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Military Law Review

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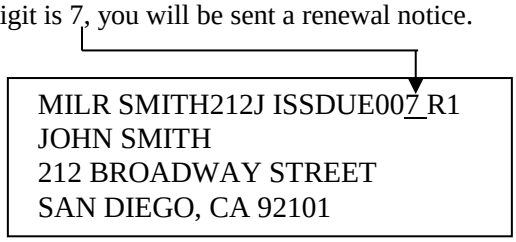

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MILITARY LAW REVIEW

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FEELING SO FLY LIKE A C12 (OR MAYBE A UC35, DEPENDING ON AVAILABILITY): A PRIMER ON UTILIZING MILAIR FOR OFFICIAL TRAVEL[1]

MAJOR JOSHUA J. TOOMAN*

I. Introduction

Hypothetical scenario: you are the new Chief of Administrative Law at V Corps in Heidelberg, Germany, and just got a heads up from G3 Aviation that there will be a military air (MILAIR) request coming in today for the Commanding General (CG), Major General (MG) Tressel. No sooner did you hang up the phone with the aviation folks when you received an urgent call from MG Tressel's aide, who was frantically attempting to plan last minute travel for the boss after a number of taskings came down from U.S. Army Europe. According to the aide, MG Tressel needs to attend a rehearsal of concept (ROC) drill and provide his

* Judge Advocate, United States Army. Presently assigned as Command Judge Advocate, 32d Army Air and Missile Defense Command, Fort Bliss, Texas. LL.M., 2019, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; J.D., 2009, Cleveland-Marshall College of Law, Cleveland State University; B.S., 2002, The Ohio State University. Previous assignments include Administrative Law Attorney, United States Army Europe, Wiesbaden, Germany, 2017-2018; Operational Law Attorney, United States Army Europe, Wiesbaden, Germany, 2015-2017; Brigade Judge Advocate, 66th Military Intelligence Brigade, Wiesbaden, Germany, 2014-2015; Knowledge Management Attorney, Office of the Judge Advocate General, Pentagon, Arlington County, Virginia, 2013-2014; Trial Defense Counsel, Fort Belvoir, Virginia, 2012-2013; Trial Defense Counsel, Fort Leavenworth, Kansas, 2011-2012; Legal Assistance Attorney, Combined Arms Center, Fort Leavenworth, Kansas, 2010. Member of the bar of Ohio. This paper was submitted in partial completion of the Master of Laws requirements of the 67th Judge Advocate Officer Graduate Course.

[1] FAR EAST MOVEMENT, LIKE A G6 FT. THE CATARACS AND DEV (Cherrytree and Interscope Records 2010).

command intent with 2d Cavalry Regiment (2CR) in Grafenwoehr, Germany, on 1 April, followed immediately by travel to T'bilisi, Georgia, for a series of meetings with the Georgian Minister of Defense from 2-4 April. Major General Tressel then needs to stop in Oberammergau, Germany, to attend the Combined Training Conference (CTC) on 5 April, before returning to Heidelberg on 6 April. The aide signs off, "We need to make MILAIR work for this travel. I'll have the request to G3 Aviation within the hour." Good. That gives you an hour to learn how to review a request for MILAIR. Plenty of time.

With increased scrutiny on government travel, it is critical that judge advocates (JAs) understand the rules surrounding government travel and help ensure leaders comply with all laws, policies, and procedures governing the use of government aircraft.[2] A JA well-versed in the nuances of MILAIR can help streamline the MILAIR process and enable mission success, all while keeping Army personnel "in the ethical midfield."[3]

This article will provide JAs with an overview of the applicable rules pertaining to the use of government aircraft in lieu of commercial aircraft for official travel and outline how to analyze such requests for legal sufficiency. Part II will discuss the differences between operational and administrative use, and distinguish between routine site visits and the exercise of command authority. Then, Part III will discuss the two justifications for administrative use of MILAIR—commercial service is not reasonably available or it is more cost-effective than commercial

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[2] David Smith, *Treasury Chief Steven Mnuchin Asked for a Government Jet for His Honeymoon*, THE GUARDIAN (Sept. 13, 2017, 8:47 PM), https://www.theguardian.com/us-news/2017/sep/13/treasury-secretary-steven-mnuchin-honeymoon-government-jet; Miranda Green, *Mnuchin Won't Commit to Commercial Only Flights for Treasury Travel*, CNN (Sep. 28, 2018, 12:23 PM), https://www.cnn.com/2017/09/28/politics/steven-mnuchin-military-jet-use/index.html; *see also* Press Release, Judicial Watch, Judicial Watch Uncovers New Documents Detailing Pelosi's Use of Air Force Aircraft for Her Family in 2010 (July 21, 2011), https://www.judicialwatch.org/press-room/press-releases/judicial-watch-uncovers-new-documents-detailing-pelosis-use-of-air-force-aircraft-for-her-family-in-2010/; Associated Press, *General William Ward Demoted for Lavish Travel, Spending*, POLITICO (Nov. 13, 2012, 12:21 PM, Updated Nov. 13, 2012, 1:11 PM), https://www.politico.com/story/2012/11/general-william-ward-demoted-for-lavish-travel-spending-083770.

[3] Memorandum from SecDef to all DoD Personnel, subject: Ethics Sentinels (13 Sept. 2018).

transportation.[4] Using MG Tressel's proposed travel as a foundation, each justification will be discussed in turn and it will look at the practical application of the rules and how requestors can best document their request. Finally, Part IV will address who can approve each type of travel request.

II. Mission Requirement (i.e. Operational Use) vs. Other Official Travel (i.e. Administrative Use)

The Office of Management and Budget Circular No. A-126 (OMB A-126), issued in May 1992, is the cornerstone for all analysis of the use of government aircraft for official travel. It establishes that "agencies shall operate government aircraft only for official purposes" and draws a distinction between "mission requirements" and "other official travel."[5] Thus, the first question JAs must answer when analyzing a MILAIR request is whether the purpose of the travel is for "mission requirements," also known as "operational" use, or if the travel is for another official purpose, also known as "administrative" use.[6] The answer to this question will dictate the approval level for the MILAIR request.[7]

When classifying proposed travel as either operational or administrative, one should turn first to OMB A-126, which addresses travel for mission requirements and includes a non-exhaustive list of "activities that constitute the discharge of an agency's official responsibilities."[8] It includes, "the transport of troops and/or equipment, training, evacuation (including medical evacuation), intelligence and counter-narcotics activities, search and rescue, transportation of prisoners,

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[4] This article will not address "required users," as there are so few of them in the Department of the Army that, practically speaking, the issues pertaining to them will not be helpful to the majority of readers and practitioners in the field.

[5] OFFICE OF MGMT. & BUDGET, OMB CIR. A-126, IMPROVING THE USE AND MANAGEMENT OF GOVERNMENT AIRCRAFT para. 7 (May 22, 1992) [hereinafter OMB A-126].

[6] U.S. DEP'T OF ARMY, REG. 95-1, FLIGHT REGULATIONS para. 3-5 (22 Mar. 2018) [hereinafter AR 95-1].

[7] *See* AR 95-1, *supra* note 6, para. 2-14a(3); OMB A-126, *supra* note 5, para. 11a; U.S. DEP'T OF DEF., DIR. 4500.56, DOD POLICY ON THE USE OF GOVERNMENT AIRCRAFT AND AIR TRAVEL para. 4e (C5, 3 Apr. 2019) [hereinafter DODD 4500.56]; U.S. DEP'T OF ARMY, DIR. 2017-05, SECRETARY OF THE ARMY POLICY FOR TRAVEL BY DEPARTMENT OF THE ARMY SENIOR OFFICIALS encl., para. 1g (18 Jan. 2017) [hereinafter AD 2017-05].

[8] OMB A-126, *supra* note 5, para. 5b.

use of defense attaché-controlled aircraft, aeronautical research and space and science applications, and other such activities."[9]

The Department of Defense (DoD) adopts a nearly identical definition of "official travel to meet mission requirements" in DoD Instruction (DoDI) 4500.43:

> Mission requirements are activities that constitute the discharge of a DoD Component's official responsibility. Such activities include, but are not limited to, the transport of troops and equipment, training, evacuation (including medical evacuation), intelligence and counter-narcotics activities, search and rescue, transportation of prisoners, use of defense attaché-controlled aircraft, aeronautical research and space and science applications, and other such activities. Mission requirements do not include official travel to give speeches, attend conferences or meetings, or make routine site visits.[10]

The Army, in Army Regulation (AR) 95-1, echoes and expands on the OMB A-126 and DoDI 4500.43 lists and rebrands "mission requirements" as "operational."[11] In addition to those operational uses previously enumerated, the Army includes as operational uses:

> *a*. Actual or simulated tactical and combat operations.
> *b.* [A]ircrew/crewmember training . . .
> *h.* [R]esearch and development.
> *i*. Maintenance flights.
> *j*. Flight tests.
> *k*. Repositioning or reassignment of aircraft . . .
> *m.* Special use (Defense Support of Civilian Authorities/intelligence related activities, humanitarian, disaster relief, and deployments).

