FEDERAL GOVERNMENT, HEALTH CARE CHALLENGES FOR THE 21ST CENTURY, GAO-05-325SP, sect. 2, at 35 (2005).

[189] Williams, *supra* note 171*; see also* Statement of General Robert Magnus, *supra* note 187.

[190] WHITLEY, *supra* note 171; *see also* Williams, *supra* note 171.

[191] Memorandum, The Deputy Sec'y of Def., Dep't of Def., subject: Restricted Reporting Policy for Incidents of Domestic Abuse (22 Jan. 2006) [hereinafter Domestic Abuse Memorandum]. The term "adult" is defined as "a service member or a person who is not a service member who has either attained the age of eighteen years of age or is married." *Id.* at 8.

[192] GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, MILITARY PERSONNEL, PROGRESS MADE IN IMPLEMENTING RECOMMENDATIONS TO REDUCE DOMESTIC VIOLENCE, BUT FURTHER MANAGEMENT ACTION NEEDED, GAO-06-540, at 22 (May 2006).

the same installation facilities and resources, and have to share the same work and/or living environment, especially overseas.[193] Additionally, the victims of these crimes face similar fears and concerns regarding reporting.[194] Therefore, the victims under both policies should be afforded the same reporting options.

V. CONCLUSION

Although "DoD's sexual assault policy provides a solid foundation that improves prevention of sexual assault, enhances support to victims, and increases accountability,"[195] incorporating the recommendations presented herein would further encourage victims to come forward by providing a more comprehensive and uniform policy. This in turn, provides a more accurate depiction of the crime, enabling DoD to take more appropriate preventive measures and make refinements to the policy to ensure it attains its dual objectives: encouraging victims to come forward and seek help and holding perpetrators accountable.

The success of this policy, however, is impacted by several other areas. "Because barriers to reporting exist at many levels, a single policy or approach, such as allowing confidential reporting, is inadequate. The optimum approach to encourage reporting would be to combine a number of strategies . . . ."[196] DoD must continue to assess and refine other areas influencing the sexual assault policy. For example, training and education of servicemembers is imperative to encouraging victims to report an incident. Additionally, members at all levels must continue to take responsibility to ensure they are promoting and fostering an environment conducive to the objectives of the policy. This includes such actions as seeking mentors and same-gender role models to better understand the military environment and a member's role within it or surveying the command climate.

The recommendations set forth herein eliminate some of the barriers to reporting and provide victims of sexual assault a more practical and equitable restricted reporting option. Further encouraging victims to come forward and seek support will promote mission readiness and decrease several detrimental indirect consequences on the military and its members. These reforms must be

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[193] Hansen & Summers, *supra* note 2, at 40.
[194] Barkley, Lynn, EdD, MS, LLB(c), *"Domestic Violence,"* MEDICINE FROM WEBMD (Jan. 17, 2006), *available at* http://www.emedicine.com/emerg/topic153.htm; *see also* Rodriguez, M.A., *"Patient Attitudes About Mandatory Reporting of Domestic Violence. Implications for Health Care Professionals,"* 169 WESTERN JOURNAL OF MEDICINE 337, 337-41 (1998).
[195] DoD CY2004 REPORT, *supra* note 5, at 1.
[196] SEXUAL ASSAULT ON CAMPUS, *supra* note 2, at 9.

made for DoD to accomplish its first priority of encouraging victims to come forward for support.

"HIDING AMONGST A CROWD" AND THE ILLEGALITY OF DECEPTIVE LIGHTING

Matthew G. Morris*

INTRODUCTION

During war, if the commander of land forces disguises his troops as non-combatant civilians or as the enemy he runs the risk of violating the prohibition against perfidy. Broadly speaking, that prohibition includes: "[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence."[1] The specific examples in Article 37 of Geneva Protocol I Additional to the Geneva Conventions include not only "the feigning of civilian, non-combatant status" but also the "feigning of protected status by the use of signs, emblems or uniforms of … neutral or other States not Parties to the conflict" in order to kill, injure or capture the enemy.[2] Article 39 extends the prohibition to the "use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield favour, protect or impede military operations."[3]

But if that same commander is transplanted into a war at sea, the laws appear to change. Treaties and custom reserve a subset of otherwise perfidious behavior as being outside the scope of the protections of Additional Protocol I. For example, "[n]othing in [Additional Protocol I Article 39] or in Article 37, paragraph 1(d), shall affect the existing generally recognized rules of international law applicable to … the use of flags in the conduct of armed conflict at sea."[4] The "generally recognized rules" to which the Protocol refers is the practice of warships routinely flying "false flags" — enemy or neutral flags — before engaging in attacks against other ships or bombarding land targets.[5]

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* B.S.F.S. 1993, Georgetown; J.D. 2006, Michigan. I am indebted to Professor Steven R. Ratner for comments, guidance, and patience on earlier versions of this paper.

[1] 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, art. 37 [hereinafter Protocol I].

[2] *Id.*

[3] *Id.* at art. 39.

[4] *Id.*

[5] *See infra*, Part II.

These prohibitions on perfidy can be held in contrast to "ruses of war": those acts of deception that do not invite the adversary to believe that the laws of war afford or require particular behavior, but which are nonetheless sneaky behavior. Such ruses might include camouflage, decoys, operational deception, or misinformation.[6] The use of deception as a method of war is at least as old as the state practices and treaties that compose International Humanitarian Law (IHL), if not older. But for the purposes of modern IHL, the distinction is somewhat clear. Ruses are allowed; treachery and perfidy are not.

While the treaties are explicit about their treatment of the use of false flags in naval combat, there is a practice called "deceptive lighting" that is not explicitly discussed in the treaties of the twentieth century. This practice consists of changing the configuration of lights aboard a warship so that — to a casual or distant viewer — the ship appears to be something other than it really is.[7] The received wisdom on the topic is unanimous, or perhaps simply uncritical. According to the United States Navy, "[s]tratagems and ruses of war permitted in armed conflict include … deceptive lighting, dummy ships and other armament, decoys, simulated forces, feigned attacks and withdrawals, ambushes, false intelligence information, electronic deceptions, and utilization of enemy codes, passwords, and countersigns."[8] This assertion has been noted and not challenged by several authors.[9]

This paper argues that the position of the United States Navy and those commentators is incorrect and that the use of deceptive lighting in offensive military operations is — and should be — a violation of IHL. Part I discusses the distinction between perfidy and ruses in this context. Part II considers the development and extent of the exception to the prohibition against perfidy for naval warfare. Part III considers the purposes and nature of the use of deceptive lighting. Part IV argues that this practice cannot be reconciled with either the letter or the spirit of international law and is therefore best considered a violation of the laws of war.

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[6] Protocol I, *supra* note 1, art. 37.

[7] Despite the use of the term in U.S. Navy publications, the DICTIONARY OF MILITARY AND ASSOCIATED TERMS contains no official definition of "deceptive lighting." The definition above is derived from the author's experience as an officer in the United States Navy.

[8] United States Navy, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NAVAL WARFARE PUBLICATION 1-14M § 12.1.1 [hereinafter COMMANDER'S HANDBOOK].

[9] *See* J. Ashley Roach, *Ruses and Perfidy: Deception During Armed Conflict*, 23 U. TOL. L. REV. 395 (1992); Thomas C. Wingfield, *Chivalry in the Use of Force*, 32 U. TOL. L. REV. 111, 134, n.89 (2001).

I. THE DISTINCTION BETWEEN PERFIDY AND RUSES

A. Perfidy and Ruse in Additional Protocol I

The attempt to delineate acceptable and unacceptable acts of military deception has a history that exceeds the scope of this paper.[10] For one modern description of the distinction, consider Additional Protocol I, Article 37:

> 1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
> (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
> (b) the feigning of an incapacitation by wounds or sickness;
> (c) the feigning of civilian, non-combatant status; and
> (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.
> 2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.[11]

The treaty does not extend to an outright ban on all acts of perfidy.[12] Although the second sentence of the article contains a general-purpose definition of perfidy — inviting the confidence of the enemy to lead him to believe that he is entitled to or bound to oblige protection under IHL — the first sentence

[10] *See generally* Wingfield, *supra* note 9. *See also* GEORGE P. POLITAKIS, MODERN ASPECTS OF THE LAWS OF NAVAL WARFARE AND MARITIME NEUTRALITY 297-319 (1998) (tracing the debate over ruses and perfidy from the Roman Empire through the SAN REMO MANUAL).
[11] Protocol I, *supra* note 1, art. 37.
[12] The literal derivation of "perfidy" is "breach of faith." *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987), para. 1483 [hereinafter COMMENTARY].

explicitly limits the scope of the ban in Protocol I to those acts of perfidy that are used to kill, injure, or capture the adversary.[13]

This leaves at least two significant holes in the ban. One is that it does not explicitly prohibit the abuse of the protections of IHL in order to achieve other concrete military objectives short of killing, injuring, and capturing. The commentary to Additional Protocol I clarifies that at least some delegates to the convention considered this reduced scope to be a significant weakness and lobbied for a broader prohibition on all acts of perfidy.[14] For example, the language in Article 37 leaves open the possibility that it is acceptable to perfidiously feign civilian status in order to retreat, to stall for time while awaiting re-supply, or generally to confuse the enemy. Second, the language also suffers from a weakness in that inchoate crimes are apparently not covered by the letter of the ban. So while it is prohibited to kill, injure, or capture by perfidy, there is some question whether an *unsuccessful* attempt to kill the enemy through the use of false surrender is banned if the terms of the treaty are applied in their narrowest possible reading.[15]

The ban in Article 37 cannot be considered in isolation from Article 39:

> 1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.
> 2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.
> 3. Nothing in this Article or in Article 37, paragraph 1 (d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.[16]

While not using the term perfidy, the same types of considerations appear to permeate this article on the use of other nation's emblems in military operations. Leaving aside paragraph three, which will be considered in depth in Part II, Article 39 is at once both broader and narrower than Article 37. It carries broader prohibitions in the form of the first paragraph, which entirely bans the use of the flags or insignia of *neutral* states for any reason. Unlike Article 37, where other types of deception can be tolerated if they do not result in killing, injuring, or capturing the other side, the laws of neutrality are inviolate

[13] COMMENTARY, *supra* note 12, at para. 1490.
[14] *Id.*
[15] *Id.* at para. 1492.
[16] Protocol I, *supra* note 1, art. 39.

according to Article 39 paragraph 1. But the prohibition is more narrowly tailored in the second paragraph, which still carries some sweeping language but at least admits of a possibility that the *enemy's* insignia might be used in some circumstances other than launching an attack or garnering any concrete military advantage.[17]

1. Pre-Protocol Origins and Post-Protocol Developments

Protocol I is not the sole authority for military deception under international law. In fact, in some ways the Protocol is a departure from customary international law and from other treaty law on this subject. Within the modern era, the concept of perfidy and treachery date back at least as far as the *Lieber Code* of 1863.[18] For example, Article 16 instructed the army that "[m]ilitary necessity … admits of deception, but disclaims acts of perfidy."[19] Unfortunately, the *Lieber Code* did not include an attempt to define perfidy. Article 65 foreshadowed the eventual Article 39 of Geneva Protocol I: "The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war."[20] The *Lieber Code* does make use of a parallel concept that pre-existed Protocol I: treachery. Again leaving the term largely undefined, the Code notes in Article 101 that "[w]hile deception in war is admitted as … just and necessary … the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy…."[21]

By 1880, prohibitions on treachery and perfidy had been incorporated into the *Oxford Manual for the Laws of War on Land*.[22] Belligerents were expected to "abstain … from all … perfidious, unjust, or tyrannical acts."[23] Additionally, to make an attempt on the life of the enemy by feigning surrender was explicitly labeled an example of treacherous behavior.[24] Most of these concerns would carry forward into the *Oxford Manual on the Laws of Naval War* thirty-three years later: ruses of war were considered permissible, treachery was not.[25]

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[17] *Id*.
[18] *See* INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, (LIEBER CODE) (Apr. 24, 1863) [hereinafter LIEBER CODE].
[19] LIEBER CODE, *supra* note 18, art. 16.
[20] Protocol I, *supra* note 1 art. 39.
[21] LIEBER CODE, *supra* note 18, art. 101.
[22] *See* OXFORD MANUAL FOR THE LAWS OF WAR ON LAND (Sep. 9, 1880), *available at* http://www.icrc.org/ihl.nsf/full/140 gop - document.
[23] OXFORD MANUAL FOR THE LAWS OF WAR ON LAND, *supra* note 22, art 4.
[24] *Id.* at art 8.
[25] OXFORD MANUAL FOR THE LAWS OF NAVAL WAR, art. 15 (Aug. 9, 1913), *available at* http://www.usslibertyinquiry.com/law/oxford.pdf (last visited Jan. 23, 2007).