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[9] *Id.*

[10] U.S. DEP'T OF DEF., INSTR. 4500.43, OPERATIONAL SUPPORT AIRLIFT Glossary (C3, 31 Aug. 2018) [hereinafter DODI 4500.43]; *but see* U.S. DEP'T OF DEF., INSTR. 4515.13, AIR TRANSPORTATION ELIGIBILITY (C3, 13 Aug. 2018) [hereinafter DODI 4515.13]; DODD 4500.56, *supra* note 7 (while seminal references for MILAIR issues, do not address this issue).

[11] AR 95-1, *supra* note 6, para. 3-3; *see also* DODI 4500.43, *supra* note 10; DODI 4515.13, *supra* note 10; DODD 4500.56, *supra* note 7.

> *n.* Aeromedical evacuation by aeromedical unit . . . [and]
> *p.* Exercising command and/or supervision authority at adjacent and local installations.[12]

In addition to the expanded list of enumerated operational uses, AR 95-1 offers additional guidance on what qualifies as operational, noting, "[o]perational use includes those missions required to accomplish the Army's mission and to maintain the combat readiness of aviation and ground units."[13] Importantly, AR 95-1, like OMB A-126, emphasizes that the enumerated list is not all-inclusive, thus giving Army personnel and JAs maneuver space to legitimately and effectively employ MILAIR.[14]

However, the Office of Management and Budget (OMB), DoD, and the Army distinguish between operational use and use for "other official travel." The Army defines "other official travel," or administrative travel, as "travel to give speeches; attend conferences, meetings, or training courses; make routine site visits; and other similar uses."[15] Thus, if an individual's proposed travel is not one of the enumerated operational uses in either OMB A-126 or AR 95-1, or cannot be considered required to "maintain the combat readiness of aviation and ground units," the travel is properly categorized as administrative travel.[16]

Most travel outside a combat theater is properly defined as "administrative."[17] However, AR 95-1 creates a significant gray area between operational use, which specifically includes "exercising command and/or supervision authority at adjacent and local installations," and administrative use, which includes "routine site visits."[18] Analysis of whether something is a "routine site visit" will be fact-based and may require back and forth with the requestor so the travel can be properly categorized.[19] For an individual's travel to be considered for command or supervision purposes, there should be a formal command or supervisory

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[12] AR 95-1, *supra* note 6, para. 3-3.
[13] *Id.*
[14] *Id.*; OMB A-126, *supra* note 5, para. 5b.
[15] AR 95-1, *supra* note 6, para. 3-5.
[16] *Id.* paras. 3-3, 3-5.
[17] AR 95-1, *supra* note 6, paras. 3-1–3-5.
[18] *Id.* para. 3-5.
[19] This assertion is based on the author's recent professional experience as an Administrative Law Attorney for United States Army Europe from August 2017 to July 2018 [hereinafter Professional Experience].

relationship between the traveler and individuals at the destination.[20] For example, the traveler should be in the rating chain of those whom he or she is visiting or the traveler should exercise some manner of control (e.g., administrative, tactical, operational, etc.) over the unit he or she is visiting.[21] Further, an individual must demonstrate that the proposed travel is "more than a routine site visit."

When determining if travel is more than a routine site visit, JAs should review the traveler's schedule, looking for events that do not occur as a matter of course in a unit's battle rhythm. For example, travel to attend a subordinate unit's weekly Commander's Update Brief (CUB) would be administrative use because the CUB is merely a routine meeting.[22] If, however, a commander is traveling in order to observe a subordinate unit's participation in an exercise, the purpose of the commander's visit would be more than routine, and may qualify as exercising command or supervisory control, and could be properly categorized as operational use.[23]

When reviewing MG Tressel's travel, JAs will notice four legs. Leg 1 is travel from Heidelberg to Grafenwoehr to observe a 2CR ROC drill; Leg 2 is from Grafenwoehr to T'bilisi for meetings with the Georgian Minister of Defense; Leg 3 is from T'bilisi to Oberammergau to attend the CTC; and Leg 4 is the return to home station. Applying the operational and administrative use standard to the purpose of the proposed travel reveals Leg 1 as an operational use, while Legs 2 through 4 are properly categorized as administrative use.

For Leg 1, MG Tressel is traveling to Grafenwoehr to observe a ROC drill and give his command intent to 2CR. Because MG Tressel will be exercising his command authority and because the purpose of his travel is for something more than a meeting or routine site visit, his travel could be properly categorized as operational.[24] Conversely, the purpose of MG Tressel's travel for Legs 2 through 4 is clearly administrative. While unquestionably important, MG Tressel's engagement with the Georgian Minister of Defense is a meeting and does not involve him exercising command at an adjacent location. Moreover, travel for the purpose of a

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[20] *Id.*
[21] *Id.*
[22] *See* AR 95-1, *supra* note 6, para. 3-5.
[23] *Id.* para. 3-3.
[24] *Id.*

meeting is explicitly included as administrative use under AR 95-1.[25] As such, his movement to Georgia is for an administrative purpose.[26] Likewise, Leg 3 is for the purpose of MG Tressel attending a conference, another administrative purpose under AR 95-1, in Oberammergau, and is, thus, administrative in nature.[27] Finally, Leg 4 is for MG Tressel's return to home station and, thus, administrative.[28]

Keen to the distinction between operational and administrative use, JAs can, when appropriate, give individuals maneuver space and create travel efficiencies by categorizing travel as operational.[29] That said, most travel will properly be categorized as administrative.[30]

III. Justifying MILAIR for Administrative Use

As a baseline for all government travel, government officials should only travel when they have shown "the benefit of the travel to the Army and that the purpose of the travel cannot be accomplished by a less expensive alternative, such as videoconference or Web-based communication."[31] When personal attendance is necessary, travelers should first look to utilize commercial air (COMAIR) for their administrative travel needs.[32] Pursuant to OMB A-126, MILAIR may be utilized in two scenarios—no commercial service is reasonably available or MILAIR is more cost-effective than commercial transportation.[33] Understanding each is key to a successful MILAIR review.

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[25] *Id.* para. 3-5.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] Operational use of military aircraft (MILAIR) has a much lower approval level, and, thus, takes significantly less staff time to make a reality. *See infra* Section IV.
[30] While AR 95-1, para. 3-3, includes "exercising command and/or supervision at adjacent and local installation" as an operational use, most MILAIR requests tend to be for official duties that fall within AR 95-1, para. 3-5's "other official travel." Professional Experience, *supra* note 19.
[31] AD 2017-05, *supra* note 7, para. 1d.
[32] OMB A-126, *supra* note 5, para. 8a(i).
[33] *Id.*

A. Commercial Service is Not Reasonably Available

The first justification for the use of MILAIR to satisfy one's administrative, or non-operational, transportation needs arises when commercial service is not reasonably available to satisfy the traveler's requirements. Office of Management and Budget A-126 defines reasonably available as, "able to meet the traveler's departure and/or arrival requirements within a twenty-four hour period, unless the traveler demonstrates that extraordinary circumstances require a shorter period to fulfill effectively the agency requirement."[34] The DoD echoes this definition of "reasonably available" and offers additional guidance for requestors on how to document the unavailability of commercial travel.[35]

Requestors may show that commercial service is not reasonably available if they "clearly demonstrate that a valid official reason for the use of government aircraft exists," and "cite scheduling requirements and why they cannot be changed, whether secure communications are required, or other appropriate factors."[36] Although MILAIR cannot be justified on the basis of rank or status, practically speaking, it is likely much easier for more senior travelers to justify MILAIR on this basis because their schedules are typically very full. In accordance with DoD Directive (DoDD) 4500.56, "[t]ravel status, distinguished visitor (DV) code or status, grade, or rank alone is not sufficient to justify the use of government aircraft or to dictate a particular aircraft type."[37]

While JAs should not attempt to dictate a traveler's schedule, it is the JA's responsibility to ask hard questions about whether or not a particular meeting can be moved to accommodate a commercial flight.[38] Indeed, it is important for JAs to keep in mind the language from OMB A-126, which requires traveler's to consider travel options within a twenty-four hour period.[39] For example, suppose MG Tressel's travel to Grafenwoehr were for an administrative purpose. He would need to include his schedule for 31 March and 2 in order to show why commercial transportation

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[34] *Id.* para. 8a.
[35] DoDD 4500.56, *supra* note 7, para. 4c.
[36] *Id.* encl. 3, para. 3b.
[37] *Id.* para. 4c.
[38] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 2.1 (28 June 2018) [hereinafter AR 27-26], (stating, in part, "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.")
[39] OMB A-126, *supra* note 5, para. 8a(i).

options cannot meet his requirement to be in Grafenwoehr on 1 April.[40] This is particularly true when dealing with high ranking travelers, who may be the senior ranking individual at an event and, thus, able to dictate times and places of meetings. If a requestor has the ability (i.e., the rank and authority) to move a meeting thirty minutes to accommodate a commercial travel option, the requestor must articulate in the MILAIR request why he or she cannot move the meeting. In many cases, moving one meeting causes a domino effect that impacts other engagements in the course of a day over which the requestor does not have control.