The Hague Conventions of 1907 provide another insight into the nature and extent of the prohibitions. Article 23 sets out certain prohibited means of injuring the enemy, among them "to kill or wound treacherously"[26] and to make "improper" use of flags, insignia, uniforms, the distinctive insignia, and flags of surrender.[27] Without using the term "perfidy," the Hague Conventions set the template for what would eventually become Articles 37 and 39 of Geneva Protocol I.[28] Note, however, the differences. The Hague Convention concerns itself with the *killing* and *wounding* of the enemy, whereas the Geneva Protocol adds the *capture* of the enemy.[29] The Protocol also explicitly shifts the term of discussion from *treachery* to *perfidy*.[30] The ICRC commentary is clear that the change in words, from *trahison* to *perfidie,* was meant to make the Protocol more expansive.[31] But the commentary is equally clear that the Protocol is not meant to supplant the Hague Convention, but rather to develop the themes found there.[32]

The law continues to develop even since the Additional Protocol. From 1988 to 1994, a group of legal scholars and naval experts met for the purpose of compiling a "contemporary restatement of international law applicable to armed conflict at sea."[33] The resulting *San Remo Manual* was intended to reflect changes in the law since the *Oxford Manual* of 1913 that had not been codified into treaty law.[34] In particular, the *San Remo Manual* noted that the Geneva Conventions and Additional Protocol I had been concerned largely with land warfare and that naval warfare was considered only in a few particular instances – especially naval treatment of civilians and the shipwrecked.[35]

The *San Remo Manual* Paragraphs 110 and 111 outline the legality of ruses and perfidy, but also note limitations on the use of ruses:

> 110. Ruses of war are permitted. Warships and auxiliary vessels, however, are prohibited from launching an attack whilst flying a false flag and at all times from actively simulating the status of:

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[26] HAGUE CONVENTION (IV), RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND, 18 OCTOBER 1907, art 23(b) [hereinafter HAGUE CONVENTION (IV)].
[27] *Id.* at art 23(f).
[28] The provisions on perfidy were heavily informed by the provisions on treachery in the Hague Conventions. *See* COMMENTARY, *supra* note 12, at para. 1488.
[29] *Supra* note 11 and accompanying text.
[30] COMMENTARY, *supra* note 12, at para. 1488.
[31] *Id.*
[32] *Id*.
[33] SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, (Louise Doswald-Beck, ed.) 5 (1994) [hereinafter SAN REMO EXPLANATION].
[34] *Id*.
[35] *Id*.

(a) hospital ships, small coastal rescue craft or medical transports;

(b) vessels on humanitarian missions;

(c) passenger vessels carrying civilian passengers;

(d) vessels protected by the United Nations flag;

(e) vessels guaranteed safe conduct by prior agreement between the parties, including cartel vessels;

(f) vessels entitled to be identified by the emblem of the red cross or red crescent; or

(g) vessels engaged in transporting cultural property under special protection.

111. Perfidy is prohibited. Acts inviting the confidences of an adversary to lead it to believe that it is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, constitute perfidy. Perfidious acts include the launching of an attack while feigning:

(a) exempt, civilian, neutral or protected United Nations status;

(b) surrender or distress by, e.g., sending a distress signal or by the crew taking to life rafts.[36]

The explanatory material clarifies how these two paragraphs operate in tandem. Paragraph 110 retains the legality of ruses.[37] The second sentence, although silent on the use of false flags in general, prohibits belligerents from attacking while under a false flag.[38] Neither of these terms reflects any expansion from Protocol I. But the enumeration of certain prohibited ruses *is* a significant departure. The paragraph was intended to "clarify a number of actions by warships which, although they might not qualify as perfidy, are prohibited under the law of armed conflict."[39] Paragraph 111 then repeats the Protocol I definition of perfidy and expands on the maritime application of perfidy. According to the drafters, the paragraph was intended to clarify a number of issues revolving around those things that the Hague Conventions had termed "treachery" and that the *Oxford Manual* had applied to the naval arena.[40]

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[36] SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA, para. 110-11, *available at* https://www.icrc.org/web/Eng/sixteeng0.nsf/wplist149/96627225c179edcc1256b6600598e01 (last visited Jan. 23, 2007) [hereinafter SAN REMO MANUAL].

[37] *Id* at para. 110.

[38] *Id.*

[39] SAN REMO EXPLANATION, *supra* note 33, at para. 110.2.

[40] SAN REMO EXPLANATION, *supra* note 33, at para. 111.1.

2. Summary of Perfidy and Ruse

In context, therefore, the distinction between perfidy and ruses in Protocol I is only one snapshot of an evolving legal concept. As a result, we can see a theme emerging that runs through customary international law and through the conventions and treaties. War involves legitimate attempts to use deception and surprise to achieve an advantage over the enemy. But some types of deception are not accepted. Variously called treachery or perfidy — terms that have not been exhaustively defined or developed — the examples of such acts have varied over the last 150 years. Some appear to be constants, such as the use of a flag of surrender or feigning civilian status in order to lure the enemy to his death. To the extent that flags of neutral states receive treatment, they also appear to be accorded high protection: Article 39 bans outright the use of neutral flags on land even while leaving open the potential use of enemy flags.[41] This reflects the unique and heavily protected nature of being a neutral state, as opposed to simply not being a state party to a conflict.[42] But other acts of deception are not as universally rejected. Combatants can make at least limited use of the enemy's insignia, although the extent of that legal use is subject to at least some qualification.[43]

Despite the criticism noted above, Protocol I appears to be a relatively faithful codification of these customary practices — but perhaps is underinclusive of prohibited acts when viewed in light of the amplifying information contained in the *San Remo Manual*. The Protocol bans the use of perfidy to kill, injure, or capture the enemy, and establishes three elements that were common to other practices: (1) inviting the confidence of the enemy, (2) the subjective intent to betray that confidence, and (3) the objective element that the confidence must be related to an obligation or privilege that is extended pursuant to IHL.[44] Nevertheless, as noted above there is another thread to this discussion with respect to perfidy and ruse at sea: the use of the enemy's flags in preparation for combat. It is to this practice that this paper now turns.

II. THE NAVAL WARFARE EXCEPTION: FALSE FLAGS

The Protocol acknowledges a split between the customs of war on land and the customs of war at sea. After spending considerable time in Articles 37 and 39 to lay out the elements of perfidious acts and the improper use of neutral and enemy flags, paragraph 3 of Article 39 then carves out a substantial exception: "Nothing in this Article or in Article 37, paragraph 1 (d), shall affect

[41] *Supra* notes 16-17 and accompanying text.
[42] *See* COMMENTARY, *supra* note 12, at para. 1510.
[43] *Supra* note 17 and accompanying text.
[44] COMMENTARY, *supra* note 12, at para. 1500.

the existing generally recognized rules of international law applicable to … the use of flags in the conduct of armed conflict at sea."[45] According to the ICRC commentary, the provision was added to clarify that the Protocol was not intended to alter any norms of customary international law with respect to the use of false flags in naval combat. The ICRC begrudgingly acknowledges that such usage is "accepted, or at least tolerated" under international law.[46]

The practice in question had become common by the time of the Napoleonic wars. Ships of war, upon sighting each other individually or in small groups, faced a dilemma. Barring luck or unusual skill, the outcome of a battle was likely determined by the number and weight of cannon on either side, tempered perhaps by the direction of the wind and the design — and therefore speed and maneuverability — of the individual ships.[47] These variables could be largely determined during the interminable delay between noticing the enemy and closing the distance to within the relatively short effective range of the ships' guns.[48] This, of course, gave little incentive for the putative loser of the upcoming battle to allow that distance to be closed. So the custom was tolerated whereby ships would raise and lower various flags of neutrals, enemies, and allies, in the hopes of eliciting a responding show of colors from the other side. The hope was that the larger ship — or perhaps the outgunned ship, if they were counting on one quick attack to seize the advantage — could allay suspicion long enough to narrow the gap and, in a triumphant flourish, expose the ship's true flag shortly before blasting away.[49]

The Protocol seeks to preserve this custom in paragraph 3 of Article 39. Oddly, by 1977 the use of false flags had largely become a relic of an older era.[50] The Commentary raises the possibility that the continued reluctant acceptance of these practices might be a result of changes in the way that neutral

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[45] Protocol I, *supra* note 1, art 39.
[46] COMMENTARY, *supra* note 12, at para. 1582.
[47] *See generally*, NATHAN MILLER, BROADSIDES: THE AGE OF FIGHTING SAIL 1775-1815 (2000).
[48] Michael Phillips, *Notes on Sailing Warships Part* I, (2000), *available at* http://www.cronab.demon.co.uk/gen1.htm .
[49] For an account of just one such engagement, *see* Captain Thomas Truxton, *Letter to Secretary of the Navy 10 Feb. 1799*, in NAVAL DOCUMENTS, QUASI-WAR WITH FRANCE NOV. 1798-MAR. 1799, 326-27 (1935).
[50] This might be the result of any number of causes. The range of naval weapons expanded enormously in the age of the missile, making obsolete the need to lull the enemy into closing the distance between the sides. Sensors to determine the nature of an unknown ship are more sophisticated. The industrial age also brought standardized designs for ships of particular classes and the destructive force of modern weapons made the capture and re-flagging of warships less common, so the determination of a ship's nationality is now usually possible at long ranges even without any identifying insignia.

shipping was treated since the golden age of sail and the drafting of the Protocol.[51]

For example, in World War I and subsequently, naval combat has grappled with the era of total warfare and massive trans-oceanic shipment of war supplies. The outright protection of neutral shipping in this era had become somewhat qualified.[52] Consider for example the evolution of merchant prizes. By 1913, the Oxford Manual contained an entire section — seventeen articles — on the legal status and treatment of prizes.[53] The cargo had to be safeguarded, several reports had to be prepared, the ship had to be brought to the nearest port of the belligerent, and the ultimate fate of the ship and cargo were to be left only in the hands of specialized prize courts.[54] As early as the Hague Conventions of 1907, the international community was moving forward with the establishment of an international prize court, which would have stood as a supra-national court of appeal for the prize cases of belligerent states.[55] The court failed to materialize, however, due to a failure to agree on uniform prize laws, among other reasons.[56]

Within decades, this view of neutral merchant shipping was severely challenged by the advent of submarine warfare and the view that the entire war-sustaining effort of a belligerent was becoming fair game.[57] The result is summarized in the commentaries to Protocol I:

> [S]ince the First World War, warfare has been extended at sea to the economic field and to the merchant navy of the belligerent countries. It even affected neutral ships or ships flying a neutral flag when it was considered that these could serve the interests of a country at war. This led to complex rules which cannot be changed without a thorough study, and this is the import of the proviso formulated in this article.[58]

Hence the maintenance in Article 39 of the "generally recognized rules of international law of armed conflict at sea" might be better viewed as a reflecting

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[51] COMMENTARY, *supra* note 12, at para. 1582.
[52] *See* POLITAKIS, *supra* note 10, at 616-27.
[53] OXFORD MANUAL FOR THE LAWS OF NAVAL WAR, *supra* note 25, at arts. 100-116.
[54] *Id.* at arts. 103, 100, 102, 109, and 110 respectively.
[55] Hague Convention XII (1907), London Declaration of 1910.
[56] International Committee of the Red Cross, *Introductory Comments on the Hague Convention (XII) relative to the Creation of an International Prize Court, available at* ,http://www.icrc.org/ihl.nsf/INTRO/235?OpenDocument (last visited Jan. 23 2007).
[57] Contrast Washington Treaty of 1922, Havana Convention on Maritime Neutrality of 1922, and London Treaties of 1930 and 1936.
[58] COMMENTARY, *supra* note 12, at para. 1582.

the fact that untangling these aspects of IHL would require resources and expertise that were beyond the scope of the delegates, rather than being a definitive discussion of the substance of perfidy and ruse in the modern era. As noted in Part II, this view is consistent with the varied treatment of perfidy at sea among the precursors and successors to the Protocol.[59]

For our purposes, however, the text of Article 39 makes clear that some behavior that might otherwise be outlawed as perfidious under Article 37 or otherwise illegal under Article 39 is preserved. To the extent that this behavior involves customs on the use of flags, the carve-out seems temporarily secure from the efforts of reformers among the delegates to Protocol I and the *San Remo* conferences to make inroads against the acknowledgment of the practice.[60] Curiously, a separate and distinct form of deception has been put forward as being permitted under the laws of war, and it is to that deceptive practice that this paper now turns.

III. DECEPTIVE LIGHTING

In the age of steel warships and customary laws governing the use of identifying lights for all ships at sea, one of the many risks that a ship commander faces can be that the pattern of lights on the ship betrays her status as a belligerent. Warships, after all, are designed for different tasks than a merchant ship. For example, warships and merchant ships typically have different beam-to-length ratios. Further, warships in the age of electronic combat are interested in placing at least some antennae as high as can be managed without detracting from the sea-keeping abilities of the ship in order to maximize the effective range of the radar. While warships care very much about what might be lurking 25 miles away, merchant ships are more concerned only with objects and items within a much more limited radius.

Under normal conditions, ships are required to have certain lights mounted at prescribed locations.[61] By combining just the above-mentioned aspects of ship design and the fact that vessels have standard lights mounted at the legally required locations, it becomes clear that the visual appearance of a warship at night will be noticeably different from civilian ships in the same area. One potential solution for a ship commander would be to simply extinguish all

[59] Even the specialized delegates drafting the San Remo Manual grappled with the complexities of modern total warfare and traditional notions of perfidy and ruse. *See* SAN REMO EXPLANATION, *supra* note 33, Preliminary remarks to Section III, 184.

[60] For an in-depth consideration of the value of continuing the protection of the use of false flags, *see* POLITAKIS, *supra* note 10, at 305-12.

[61] *See* CONVENTION ON THE INTERNATIONAL REGULATIONS FOR THE PREVENTION OF COLLISIONS AT SEA, codified at 33 U.S.C. § 1602 *et seq*. The exact colors, locations, and visible arcs of the lights vary depending on the size and activity of the vessel.

lights. Although this might increase the chances of a collision, and in peacetime would violate maritime safety treaties,[62] it would also provide a deceptive advantage to the ship with respect to not being recognized for its true identity. There is, however, a limit to the logic of that course of action. Although such "darken ship" procedures provide some protection from detection, in the age of radar and infrared sensors, the end result might actually detract from the stated purpose: it takes little imagination to determine the identity of a huge metal ship with no lights on it.