In addition to the guidance on when transportation is reasonably available set forth in OMB A-126 and DoDD 4500.56, the Joint Travel Regulation (JTR) is also instructive on the issue.[41] Specifically, section 0202 of the JTR "addresses transportation to, from, and around official travel locations."[42] The JTR further establishes, "[n]ormally, a traveler is not required to travel between the hours of 2400 and 0600 if it is not necessary for the mission."[43] Thus, it is feasible that, although commercial flights may be offered to a traveler's destination, they may be considered "reasonably unavailable" because of the time they are offered.[44]

Consider MG Tressel's request to travel to T'bilisi via MILAIR for meetings with the Georgian Minister of Defense. Major General Tressel's meetings with the Georgians are preceded by preparatory meetings with the Office of Defense Cooperation and the Ambassador.[45] Now, assume a commercial flight is reasonably available if MG Tressel postpones his meeting with the country team until later in the day.[46] While MG Tressel may be able to dictate a move of a meeting with the country team, he likely could not and should not do so if such a request would require him to also

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[40] *Id.*

[41] U.S. DEP'T OF DEF., THE JOINT TRAVEL REGULATIONS (JTR) (1 Jan. 2019) [hereinafter JTR].

[42] *Id.* sec. 0202.

[43] *Id.* para. 020202.

[44] *Id.*; s*ee also* OMB A-126, *supra* note 5, para. 8a and DODD 4500.56, *supra* note 7, encl. 3, para. 3a.

[45] *See infra* Appendix A.

[46] *Id.* It is also worth noting that most flights in and out of T'bilisi, Georgia, often fall within the "excluded hours" contemplated by the JTR. As such, a reasonable debate exists as to whether flights offered during excluded hours alone can justify the use of MILAIR when those flights are the *only* flights offered to or from a destination. That is, if there are never flights to or from a destination during non-excluded hours, as defined by the JTR, can that alone justify the use of MILAIR? *See* JTR, *supra* note 41, para. 020202.

ask to shift meetings with the Ambassador or Georgian Minister. Thus, although a circumstance may arise where shifting a lower level meeting to accommodate commercial transportation may seem possible at first glance, the second and third order effects (e.g., impacting meetings over which the traveler *does not* have control) of such a move can amount to "other compelling operational considerations [that] make commercial transportation unacceptable" and justify the use of MILAIR.[47]

B. MILAIR is More Cost-Effective Than Commercial Air

Even if a traveler's schedule can accommodate the use of commercial air, the use of MILAIR may still be appropriate if the actual cost of using MILAIR is less than the cost of using commercial air.[48] Pursuant to OMB A-126, a cost comparison must be completed prior to approving the use of MILAIR.[49] However, it is worth noting, "secondary use of the aircraft for other travel for the conduct of agency business may be presumed to result in cost savings (i.e., cost comparisons are not required)."[50] That is, if a MILAIR flight is already scheduled (e.g., required use flight or training flight) that fits a traveler's schedule, that traveler does not need to conduct a cost comparison. That said, practitioners are warned, "DoD components shall not schedule training missions to accommodate the travel of DoD senior officials. It is essential that managers and commanders at all levels prevent misuse of transportation resources well as perception of their misuse."[51] The ensuing sections discuss how to calculate the relevant costs for the purposes of the required cost comparison.

1. Calculating the Actual Cost of MILAIR

Because most MILAIR requests that JAs will provide a review involve DoD-owned aircraft, requestors will use the "variable cost of using the aircraft" as the actual cost of using the government aircraft.[52] The DoD Comptroller publishes a memorandum annually which establishes the

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[47] DoDD 4500.56, *supra* note 7, encl. 3, para. 3a.
[48] OMB A-126, *supra* note 5, para. 8a(ii).
[49] OMB A-126, *supra* note 5, Attachment A.
[50] OMB A-126, *supra* note 5, para. 8a(ii).
[51] DoDD 4500.56, *supra* note 7, para. 4a.
[52] *Id.*

hourly cost for various military airframes.[53] The titular, and most commonly used MILAIR assets, the C12 and UC35, cost $2,019 and $2,221 per hour, respectively, for fiscal year 2019 (FY19).[54] Thus, requesters should multiply the number of flight hours by the airframe's hourly rate to determine the cost against which they must compare the cost of commercial travel.[55]

While the basic formula for calculating MILAIR's actual cost is straightforward, JAs should review a request carefully to ensure all costs are properly accounted for. For example, determining the number of flying hours for proposed travel requires more than just calculating the time between takeoff and landing. Indeed, calculating flying hours also includes "all time required to position the aircraft to begin the trip and to return the aircraft to its normal base of operations, if no follow-on trip is scheduled."[56] Imagine for a moment that MG Tressel did not utilize operational MILAIR for his travel to Grafenwoehr and instead used a non-tactical vehicle (NTV) (i.e., the aircraft is not already waiting for him in Grafenwoehr for his follow-on travel). When calculating the cost of MILAIR for the flight from Grafenwoehr to T'bilisi, MG Tressel would need to include the flight hours involved in moving the aircraft from its home station to Grafenwoehr.[57]

Moreover, situations may arise where, on a multi-leg journey such as the one contemplated for MG Tressel, the aircrew are required to stay at a location in a temporary duty status to support follow on legs. In such situations, the actual cost of MILAIR must include the "travel expenses (particularly reimbursement of subsistence (i.e., per diem and miscellaneous expenses))" of the crew.[58] As such, the actual cost of utilizing MILAIR can be reduced to a simple mathematical formula: MILAIR = (Flying Hours x Aircraft's Hourly Rate) + any additional crew costs.[59] With the cost of MILAIR in hand, one can turn to calculating the cost of commercial air.

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[53] Memorandum from Anne J. McAndrew, Deputy Comptroller, Office of Under Sec'y of Def. to Assistant Sec'y of Army (Fin. Mgmt. & Comptroller), et al., subject: Fiscal Year (FY) 2019 Department of Defense (DoD) Fixed Wing and Helicopter Reimbursement Rates (12 Oct. 2018) [hereinafter Aircraft Reimbursement Rates Memo].
[54] *Id.*
[55] OMB A-126, *supra* note 5, Attachment A.
[56] *Id.*
[57] *Id.*
[58] OMB A-126, *supra* note 5, Attachment B; *see also infra* Appendix A.
[59] OMB A-126, *supra* note 5, Attachments A & B.

2. Calculating the Cost of Commercial Air

As with all other aspects of MILAIR, practitioners should begin their analysis of the cost of commercial air with OMB A-126. In accordance with OMB A-126, calculating the cost of commercial air begins with determining "the current government contract fare or price or the lowest fare or price known to be available for the trip."[60] The DoD reiterates this point in DoDI 4500.43, noting the cost of commercial air calculation begins with the available government rate.[61] The Secretary of the Army (SecArmy) elaborated on these commercial air requirements, stating, "[c]ommercial air travel must be conducted using contract fares via a contracted commercial travel office."[62] As such, requestors are best-served if they obtain a quote for commercial air transportation from their servicing Schedule Airlines Traffic Office (SATO).[63]

While much attention is being paid to the cost of air travel, it is important for requestors to also consider the cost of commercial train travel when requesting MILAIR. This is particularly true if stationed overseas, where train travel is far more common and accessible than it is in the United States. Indeed, SecArmy allows requestors to use a noncontract commercial carrier when "rail service is available and that service is cost-effective and consistent with mission requirements."[64] The SecArmy travel policy, when considered with DoD policy to minimize travel cost, should be read to require requestors to consider commercial rail service, in addition to commercial air service, when determining the availability of and cost of commercial travel options.[65]

With a price quote from SATO (and/or the local rail provider, if necessary) in hand, requestors should continue their calculation. Next, requestors should "include, as appropriate, any differences in the costs of any additional ground or air travel, per diem and miscellaneous travel (e.g., taxis, parking, etc.), and lost employees' work time (computed at gross hourly costs to the government, including benefits) between the two options." [66] Elaborating further, DoDD 4500.56 establishes, "[i]n determining commercial costs, the cost of rental cars, the cost of lodging

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[60] OMB A-126, *supra* note 5, Attachment A.
[61] DoDI 4500.43, *supra* note 10, encl. 3, para. 4a(2)(a).
[62] AD 2017-05, *supra* note 7, para. 3a.
[63] *Id.*
[64] AD 2017-05, *supra* note 7, para. 3a(4).
[65] *Id*.; DoDD 4500.56, *supra* note 7, para. 4a.
[66] OMB A-126, *supra* note 5, Attachment A.

and meals if the party must remain overnight, and other such appropriate factors may be considered."[67]