The practice has therefore developed of going to the opposite extreme. Instead of becoming a conspicuously dark ship, a ship commander might be tempted to engage in the practice of deceptive lighting.[63] While the specifics might vary, a creative ship's crew could find ways to use lights to disguise the distinctive beam-to-length ratios or the height of the main mast that makes their ship such an obvious mark among other targets. A false mast might be erected, or running lights might be placed farther forward or behind their normal location. An array of dim lights might be spread along the entire length of a ship to resemble port-holes on a cruise ship, or super-high intensity halogen lights might be lit to simulate the practices of certain commercial fishing fleets to lure their quarry to the surface with false daylight.[64] Even simple lamps with baffles and plywood cutouts can be used to make a ship appear to have cavernous cargo holds where none exist.[65]

The lawyers for the United States Navy have embraced this practice. In *The Commander's Handbook on the Law of Naval Operations*, the Navy sets in writing that the use of deceptive lighting is a permitted ruse of war.[66] But in the following paragraph, the definition of perfidy found in Protocol I is repeated, with the warning that acts of perfidy are prohibited. The only example given of perfidy is feigning surrender in order to kill the enemy.[67] The publication does not define for the Commander exactly what is meant by deceptive lighting.[68]

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[62] *Id*.
[63] *See infra* notes 69-71 and accompanying text.
[64] The amount of light emitted by quid fishing fleets in the waters between Korea and Japan was sufficient to allow The North Pacific Marine Science Organization to estimate environmental damage on the basis of satellite images of the lights. *See* H. Kiyofugi, et al., *Environmental Impact Assessment of Squid Fisheries in Japan Using RS-GIS, available at* http://www.pices.int/publications/presentations/PICES_12/pices_12_S1/Kiyofuji_964.pdf (n.d.).
[65] MARTIN YOUNG & ROBBIE STAMP, TROJAN HORSES: DECEPTION OPERATIONS IN THE SECOND WORLD WAR 125-26 (1989). The example cited was actually even more extensive: through the use of lights, canvas and wood, the British created a fake shipyard in the middle of Britain which successfully lured German bombers to waste their efforts bombing a field. *Id.*
[66] COMMANDER'S HANDBOOK, *supra* note 8, § 12.1.1.
[67] *Id*. § 12.1.2.
[68] *Id*. § 12.1.1.

Furthermore, the Department of Defense does not define "deceptive lighting" in its *Dictionary of Military and Associated Terms*.[69]

A survey of some publicly available accounts of the use of deceptive lighting can provide insight into the types of acts that might be encouraged under this definition. The following is one such account of an exercise conducted in the early 1980's.[70] A task force transited to areas immediately off the coast of the Soviet Union. Using a variety of deception tactics, the task force attempted to remain undetected, or to the extent they were seen, to appear to be something other than military ships. In this endeavor, "deceptive lighting [was] used at night so that the obvious 'blacked out warship' [was] instead thought to be a merchant or cruise liner. . . .." Initial waves of attacks were launched at the notional enemy with the result that, "[i]n wartime this would result in the survivors picking themselves out of the (possibly radioactive) rubble of their airfields and other key military facilities."[71]

Or consider the following account of an exercise between two submarines. One submarine, assigned to protect other ships, was actively searching for the other. That second had already surfaced and "took the latitude to use deceptive lighting."[72] The protecting submarine noticed the surfaced submarine and attempted communication by radio, presumably to determine its identity. Unaware that this unknown contact was in fact military the protector did not fire on it, and instead the deceiving submarine "shot" the other and retreated.[73]

The Navy does not conceal the development of such tactics. In a public affairs article profiling technicians whose primary job is to assist in the recovery of aircraft aboard the aircraft carrier USS KITTY HAWK, the Navy noted that "[f]light deck lighting is not only essential for regular flight operations. It is also used for night time illumination and deceptive lighting."[74]

Before turning to the question of the legality and advisability of the use of this means of warfare, it is worth noting that the acceptance of deceptive lighting appears to be recent even for the United States Navy. The precursor to

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[69] UNITED STATES DEPARTMENT OF DEFENSE, JOINT PUBLICATION 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (Rev. 2005).
[70] *See* Andy Pico, *How to Hide a Task Force*, *available at* http://www.navweaps.com/index_tech/tech-031.htm (last updated Jan. 2, 1999).
[71] *Id.*
[72] *An Operational Perspective of Submarine Evasion*s *Operations,* (Apr. 27, 2004) *, available at* http://www.alidade.net/2004/search4/presentations/sykora/ (Apr. 27 2004).
[73] *Id.*
[74] Charise Cunningham, *VLA Team Crucial to Hawk's Mission* (Dec. 9, 2002), *available at* http://www.news.navy.mil/search/display.asp?story_id=4910 .

the Navy's *Commander's Handbook* made no mention of the practice. In *The Law of Naval Warfare*, the issue was dealt with as follows:

> 640 Stratagems and Treachery
> a. STRATAGEMS, OR RUSES OF WAR, are legally permitted. In particular, according to custom, it is permissible for a belligerent warship to use false colors and to disguise her outward appearance in other ways in order to deceive an enemy, provided that prior to going into action such warship shows her true colors.
> b. ACTS OF TREACHERY, whether used to kill, wound, or otherwise obtain an advantage over an enemy, are legally forbidden. It is, for example, an act of treachery to make improper use of a flag of truce.[75]

It is also notable that, similar to the Protocol and the *San Remo Manual*, the German tri-service manual on *Humanitarian Law in Armed Conflict* makes no mention of disguising warships as civilian ships in its list of permissible ruses. Instead it lists as examples "the use of enemy signals, passwords, signs, decoys, etc.; not, however, espionage."[76] Admittedly, such lists can be argued to be inclusive but not exhaustive of the types of activities that are allowed as ruses. Nevertheless, in discussing the legality of the practice in Part IV herein, it is worth considering its novelty in United States literature, and its absence from similar literature of another nation.

IV. THE LETTER AND INTENT OF THE PROHIBITION AND THE EXCEPTION

A. The Textual (Protocol I) Argument Against the Use of Deceptive Lighting in Combat

The use of deceptive lighting in combat meets a prima facie case of perfidy under Protocol I: the type of behavior that would otherwise be termed treacherous. It meets the three requirements of the classic test for an act of perfidy, and if used in combat it would, and should be, prohibited. For the sake of argument, this Part will start with the assumption that Protocol I is binding legal authority, either as treaty law for those nations who are signatories or as reflective of customary international law for others. Part IV.B will also consider the act under other norms of customary international law outside of Protocol I. Consequentialist arguments against its legality will be considered in Part IV.C.

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[75] UNITED STATES NAVY, NAVAL WARFARE INFORMATION PUBLICATION 10-2, THE LAW OF NAVAL WARFARE § 640 (1955).
[76] Humanitarian Law in Armed Conflicts – Manual, para. 472, as cited in POLITAKIS, *supra* note 10, at 315.

To meet the textual definition of perfidy under Protocol I, an act must meet three elements. First, it must be an act that invites the confidence of the enemy. That is, it must be designed to encourage the enemy to act in a particular way. Second, an objective element must be met: it must place the enemy into a position where he feels (or at least *should* feel) entitled to — or bound to afford — some protected status under the laws of war. Third, there must be a subjective element: the deceiver must intend to induce this reliance on the part of the enemy.[77]

The first element is easily met in the case of deceptive lighting. By definition, acts of deception are designed to induce the enemy to act in a particular way.[78] Even if this blanket definition were not determinative, the placement of deceptive lighting within the *Commander's Handbook*, in the section on stratagems and ruses, supports this reading. In fact, the definition of deception in the *Commander's Handbook* is an act directed against the enemy in order "to mislead him, to deter him from taking action, or to induce him to act recklessly."[79]

The second element, the objective element that the deception places the enemy in the position to feel bound to behave in a certain way by the laws of war, is also met. Note that in all discussion of deceptive lighting, the focus is not on trying to make the ships look *more* like military targets, nor is the discussion about trying to make one legitimate military target look more like a different legitimate target. The point of the deception is to make the ship appear to be protected: a cruise ship, a merchant ship, or a fishing vessel. These vessels, while not being completely *hors de combat* in the sense of some of their land equivalents, are definitely afforded a heightened level of protection vis-à-vis warships as the following illustrates.

Even in the modern age the rights of neutral and belligerent merchant shipping are greater than the rights of belligerent warships — at least with respect to unprovoked attack and destruction. Neutral merchant ships are legally permitted to engage in commerce with the enemy, provided that they do not cross a (highly-debated and ill-defined) line and provide material support to the war effort of a belligerent.[80] Even the merchant ships of a belligerent state, not immune from seizure or destruction, must be given the opportunity for capture

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[77] *See supra* note 44 and accompanying text.

[78] "Deception. Those measures designed to mislead the enemy by manipulation, distortion, or falsification of evidence *to induce the enemy to react* in a manner prejudicial to the enemy's interests." UNITED STATES DEPARTMENT OF DEFENSE, JOINT PUBLICATION 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (Rev. 2005) (emphasis added).

[79] COMMANDER'S HANDBOOK, *supra* note 8, § 12.1.

[80] SAN REMO MANUAL, *supra* note 36, para 67. For a description of the unsettled nature of this norm of international law, see SAN REMO EXPLANATION, *supra* note 33, paras. 67.1 - 67.27 at 155-61.

before destruction and must be given precautions for the well-being of the crew that warships are not given.[81] Fishing vessels are also largely immune from capture and destruction under customary international law.[82] The other chapters of the *Commander's Handbook* itself recognize these distinctions in how various ships are to be treated.[83]

By combining the above restrictions, we can evaluate the objective element of burdening the enemy with a perceived obligation under international law. If we place ourselves in the shoes of an enemy ship or aircraft commander, upon locating an unknown ship at sea there is a hierarchy of actions that can be taken depending on the nature of the ship. If it is an enemy warship, we are entitled to attack and destroy it, barring any other considerations of IHL such as being located in a neutral harbor, showing signs of surrender, or the like. If the ship is an enemy merchant ship, it can be stopped, visited, searched, captured, and is subject to prize law. If the ship is a merchant ship of a neutral state, it is subject to visit, board and search, but in the absence of certain exceptions — all of which detract from its status as neutral — the ship must be allowed to resume its business. Certain other ships, such as civilian passenger ships, are presumptively immune from attack at all. In any event, if the ship is anything other than an enemy warship the belligerent is obligated to provide certain treatment above and beyond what is due to the enemy combatant. Because of those obligations, disguising a ship as something other than a warship meets the objective element.

The third element, the subjective element, might be harder to prove in every case. This is particularly true in that there is no published unclassified definition of the intent or purpose of deceptive lighting. Theoretically, a combatant could attempt to argue that they certainly attempted to *deceive* the enemy and that there might have been the *objective result* of a change in protected status, but that there was no *intent* to create the objective change in status. This argument fails for several reasons.

First, many of these cases will fall into an international legal equivalent of *res ipsa loquitur*. The argument might be made that the deceptive pattern of lights was simply an attempt to look somehow vaguely different — not to evoke a comparison to a protected ship. Likely the type of lighting change that is made will make that argument null. For example, rigging lights that are identical to

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[81] OXFORD MANUAL FOR THE LAWS OF NAVAL WAR, *supra* note 25, at arts. 104-105.
[82] *See* The Paquete Habana the Lola, 175 U.S. 677, 714 (1900). *See also* OXFORD MANUAL FOR THE LAWS OF NAVAL WAR, *supra* note 25, at art. 47 (Aug. 9, 1913) (exempting from seizure small coastal ships and forbidding belligerents to "take advantage of the harmless character of said boats in order to use them for military purposes while preserving their peaceful appearance").
[83] *See generally* COMMANDER'S HANDBOOK, *supra* note 8, chs. 7 and 8.

fishing operations, or physically constructing false masts and changing the ratios or certain measurements between the lights cannot be attributed to a simple accident of war. To borrow from domestic criminal law, sometimes in the most egregious cases the *result* allows us to impute a presumption of criminal *intent*.

By engaging in deceptive lighting schemes, a belligerent consciously chooses to do two things. First, the belligerent chooses to disguise a warship *not* as another legitimate target but as something that is entitled to at least some level of protected status. There is a quantum difference between deception that does not "break the faith," as the derivation of perfidy requires, and those deceptions that are outside of the rules.

Second, the use of deceptive lighting differs qualitatively because it deviates from customary state practice, which has confined itself almost exclusively to camouflage and concealment, not to disguising warships as merchants. For example, texts on deception at sea focus exclusively on methods of deception that could not possibly give rise to a change in protected status. The navies of the Second World War engaged in camouflage, concealment, and deception efforts that consisted of paint schemes and other devices to help ships blend with the surrounding environment.[84] Those methods included so-called "dazzle painting," the use of flat colors, or extending camouflage netting when moored.[85] In one case, the closest that might be found to deception crossing the line to perfidy, the crew of the badly damaged ship USS CANOPUS simply made no effort to repair itself and shifted operations to night to avoid detection by Japanese aircraft, or if detected, to appear to be a derelict hulk not worthy of further attention.[86] These examples are all striking in their singular rejection of the critical aspect of deceptive lighting: they do not invite the enemy to think that the ship is accorded a higher level of protection than it deserves.

By these facts, the use of deceptive lighting is perfidious under Protocol I. It is significant that this might not be dispositive of its illegality under the Protocol. In order to be prohibited it must be perfidy that is used to inflict death, injury, or capture on the enemy. Hypothetically, there could be a use of deceptive lighting that is perfidious but not prohibited. For example, a ship that attempts to pass itself off as a merchant in order to break out of a blockaded port might not rise to the level of treachery that is banned. It is conceivable that the intent in that case is to avoid inflicting injury or death because it is the very use of perfidy that is meant to make a violent conflict

[84] GUY HARTCUP, CAMOUFLAGE: A HISTORY OF CONCEALMENT IN WAR 117-33 (1980)
[85] JAMES F. DUNNIGAN & ALBERT F. NOFI, VICTORY AND DECEIT 326-35 (1995).
[86] *Id*. at 166-68.

unlikely.[87] Those concerns aside, the mine-run cases of deceptive lighting make a strong prima facie case of prohibited perfidy under the Protocol. A discussion of the treatment of the practice in a regime where the Protocol is not binding, which appears to have a more sweeping scope of prohibition, follows in Part IV.B.