Calculating lost time can be complicated as many requests include multiple legs, travelers, and missions. Ultimately, determining the number of lost hours for each leg of travel requires answering one simple question: how long does it take the traveler to get from their door to their duty location with commercial travel and how long does it take with MILAIR?[68] The difference between the two numbers represents the traveler's lost time. For purposes of calculating time associated with commercial travel, requestors should be mindful to include all factors that impact the traveler's time. This may include transportation to the terminal, time to check-in and clear security, time to gather baggage at one's destination, and time to acquire a rental car.[69] Likewise, requestors must do the same for MILAIR, though JAs should expect the various aspects of travel to be much faster with MILAIR.[70] For example, it is typically not necessary to arrive at the terminal two or three hours early for a military flight, as it would be for a commercial flight. Likewise, travelers on MILAIR can expect to avoid long waits for baggage or to clear customs.[71]

Judge Advocates should be cautious that requestors do not pad the "travel team," in order to accumulate sufficient additional costs for commercial travel and lost time to justify the use of MILAIR on a cost-effective basis.[72] Indeed, OMB A-126 reminds requestors to only include costs for travelers on official business.[73] As such, JAs should ensure that requestors include a justification for each traveler included on a MILAIR request to assess whether the individual has legitimate official business.[74] For example, it would likely be reasonable, given his mission requirements, for MG Tressel to travel with his Executive Officer (XO) or Aide, G3, the country desk officer for Georgia, and his communications sergeant. Conversely, it likely would not be reasonable for MG Tressel to assert that he needs to bring six members of his servicing Office of the Staff Judge Advocate. Again, JAs should be prepared to ask hard questions of requestors about the schedule of events and why each

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[67] DoDD 4500.56, *supra* note 7, encl. 3, para. 3c.
[68] Professional Experience, *supra* note 20.
[69] OMB A-126, *supra* note 5, Attachment A.
[70] Professional Experience, *supra* note 20.
[71] *Id*.
[72] AD 2017-05, *supra* note 317, para. 5b(2).
[73] OMB A-126, *supra* note 5, Attachment A.
[74] OMB A-126, *supra* note 5, Attachment A.

traveler's participation is required when reviewing a MILAIR request for cost-effectiveness.[75]

As detailed in Part IV below, the Combatant Commands (CCMD) play a significant role in the MILAIR process. A CCMD publication may add policy guidance or additional administrative requirements, and JAs must be sure to consult any publications from their CCMD before reviewing requests in their area of operations (AO).[76] For example, the U.S. European Command (USEUCOM) Instruction on MILAIR requires, "lost time shall be computed using the current FY DoD Military Personnel Composite Standard Pay and Reimbursement Rate via an hourly computation."[77] While this method for computing lost time may seem intuitive, it is not required by OMB A-126 or any of the relevant DoD or Army publications.[78] Thus, for MG Tressel's request, he would calculate the lost time for each person in the travel party by multiplying the number of lost hours by the rate calculated by OMB for FY19.[79]

To justify the use of MILAIR on the basis of cost-effectiveness, the requestor must document that the cost of MILAIR is less than the cost of commercial transportation.[80] Take, for example, MG Tressel's travel from T'bilisi, Georgia, to Oberammergau, Germany. The cost of each traveler's commercial flight is $1,074.80 (plus $48 booking fee) and the use of COMAIR results in 4.39 lost hours per traveler.[81] Thus, the total cost of COMAIR for five travelers is $8,124.38 versus a total MILAIR cost of

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[75] AR 27-26, *supra* note 38, r. 2.1.

[76] For example, U.S. European Command's (USEUCOM) instruction on MILAIR parrots the definition of "mission requirements" already discussed from OMB A-126 and DoDI 4500.43. U.S. EUROPEAN COMMAND, INSTRUCTION 3207.01, MILITARY AIRLIFT POLICIES AND PROCEDURES para. 5(e) (5 Mar. 2015) [hereinafter ECI 3207.01] (on file with the author); OMB A-126, *supra* note 5, para. 5b; DoDI 4500.43, *supra* note 10, Glossary. Also, I would be remiss if I did not thank members of the Military and Civil Law Division at U.S. Army Europe for their help acquiring the MILAIR publications relevant to USEUCOM—MAJ Shawn Atkins, CPT Kelsey Mowatt-Larssen, SGT Ebony Harris, SGT Veape Milo, and Mrs. Jennifer Serakas.

[77] ECI 3207.01, *supra* note 76, para. 7a(7).

[78] *See supra* notes 5, 6, 7, and 10.

[79] ECI 3207.01, *supra* note 76, para. 7a(7); Memorandum from Mary E. Tompkey, Assistant Deputy Comptroller, Office of Under Sec'y of Def. to Dir., Health & Fin. Policy, Office of Assistant Sec'y of Defense (Health Affairs), et al., subject: Fiscal Year (FY) 2019 Department of Defense (DoD) Military Personnel Composite Standard Pay and Reimbursement Rates (30 Mar. 2018) [hereinafter Personnel Reimbursement Rates].

[80] OMB A-126, *supra* note 5, para. 8a(ii).

[81] *See infra* Appendix A.

$7,496 (four flight hours x $1,874 hourly rate).[82] If the requestor is seeking a fixed wing asset, the requestor has sufficient data to complete the request. But, what if the request is for a rotary wing asset?

C. "Get to the Choppa!"[83]

The previous paragraphs contemplate a request for a fixed wing asset, though it is not uncommon for travelers to request movement on a rotary wing asset. While all the justifications for MILAIR that have previously been discussed are still applicable, there is enhanced scrutiny and additional requirements on requests for rotary wing aircraft due to the high cost of operating a rotary wing asset. Indeed, each flight hour in a UH-60 (Blackhawk) costs $4,587, while an hour in a CH-47 (Chinook) costs a whopping $6,489.[84]

Although OMB A-126 is silent on specific rules for rotary wing MILAIR requests, DoDD 4500.56 lays the foundation for additional scrutiny with respect to rotary wing MILAIR requests. It states, "[r]otary wing aircraft will be used only when the use of ground transportation would have a significant adverse impact on the ability of a senior official to effectively accomplish the purpose of the official travel. This policy applies to all officers and employees of the Department of Defense."[85] The SecArmy travel policy echoes the requirement for requestors to demonstrate that ground transportation would have a "significant adverse impact" on mission accomplishment.[86]

As previously noted, JAs must ensure they reference Combatant Command (COCOM) guidance when reviewing MILAIR requests. For example, USEUCOM reiterates the policy that ground transportation must be used vice rotary wing assets unless there would be a "significant adverse impact on the ability of a senior official to effectively accomplish the purpose of the official travel."[87] European Command goes on to require, "[f]or rotary-wing aircraft, the justification must include a clear

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[82] *Id.* A-5.

[83] PREDATOR (Twentieth Century Fox 1987). Arnold Schwarzenegger's character, Major "Dutch" Schaefer, famously gives this order as he attempts to rescue a group of people from an extra-terrestrial being in a South American jungle.

[84] Aircraft Reimbursable Rates Memo, *supra* note 533.

[85] DoDD 4500.56, *supra* note 7, para. 4k.

[86] AD 2017-05, *supra* note 7, para. 6a.

[87] ECI 3207.01, *supra* note 76, para. 6q.

explanation of why ground transportation cannot be used to meet mission requirements."[88] Now, well-versed in the standards for justifying a MILAIR request, JAs can turn their attention to ensuring the request is documented appropriately.

D. Documenting Requests

Upon reviewing a MILAIR request for administrative use, the first document JAs will see is Department of Defense (DD) Form 2768, which will include the names and justifications for all the travelers.[89] Pursuant to DoDD 4500.56, "[a]ll requests for the use of government aircraft for other official travel must be signed by the senior traveler."[90] The SecArmy travel policy adds, "[u]nder no circumstances will a MILAIR flight be formally scheduled without the senior traveler's signature (actual or digital) included on the appropriate request form. Further, the documented senior traveler must be onboard the requested aircraft or the scheduling agency may cancel the mission."[91] As with all travel, the requestor must include a certification statement, "specifying that alternate means, such as Secure Video-Teleconference or other Web-based communication are insufficient to accomplish travel objectives."[92]

In addition to DD Form 2768, JAs should expect to see a fair amount of documentation supporting any MILAIR request. Documents should include the traveler's schedule, dates, times, and costs times of commercial travel options, and time estimates for transfers (e.g., Google Maps time estimate for travel from official duty location to the servicing airport.)[93] Thus, depending on a requestor's justification for MILAIR, the requestor will need to submit documentation demonstrating why his or her schedule cannot accommodate commercial transportation options or why MILAIR is more cost-effective than commercial options.[94]

In the case of MG Tressel's proposed travel, the CCMD has promulgated specific guidance for how he must satisfy the documentation

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[88] *Id.* para. 7a(2)(c)5.
[89] U.S. Dep't of Def., DD Form 2768, Military Air Passenger/Cargo Request, (Mar. 1998).
[90] DoDD 4500.56, *supra* note 7, encl. 3, para. 3b.
[91] AD 2017-05, *supra* note 7, para. 1f.
[92] JTR, *supra* note 41, para. 010104A.
[93] OMB A-126, *supra* note 5, para. 12.
[94] *Id.*

requirements in OMB A-126. For example, if MG Tressel asserts that MILAIR is required because commercial air cannot meet his travel requirements, "a description of the travel itinerary must be submitted with the request that includes details on why commercial air cannot meet mission requirements."[95] Should MG Tressel attempt to justify MILAIR on the basis of cost, he would need to complete USEUCOM's lost time worksheet, which accounts for differences in time and cost for commercial air and MILAIR, and, to the extent he relies upon those differences, provide documentation for them.[96] For example, the request for MG Tressel's second leg of travel from T'bilisi, Germay, to Oberammergau, Germany, would account for the difference in travel time to his TDY location from the airfield utilized by MILAIR (i.e., 0.66 hours from Altenstadt to Oberammergau) versus the travel time from the commercial airport (i.e. 1.80 hours from Munich to Oberammergau).[97] Major General Tressel's staff could document this temporal difference with screenshots from Google Maps or another online map service.[98]

It is worth noting that not all times associated with travel can be documented. For example, the time required for check-in at the airport, customs, or claiming baggage, will likely be based on the requestor's, and JA's, responsible judgment.[99] With a complete and sufficient MILAIR packet in hand, a JA need only determine who the proper approval authority is.