B. The Argument Against Customary Acceptance

The analysis cannot be restricted only to Protocol I. There are significant naval powers who are not signatories to the convention and look unlikely to ever become such. But returning to the analysis in Parts I, II, and III, any claims that deceptive lighting is in some way permitted either under customary international law or under the letter of earlier codes must fail.

One such argument might be that the strict wording in Protocol I actually goes beyond other requirements of international law. There is evidence for this argument. For example, the Protocol does explicitly add the criteria of "capture" to the prohibited purposes for which perfidy cannot be used.[88] This represents a decision to increase the scope of the prohibition beyond the bounds of the Hague Conventions.[89] Likewise, the commentary on the convention notes that the decision to shift from the word *treachery* to the word *perfidy* was made with the intent to broaden the scope of the prohibited actions.[90] The commentary also notes that the delegates were not in agreement on that course of action.[91] In those senses, the prohibition could be argued to be greater than the requirements of customary international law.

But even assuming for the sake of argument that the prohibition in the protocol is not reflective of customary international law, there clearly is some level of prohibition in custom that cannot be so easily dismissed. For example, the *Lieber Code* banned the use of treacherous actions in general, and the Hague Conventions likewise prevented the killing or injuring of the enemy through the use of treachery.[92] While the *Lieber Code* is sparse with examples, the Hague Conventions do spell out at least some of the more treacherous means of warfare, and clearly the principle embodied in Protocol I is reflected in those documents.[93] The examples show a determined effort to prevent the use of

[87] Consider, for example, that ruses might be "techniques and devices to win war without a trace of blood or tears. . . ." POLITAKIS, *supra* note 10 at 269 (dismissing such claims as idyllic and misleading).
[88] *Supra* note 29 and accompanying text.
[89] Protocol I, *supra* note 1, art. 37; HAGUE CONVENTION (IV) Art. 23.
[90] *See* COMMENTARY, *supra* note 12, at para. 1488.
[91] *Id*. at para. 1492.
[92] *Supra,* Part I.A.1.
[93] *Supra,* Part I.A.1.

means of warfare that abuse other provisions of IHL. Significantly, they prohibit the use of ruses that involve feigning civilian status in combat. Further, as the discussion in Part II noted, the historical precedent for the use of false-flags predates the invention of lights. It cannot be that a practice that was impossible three hundred years ago was a part of a customary norm of international law.

Therefore, to make a claim that customary international law, or treaty law prior to Protocol I, allows deceptive lighting at sea requires some showing that the practice is protected under the customary carve-out for the use of false flags. This argument is met by returning to the discussion in Part II above. For example, even if we look at Protocol I as only persuasive authority, it is significant that the false-flag provisions of Article 39 are separate from the perfidy provisions of Article 37. It is also significant that even when paragraph 3 of Article 39 is operative, it only displaces paragraph 1(d) of Article 37. That is, among the list of examples of perfidy in Article 37, only the example of using enemy flags is modified by the carve out in Article 39. All of the other examples are implicitly retained.

The documentary history of the sentence sheds no further light on the subject. The draft debated by the committee on March 7, 1975, made no mention of any naval carve-out.[94] The first mention was an oral recommendation from the British delegate, Sir David Hughes-Morgan, that the qualifier "on land" be added to the first sentence of the draft.[95] Between that March 7 comment and the April 10 draft of the article, the working group added the third sentence.[96] The working group made minimal commentary on the added language, other than to note that "several representatives wished to record their view that, if more exceptions are developed in the Protocol in order to avoid affecting the law of naval warfare, they should wish to see these exceptions brought together in a single provision."[97] The remaining diplomatic record shows extensive debate and commentary about the inclusion of espionage in sentence three, but no mention of the naval flags provision.[98] This record would support the ICRC commentary noted above that having scratched the surface of the peculiarities on twentieth-century naval combat, the drafters resisted any extensive attempt to delve further into the subject.[99] This theory is also supported by the prefatory commentary to the *San Remo Manual* which emphasized the perceived need for

[94] HOWARD S. LEVIE, 2 PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS 319 (1980).
[95] *Id*. at 321.
[96] *Id*. at 321-22.
[97] *Id*. at 323.
[98] *Id*. at 323-27.
[99] *See supra* notes 51-59 and accompanying text.

a separate conference on peculiarities of IHL as it relates to naval war, convened just ten years after the signing of Protocol I.[100]

It is even more significant, therefore, that the drafters of the *San Remo Manual* took a more expansive view of the prohibition against perfidy than the Protocol does. While the Protocol limits its prohibition to perfidious attacks, *San Remo* claims that customary international law prohibits *any* act of perfidy, and lists launching an attack while feigning civilian status only as an *example* of perfidy.[101] The explanatory comments make clear that while the drafters adopted the Protocol I definition of perfidy, the extent of the prohibition is based not on Protocol I but on customary international law that predates Protocol I.[102]

Therefore, in contrast to Protocol I, customary international law would view any use of deceptive lighting that invites the confidence of the enemy to be a prohibited practice. This norm not only predates Protocol I in the 1913 *Oxford Manual*, as interpreted by the ICRC and the Protocol I delegates, but has also been reaffirmed since Protocol I by the drafters of the restatement in the *San Remo Manual*.

C. The Consequentialist Argument Against the Use of Deceptive Lighting in Combat.

Barring an argument from the language of the law, might there be a consequentialist argument against the use of deceptive lighting? If we take the overall intent of international humanitarian law to include such goals as controlling the methods and means of warfare in order to isolate the effects of combat to certain segments of society and preventing unnecessary suffering and superfluous injury, a ban on deceptive lighting would appear to be well founded as a matter of policy.

The Russo-Japanese War provides several examples of the danger of allowing the distinction between civilian and military shipping to become blurred with the result that most state parties ended up making allegations of violations of the laws of war against other parties.[103] In particular, the parties protested and *threatened attacks* when ships that appeared to have protected status conducted militarily useful activities. In 1904, several vessels of the Russian fleet had disguised themselves as merchant vessels and exited the

[100] SAN REMO EXPLANATION, *supra* note 33, at 5.
[101] SAN REMO MANUAL, *supra* note 36, at para. 111.
[102] SAN REMO EXPLANATION, *supra* note 33, at 186.
[103] *See generally* AMOS S. HERSHEY, THE INTERNATIONAL LAW AND DIPLOMACY OF THE RUSSO-JAPANESE WAR (1906); JOHN A. WHITE, THE DIPLOMACY OF THE RUSSO-JAPANESE WAR (1964).

Bosporus and passed via the Suez into the Red Sea. There they began to harass neutral British shipping.[104]

In addition to outrage at the allegedly unlawful seizure of the British neutrals, the British government protested the passage of the ships out of the Black Sea under the disguise of merchant ships.[105] Significantly, this was not the only response from the British. The government instructed its Mediterranean fleet under Admiral Domville to reposition into the Red Sea to "prevent any further molestation of British steamers by Russian *merchantmen suddenly transformed into warships*."[106] The Admiral is reported to have even dispatched two ships to forcefully re-seize a merchant that had been captured by the Russian merchant/warships.[107] The result is that an attempt by the Russian auxiliary fleet to blend the distinction between warships and merchants almost drew a neutral party into hostilities in order to police that distinction — a result that runs afoul of the goals of IHL to limit and cabin the extent of war.

An even more striking example of the danger of using lighting to deceive warships can be found in the North Sea incident of October 22, 1904.[108] A fishing fleet of approximately fifty small vessels was indiscriminately fired upon by the Russian Baltic squadron, which was steaming toward Asia to enter the war against Japan.[109] Although the exact reasons for the attack were never completely determined, it appears that at least some of the cause can be found in a Russian paranoia about Japanese torpedo boats such that the Fall of 1904 is replete with examples of Russian warships firing upon innocent ships in similar incidents.[110] The Russian reply to the diplomatic protests included the charges that such enemy ships were intermingled among the fishing fleet both before and after the attack.[111] The incident, in addition to sparking a series of diplomatic efforts over several years, led to outrage in Britain against Russian violations of neutrality.[112] Leaving aside the possibility that there *were* Japanese warships disguised within the fishing fleet, the incident provides a chilling reminder of the consequences when belligerents begin to believe that they cannot distinguish between warships and non-combatants. As such, it provides some of the earliest evidence of the dangerous results that might follow from the expansion of the use of this method of deception.

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[104] HERSHEY, *supra* note 103, at 138-39.
[105] *Id*. at 141-42.
[106] *Id*. at 140 (emphasis added).
[107] *Id*. at 140, n.12.
[108] *See generally id*. at 217-45.
[109] *Id*. at 217.
[110] *Id*. at 222-23 n.10.
[111] *Id*. at 218-23.
[112] *Id*. at 220-21.

D. Of Q-Ships and Commerce Raiders

In the first half of the twentieth century, as states grappled with the advent of submarine warfare and "total war," both Britain and Germany launched partially-successful campaigns of deception that provide the analysis above with its most significant counterexample to be found in state practice.[113] The British deception was the Q-ship — a flotilla of merchant ships, secretly called into Royal Navy service and fitted with weapons and various external accoutrements to supplement the disguise.[114] These ships then stood to sea as dilapidated bait in the hopes of luring a U-boat into range and then opening fire.[115] Although the practice was somewhat successful, when dusted off for the Second World War, it met with more limited success.[116] Perhaps supplementing the consequentialist argument above in Part IV.C, it appears that at least part of the diminishing effectiveness of the tactic was that German U-boats simply stopped surfacing to investigate such craft and sank all merchant ships on sight.[117] The German Navy had a similar program in the Atlantic during both wars.[118]

The legality of these actions can be debated.[119] Assuming for the sake of argument that the practices were not barred by the Hague Conventions, does this necessarily imply that similar practices using lights are also legal? At the very least, the Q-ships and German raiders can be distinguished on the basis of the stated — although not always followed — requirement that the disguised ships would unmask their true identity in a triumphant flourish just before attacking.[120]

The practices of the early twentieth century can also be distinguished on the grounds that they have been rejected in subsequent commentary on IHL. For example, in discussing the role of deception in combat, and how to balance deception with the need to protect the distinction between combatant and non-combatant, the ICRC commentary to Protocol I summarizes the rule as:

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[113] For a longer discussion of the Q-ships and commerce raiders, see POLITAKIS, *supra* note 10, at 273-92. For a legal critique of the practices, *see id*. at 319-21.
[114] *Id*. at 274.
[115] *Id*. at 275.
[116] *Id*. at 278-79.
[117] *Id*. at 275.
[118] *Id*. at 281-83.
[119] Contrast POLITAKIS, *supra* note 10, at 320-21 (arguing that the practices directly violate the Hague Conventions) with L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 139, 159 (1993) (arguing the contrary).
[120] POLITAKIS, *supra* note 10, at 274.

> A combatant who takes part in an attack, or in a military operation preparatory to an attack, can use camouflage and make himself virtually invisible against a natural or man-made background, but he may not feign a civilian status and hide amongst a crowd. This is the crux of the rule.[121]

Likewise by the end of the century, the conference report of the *San Remo Manual* had come to the conclusion that "[t]he crucial element in the examples listed is that while protected status is simulated by a warship or military aircraft, an act of hostility is prepared and executed. The Round Table therefore was of the view that the former British practice of Q-ships is no longer acceptable."[122] Whatever the legality of the behavior under the Hague Conventions, and even if the use of civilian lighting were to be placed in the same category, it now appears clear that the practice does not fall into the permitted category of ruses, but rather is a prohibited act. Presumably, to do the same by way of electrical lighting would also be prohibited.

CONCLUSION

As the history of the Protocol and the commentaries of various experts confirm, it is not easy to define the line between legitimate acts of deception and prohibited violations of the laws of war. In particular, the line between the two seems to be somewhat inconsistent between the conduct of war on land and the conduct of war at sea. Into this confusion, the U.S. Navy has added a twist. Between the 1955 manual on the *Laws of Naval War*, and the 1992 manual on the *Law of Naval Operations*, the list of permitted ruses has expanded to include, among other examples, deceptive lighting.

This inclusion is legally and pragmatically incorrect. Deceptive lighting is qualitatively *unlike* all the other examples of legal deception that are listed alongside it. It is the only such example that, instead of simply confusing or misleading the enemy, invites the enemy to think that the combatant enjoys some sort of protected status with regards to international humanitarian law. As such, under even the most minimalist reading of Additional Protocol I the use of deceptive lighting to engage in an attack is a prohibited act of perfidy.

But even outside of Protocol I, the ban appears even more complete. Customary law prior to the Protocol and since the Protocol does not limit the prohibition to only cases of attacking while feigning protected status. Both the *Oxford Manual* and the *San Remo Manual* on the laws of naval warfare are more categorical in prohibiting any acts of treachery that involve using the protection

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[121] COMMENTARY, *supra* note 12, at para. 1507.
[122] SAN REMO EXPLANATION, *supra* note 33, at 186.

of IHL for the purposes of gaining a military advantage. To the extent that the use of false flags at sea remains a viable norm of international law — and that viability is subject to some challenge — the practice of deceptive lighting does not fall within the spirit or the letter of that carve-out.

From a pragmatic perspective it becomes clear why those prohibitions are in place. From the North Sea Incident of 1904 to the escalation of economic warfare in the first half of the twentieth century, the blurring of the line between protected and unprotected vessels — whether by intent or by accident — accompanied increasing danger that the effects of warfare would expand and encroach on the very protected vessels in question. Accepting the use of deceptive lighting will serve only to blur that line further.

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