IV. Who Can Say Yes?

Properly categorizing MILAIR as "operational" or "administrative" has a significant impact on the request's approval level. Indeed, "operational" flights have a relatively low approval level, while "administrative" flights require general officer approval. Knowing the

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[95] ECI 3207.01, *supra* note 76, para. 7a(2)(c)3.

[96] USEUCOM's lost time worksheet is a fillable spreadsheet with the Office of Management and Budget reimbursement rates for aircraft and personnel preloaded. It allows requestors to easily compare cost variances for commercial air and MILAIR.

[97] *See infra* Appendix A.

[98] OMB A-126, *supra* note 5, para. 12.

[99] JTR, *supra* note 41, para. 010102 ("The guiding principle behind the JTR is to travel responsibly. The word 'responsibly' means that the traveler exercises the same care in incurring expenses for Government travel that a prudent person would exercise if traveling at personal expense."); *see also* AR 27-26, *supra* note 38, r. 2.1.

proper approval authority allows JAs and staffs to streamline the MILAIR process.

A. Operational Use

Conspicuous in its absence from OMB A-126 and DoD publications is any discussion of approval levels for operational MILAIR requests. Thankfully, Army publications offer some insight on the matter. Chapter 2 of AR 95-1 discusses aviation management and defines "final mission approval authority" as:

> Members of the chain of command who are responsible for accepting the risk and approving all aviation operations (ground and air) within their unit. They approve missions for a specific risk level. Final mission approval authorities may only approve those missions whose assessed risk level is commensurate with their command level. Commanders in the grade of O-5 and above will select final mission approval authorities from the chain of command and designate them in writing along with the level of risk (low, moderate, high, extremely high) they are authorized to approve. At a minimum, company level commanders and below are the final mission approval authority for low-risk missions, battalion level commanders and above for moderate-risk missions, brigade level commanders and above for high-risk missions, and the first general officer in the chain of command for extremely high-risk missions. Approval authorities are based upon levels of command authority and not rank.[100]

Application of the AR 95-1, paragraph 2-14, standard makes intuitive sense, as it would be unduly burdensome to apply administrative use approval standards to, for example, every training flight that is scheduled. Indeed, SecArmy suggests as much in Army Directive 2017-05, noting the policy, "does not apply to 'operational mission' use of rotary-wing aircraft as defined in AR 95-1, or to mission-required use such as . . . exercising command or supervisory authority at adjacent or local installations, and

[100] AR 95-1, *supra* note 6, para 2-14a(3).

other such activities."[101] Thus, the approval authority for "operational" flights lies with a commander within the unit that owns the aircraft, commensurate with the assessed level of risk.[102] The approval authority for administrative use is not convenient.

B. Administrative Use

As a general rule, MILAIR requests for administrative use must be approved "one organizational level above" the senior traveler.[103] That said, approval authority for administrative use is still relatively high. The DoD established that Combatant Commanders shall, "review and approve government air requests from DoD senior officials within their respective commands," and gives the Combatant Commander the ability to delegate this authority.[104] Thus, JAs will need to determine if their Combatant Commander has delegated their approval authority and if that delegation allowed further delegation from the Army Service Component Command (ASCC).

Let us revisit MG Tressel's administrative use request once more. Absent a delegation, the approval authority for his request would lie with the Commander, USEUCOM. However, Commander, USEUCOM, has delegated his approval authority to U.S. Army Europe (USAREUR), and given the CG, USAREUR, the authority to further delegate.[105] Thus, MG Tressel's MILAIR request may be approved by the CG, USAREUR, or his delegee.[106] It is worth highlighting that in the case of the USEUCOM, delegation may not be "below the two-star or civilian equivalent level."[107] As such, even if the JA's ASCC has received delegated authority from the CCMD, it is possible that the ASCC is limited in its ability to further

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[101] AD 2017-05, *supra* note 7, para. 6b.
[102] AR 95-1, *supra* note 6, para 2-14a(3).
[103] OMB A-126, *supra* note 5, para. 11a; s*ee also* DoDD 4500.56, *supra* note 7, para. 4e; AD 2017-05, *supra* note 7, para. 1g.
[104] DoDD 4500.56, *supra* note 7, para. 11c.
[105] Memorandum from General Curtis M. Scaparrotti, Commander, U.S. Europe Command to Commander, U.S. Naval Forces Europe, et al., subject: Delegation of Military Air Transportation Approval Authority (23 June 2016) [hereinafter EUCOM Delegation Memo].
[106] *Id.* para. 2. It should also be noted that the ability of the CG, U.S. Army Europe's delegee to approve MG Tressel's request is contingent upon that individual being one organizational level higher than MG Tressel. *See* OMB A-126, *supra* note 5, para. 11a; s*ee also* DoDD 4500.56, *supra* note 7, para. 4e; AD 2017-05, *supra* note 7, para. 1g.
[107] EUCOM Delegation Memo, *supra* note 105.

delegate. Here, MG Tressel's request would likely require approval by a general officer at the ASCC.

V. Conclusion

Judge Advocates in the field can earn the trust and confidence of their commanders through effective navigation of the MILAIR labyrinth. When appropriate, categorizing MILAIR use as operational can streamline approval processes and allow travelers to move out quickly on a task. Understanding the justifications for administrative MILAIR—commercial service is not reasonably available or it is more cost-effective than commercial transportation—and how travelers should document their requests will allow JAs to assist their command's planner and complete a legal review quickly. The use of MILAIR, whether operational or administrative, can create efficiencies for travelers, and, ultimately, ensure units accomplish their mission.

Appendix A. Sample MILAIR Packet

MILITARY AIR PASSENGER/CARGO REQUEST

NOTE: Keep this data on file for two years after submission date.

1. SELECT APPLICABLE TRAVEL STATEMENT:

	PRIORITY 1	Direct support of operational forces engaged in combat or contingency peace-keeping operations directed NCA, or for emergency lifesaving purposes.
X	PRIORITY 2	"Required use" travel or compelling operational considerations making commercial transportation unacceptable (within 24 hours). Mission cannot be satisfied by any other mode of travel. Requester should provide a 2-hour window for departure and arrival times to allow consolidation of missions per DoD Directive 4500.43.
	PRIORITY 3	Official business travel which when consolidated by JOSAC with other travelers, is more cost effective than commercial air travel or official business travel on previously scheduled missions. Requestermust provide at least a 2-hour window for departure and arrival times to allow consolidation of missions per DoD Directive 4500.43.

2. PURPOSE OF TRAVEL

a. PUJC CODE	b. COMPLETE MISSION DESCRIPTION
	MG Tressel and his party will depart Wiesbaden on 1 April to participate in the 2CR ROC drill, conduct meetings with the Georgian Minister of Defense and U.S. Ambassador to Georgia from 2 - 4 April, and participate in the CTC at Obergammergau on 5 April.

3. TOTAL NUMBER OF PAX	c. PRIORITY 2 COMPELLING CONSIDERATIONS AND REASON COMMERCIAL TRAVEL UNACCEPTABLE
5	Commercial travel does not meet the timeline requirements for MG Tressel's itinerary and is more expensive.

4. SENIOR TRAVELER

a. NAME *(Last, First, Middle Initial)*	b. GRADE/DV CODE	c. DUTY TITLE	d. BRANCH OF SERVICE
TRESSEL, JACK	O-8/MG	Commander, V Corps	ARMY

5. ADDITIONAL PASSENGERS *(Note: Required only for DV 7 or higher)*

a. NAME *(Last, First, Middle Initial)*	b. GRADE/DV CODE	c. DUTY TITLE	d. BRANCH OF SERVICE
Day, Justin	O-6/COL	G3, V Corps	ARMY
Ginn, Rodrigo	O-4/MAJ	Country Desk Officer, Georgia	ARMY
Doss, Stephanie	O-3/CPT	CG Aide, V Corps	ARMY

6. DESIRED FLIGHT ITINERARY

	a. DEPARTURE ICAO	b. DEPART DATE/TIME (Z)/MO/YR (+/- 2 hrs) *(Example: 25/1200 DEC 98 (1400))*	c. ARRIVAL ICAO	d. ARRIVE DATE/TIME (Z)/MO/YR (+/- 2 hrs) *(Example: 25/1200 DEC 98 (1400))*
(1) LEG 1	GAAF	01/1700Z/APR/19	UGTB/TBILISI	02/1200Z/APR/19
(2) LEG 2	UGTB/TBILISI	04/1400Z/APR/19	ASAB/Altenstadt	04/1800Z/APR/19
(3) LEG 3	ASAB/Altenstadt	05/1800Z/APR/19	ETOU/WIESBA	05/1900Z/APR/19

7. COST OF COMMERCIAL TRAVEL *(Transportation, additional per diem, lost time, etc.)*

a. LEG 1	b. LEG 2	c. LEG 3	d. TIMES NO. OF PASSENGERS	e. EQUALS TOTAL COST
1,794.65	1,784.43	919.46	5	22,492.69

8. CARGO TRANSPORTATION *(Cargo acceptors and handlers are required at destination airfield.)*

a. CARGO DESCRIPTION

b. LARGEST ITEM DIMENSIONS	c. HEAVIEST ITEM DIMENSIONS/WEIGHT	c. TOTAL WEIGHT	d. TOTAL CUBIC FEET

e. SPECIAL HANDLING REQUIREMENTS *(Explain)*

DD FORM 2768, MAR 1998 Reset Adobe Professional 8.0

9. POINT OF CONTACT *(Must be able to contact traveler(s) before departure and after arrival in case of delay(s) or cancellation(s))*

	a. NAME *(Last, First, Middle Initial)*	b. GRADE	c. DUTY PHONE *(DSN/Commercial)*	d. AFTER HOURS *(DSN/Commercial)*
(1) DEPARTURE	DOSS, STEPHANIE	O-3	(614) 149-2002	+4920021493124
(2) ARRIVAL	DOSS, STEPHANIE	O-3	(614) 149-2002	+4920021493124

10. NON-DV PASSENGERS

a. NAME *(Last, First, Middle Initial)*	b. GRADE	c. DUTY TITLE	d. BRANCH OF SERVICE

11. REMARKS/ADDITIONAL COMMENTS

* LEG 1: On 1 April, MG Tressel, along with the CG, USAREUR, will be participating in a ROC drill for 2CR's road march to Poland in summer 2019. The ROC drill will end at 1700. MG Tressel's first obligation in T'bilisi on 2 April is a meeting at the Embassy with the ODC at 0900, followed by a meeting with the Ambassador at 1000. The latest available commercial flight on 1 April is at 1845 from Nuremberg. This flight does not allow enough time for MG Tressel to participate in the ROC drill, travel to Nuremberg, and check-in for his flight. There are no commercial flights available on 2 April that will allow MG Tressel make his meetings at the Embassy. MILAIR is required for leg 1.

* LEG 2: On 4 April, MG Tressel travels from T'bilisi, Georgia to Oberammergau, Germany in order to participate in the NATO Combined Training Conference. MG Tressel's final obligation in Georgia is an out-brief with the ODC at 1100. While COMAIR is available, it is more expensive than MILAIR. MILAIR cost is $7,496, while the cost of COMAIR is $7,955.06. See attached lost time calculator for Leg 2.

* LEG 3: On 5 April, MG Tressel travels from Oberammergau, Germany to Wiesbaden, Germany. The aircraft's home station is in Wiesbaden, thus the only cost for this flight is the cost of keeping the aircrew TDY in Oberammergau for one day ($662.00). Conversely, the cost of COMAIR is $5,863.18. Additionally, the cost lost time for driving the four hours from Oberammergau to Heidelberg (over $2,000) is more than the cost of MILAIR ($662.00). Thus, MILAIR is more cost-effective than other means of transportation.
* Pax justification: CPT Doss is the Aide for MG Tressel, CSM Krenzel is the CSM of V Corps and has observed V Corps operations in Georgia. COL Hayes is the V Corps G3 and intimately involved in our training efforts in Georgia and with our NATO allies. MAJ Ginn, as desk officer, has extensive knowledge of Georgia and will assist at the CTC with integrating our Georgian partners into NATO exercises.

* CSM Megan Krenzel, V Corps, will also be a passenger for all legs.
* Alternate means, such as Secure Video Teleconference (SVTC) or other web-based comms are not sufficient to accomplish travel objectives.
* MG Tressel certifies the least expensive unrestricted economy flight using SATO for the dates and destinations requested within this document. Requester certifies that by signing block 12f, that the amounts provided within this request are the same as provided by SATO.
* Requirements IAW DOD 4500.56, AD 2017-05 and AR 95-1 have been met.

12. REQUESTER

a. NAME *(Last, First, Middle Initial)*	b. GRADE	c. DUTY TITLE	d. OFFICE SYMBOL
DOSS, STEPHANIE	O-3	CG Aide, V Corps	

e. DUTY TELEPHONE *(DSN/Commercial)*	f. SIGNATURE	g. DATE
(614) 149-2002		

h. PLAIN LANGUAGE ADDRESS *(PLAD)*

13. TRAVEL AUTHORIZING OFFICIAL *(As appointed by Service)*

a. NAME *(Last, First, Middle Initial)*	b. GRADE	c. DUTY TITLE	d. OFFICE SYMBOL
HAYES, JAMES	O-9	CG, USAREUR	

e. DUTY TELEPHONE *(DSN/Commercial)*	f. SIGNATURE	g. DATE
(614) 643-1968		

14. SENIOR TRAVELING PASSENGER *(Signature may not be delegated)*

a. NAME *(Last, First, Middle Initial)*	b. GRADE	c. DUTY TITLE	d. OFFICE SYMBOL
TRESSEL, JACK	O-8	CG, V Corps	

e. DUTY TELEPHONE *(DSN/Commercial)*	f. SIGNATURE	g. DATE
(614) 149-3124		

DD FORM 2768 (BACK), MAR 1998

Reset

DD 2768 Smart Page

Fill out the sections highlighted in yellow on each spreadsheet
Enter the final costs below in sections 6, 7, & 11 into the appropriate sections of the DD2768

Military Aircraft Type:	C-12	Total Military Airlift Flight Time:	9	Total Military Airlift Cost:	$16,866.00

Desired Flight Itinerary

	a. Departure ICAO	b. Depart Date/Time (Z)/Mo/Yr (+/- 2 hrs)	c. Arrival ICAO	d. Arrive Date/Time (Z)/Mo/Yr (+/- 2 hrs)
(1) Leg 1	GAAF/GRAFENWOEHR	01/1700Z/APR/19	UGTB/TBILISI	02/1200Z/APR/19
(2) Leg 2	UGTB/TBILISI	04/1400Z/APR/19	ASAB/ALTENSTADT	04/1800Z/APR/19
(3) Leg 3	ASAB/ALTENSTADT	05/1800Z/APR/19	ETOU/WIESBADEN	05/1900Z/APR/19
(4) Leg 4				
(5) Leg 5				
(6) Leg 6				

7. Cost of Commercial Travel

Enter the amounts in blocks a. through c. below in the DD 2768 to four decimal places. The PDF will round the amounts and accurately determine the total cost.

a. Leg 1	b. Leg 2	c. Leg 3	d. Leg 4	e. Leg 5	f. Leg 6	g. No. of Pax	e. Equals Total Cost
$1,847.1040	$1,624.8760	$1,172.4360	$0.0000	$0.0000	$0.0000	5	$23,222.08

11. Remarks / Additional Comments

- TOTAL COMM AIR COST for 5 PAX: $23222.08 = $14296.00 (Airline Tickets) + $8446.08 (Lost Time) + $480.00 (Additional Costs)

- TOTAL MILAIR COST: $16866.00 = 9.00 hrs flight time X $1874/hr for C-12

FOR EDUCATIONAL PURPOSES ONLY

Leg 1 Information

Scroll Down for Additional Costs Calculator

Dept ICAO	WAAF/WIESBADEN		Arrival ICAO	GAAF/GRAFENWOEHR
Date (ddmmmyy)	1-Apr-2019		Date (ddmmmyy)	1-Apr-2019
Time (z)	0915L		Time (z)	0945L

Traveler Information

Pay Grade	Name	Commercial Ticket Cost	Lost Time Cost	Total Cost Per Passenger - Leg 1
O-8/ES IV	TRESSEL, JACK	$1,021.40	$1,097.38	$2,118.78
O-6/GS15	DAY, JUSTIN	$1,021.40	$933.98	$1,955.38
O-4/GS13	GINN, RODRIGO	$1,021.40	$691.02	$1,712.42
O-3/GS12	DOSS, STEPHANIE	$1,021.40	$571.34	$1,592.74
E-5/GS04	KRENZEL, MEGAN	$1,021.40	$332.52	$1,353.92

Important info: Enter information in yellow cells. The spreadsheet will use the Pay Grade and Lost Time Calculator to determine the Lost Time Cost for each passenger. Select 'Civ' under Pay Grade in order to set a Lost Time Cost to $0.00. Scroll down to see the Additional Costs Calculator.

$240.00	Additional Costs - Leg 1
$8,973.24	**Total Cost - Leg 1**

Lost Time Calculator - Leg 1

	GROUND	MILAIR	Justification
Travel duration from Home/TDY location to airport:	1.25	0.25	
Check-in duration:	3.00	0.25	
Total flight duration:	6.30	4.00	
Baggage pickup duration (COMAIR only):	1.00	0.25	
Travel duration from airport to TDY/Home location:	0.75	0.75	
Total lost time:	12.30	5.50	
Difference in lost time for this leg:	6.80		

Additional Costs Calculator - Leg 1

Additional Costs	Cost	Justification
Extra baggage:	$0.00	
Extra lodging:	$0.00	
Extra per diem:	$0.00	
Rental car:	$0.00	
Parking:	$0.00	
Mileage:	$0.00	
Taxis:	$0.00	
SATO Fee:	$240.00	$48 per traveler
Other:	$0.00	
Other:	$0.00	
Other:	$0.00	
Total:	$240.00	

24

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Leg 2 Information

Scroll Down for Additional Costs Calculator

Dept ICAO	UGTB		Arrival ICAO	ASAB
Date (ddmmmyy)	4-Apr-2019		Date (ddmmmyy)	4-Apr-2019
Time (z)	1400Z		Time (z)	1800Z

Traveler Information

Pay Grade	Name	Commercial Ticket Cost	Lost Time Cost	Total Cost Per Passenger - Leg 1
O-8/ES IV	TRESSEL, JACK	$1,074.80	$708.46	$1,783.26
O-6/GS15	DAY, JUSTIN	$1,074.80	$602.97	$1,677.77
O-4/GS13	GINN, RODRIGO	$1,074.80	$446.11	$1,520.91
O-3/GS12	DOSS, STEPHANIE	$1,074.80	$368.85	$1,443.65
E-5/GS04	KRENZEL, MEGAN	$1,074.80	$214.67	$1,289.47
			$240.00	Additional Costs - Leg 2
			$7,955.06	Total Cost - Leg 2

Important info: Enter information in yellow cells. The spreadsheet will use the Pay Grade and Lost Time Calculator to determine the Lost Time Cost for each passenger. Select 'Civ' under Pay Grade in order to set a Lost Time Cost to $0.00. Scroll down to see the Additional Costs Calculator.

Lost Time Calculator - Leg 2

	COMMAIR	MILAIR	Justification
Travel duration from Home/TDY location to airport:	0.75	0.75	
Check-in duration:	3.00	0.50	
Total flight duration:	4.00	4.00	
Baggage pickup duration (COMAIR only)	1.00	0.25	
Travel duration from airport to TDY/Home location:	1.80	0.66	
Total lost time:	10.55	6.16	
Difference in lost time for this leg:	4.39		

Additional Costs Calculator - Leg 2

Additional Costs	Cost	Justification
Extra baggage:	$0.00	
Extra lodging:	$0.00	
Extra per diem:	$0.00	
Rental car:	$0.00	
Parking:	$0.00	
Mileage:	$0.00	
Taxis:	$0.00	
SATO Fee:	$240.00	$48 per traveler
Other:	$0.00	
Other:	$0.00	
Other:	$0.00	
Total:	$240.00	

FOR EDUCATIONAL PURPOSES ONLY

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Leg 3 Information

Scroll Down for Additional Costs Calculator

Dept ICAO	ASAB		Arrival ICAO	ETOU
Date (ddmmmyy)	5-Apr-2019		Date (ddmmmyy)	5-Apr-2019
Time (z)	1800Z		Time (z)	1900Z

Traveler Information

Pay Grade	Name	Commercial Ticket Cost	Lost Time Cost	Total Cost Per Passenger - Leg 3
O-8/ES IV	TRESSEL, JACK	$763.00	$577.74	$1,340.74
O-6/GS15	DAY, JUSTIN	$763.00	$491.71	$1,254.71
O-4/GS13	GINN, RODRIGO	$763.00	$363.80	$1,126.80
O-3/GS12	DOSS, STEPHANIE	$763.00	$300.79	$1,063.79
E-9/GS08	KRENZEL, MEGAN	$764.00	$313.14	$1,077.14

Important info: Enter information in yellow cells. The spreadsheet will use the Pay Grade and Lost Time Calculator to determine the Lost Time Cost for each passenger. Select 'Civ' under Pay Grade in order to set a Lost Time Cost to $0.00. Scroll down to see the Additional Costs Calculator.

$0.00	Additional Costs - Leg 3
$5,863.18	**Total Cost - Leg 3**

Lost Time Calculator - Leg 3

	COMMAIR	MILAIR	Justification
Travel duration from Home/TDY location to airport:	0.75	0.75	
Check-in duration:	3.00	0.50	
Total flight duration:	4.00	4.00	
Baggage pickup duration (COMAIR only):	1.00	0.25	
Travel duration from airport to TDY/Home location:	0.33	0.00	
Total lost time:	9.08	5.50	
Difference in lost time for this leg:	3.58		

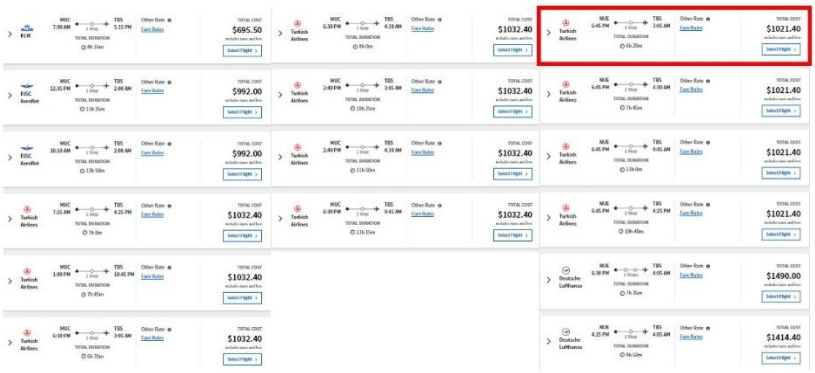
Additional Costs Calculator - Leg 3

Additional Costs	Cost	Justification
Extra baggage:	$0.00	
Extra lodging:	$406.00	$203/night for two crew members
Extra per diem:	$256.00	$128/day for two crew members
Rental car:	$0.00	
Parking:	$0.00	
Mileage:	$0.00	
Taxis:	$0.00	
SATO Fee:	$0.00	
Other:	$0.00	
Other:	$0.00	
Other:	$0.00	
Total:	$662.00	

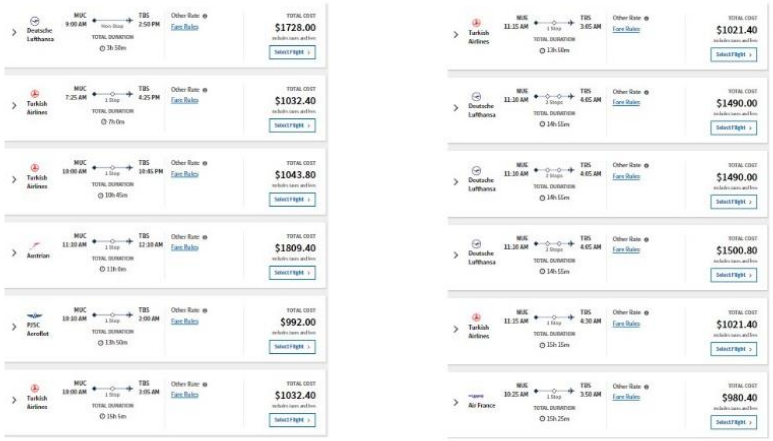
FOR EDUCATIONAL PURPOSES ONLY

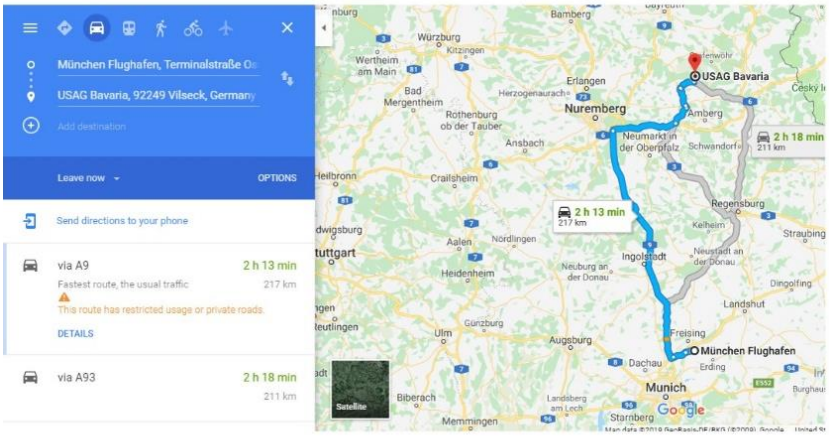
LEG 1: Grafenwoehr to T'bilisi

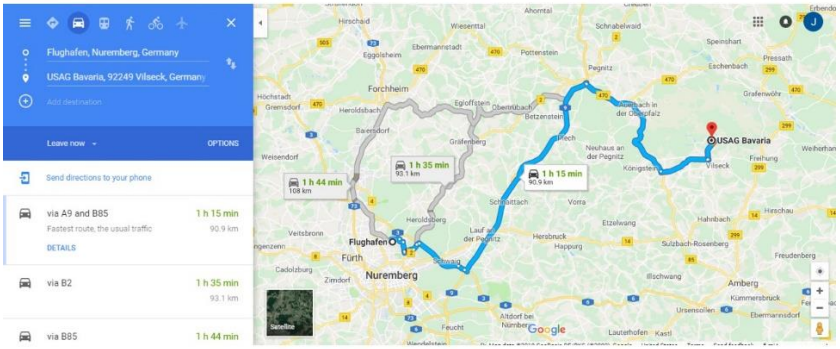
1 April Flights to T'bilisi



2 APR T'BILISI Flights




München Flughafen, Terminalstraße Os
USAG Bavaria, 92249 Vilseck, Germany
Add destination
Leave now
OPTIONS
Send directions to your phone
via A9
2 h 13 min
Fastest route, the usual traffic
217 km
This route has restricted usage or private roads.
DETAILS
via A93
2 h 18 min
211 km
USAG Bavaria
Nuremberg
Regensburg
Ingolstadt
Munich
München Flughafen
2 h 18 min
211 km
2 h 13 min
217 km
Satellite
Google


Flughafen, Nuremberg, Germany
USAG Bavaria, 92249 Vilseck, Germany
Add destination
Leave now
OPTIONS
Send directions to your phone
via A9 and B85
1 h 15 min
Fastest route, the usual traffic
90.9 km
DETAILS
via B2
1 h 35 min
93.1 km
via B85
1 h 44 min
USAG Bavaria
Flughafen
Fürth
Nuremberg
Amberg
1 h 44 min
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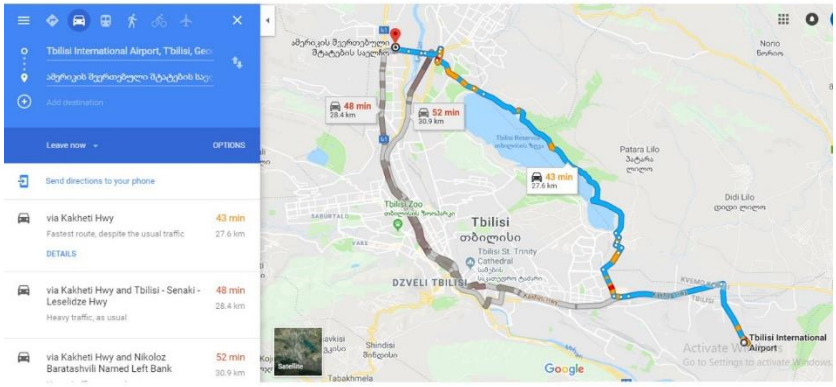
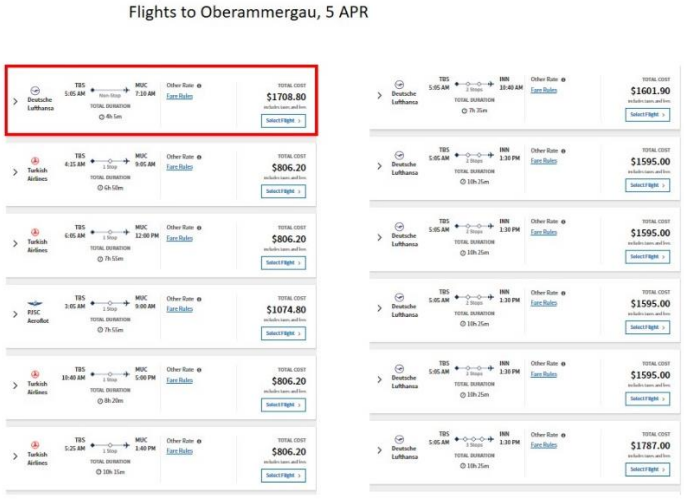
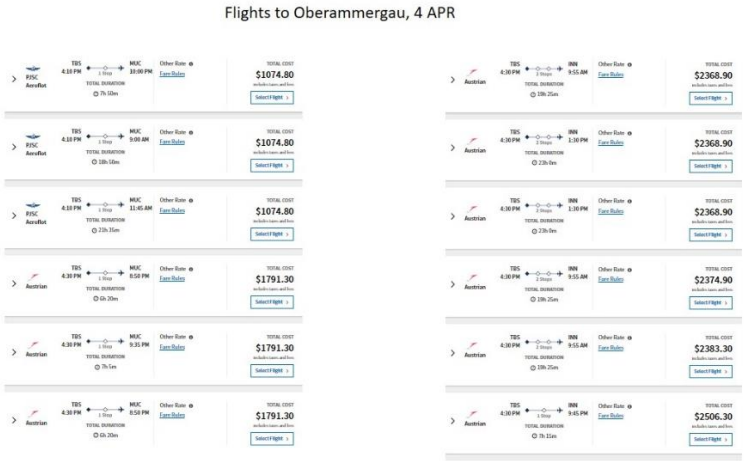
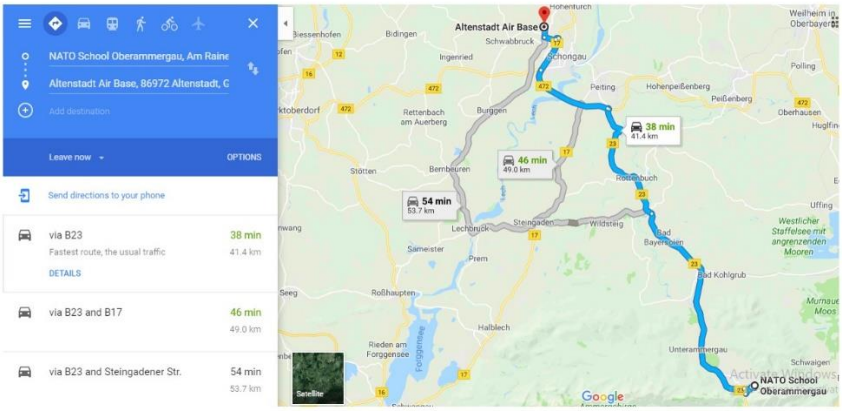
1 h 35 min
93.1 km
1 h 15 min
90.9 km
Satellite
Google


Tbilisi International Airport, Tbilisi, Geo
Add destination
Leave now
OPTIONS
Send directions to your phone
via Kakheti Hwy
43 min
Fastest route, despite the usual traffic
27.6 km
DETAILS
via Kakheti Hwy and Tbilisi - Senaki - Leselidze Hwy
48 min
Heavy traffic, as usual
28.4 km
via Kakheti Hwy and Nikoloz Baratashvili Named Left Bank
52 min
30.9 km
48 min
28.4 km
52 min
30.9 km
43 min
27.6 km
Patara Lilo
Didi Lilo
Tbilisi
თბილისი
DZVELI TBILISI
Tbilisi St. Trinity Cathedral
Tbilisi Zoo
Shindisi
Tabakhmela
Satellite
Tbilisi International Airport
Google

LEG 2: T'bilisi to Oberammergau

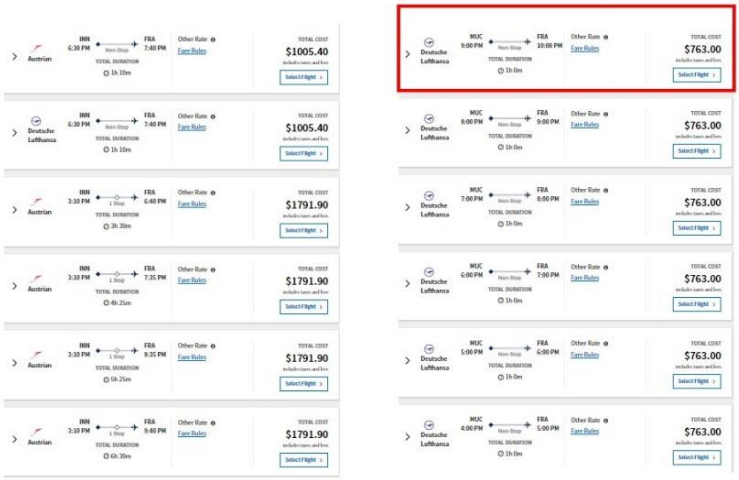




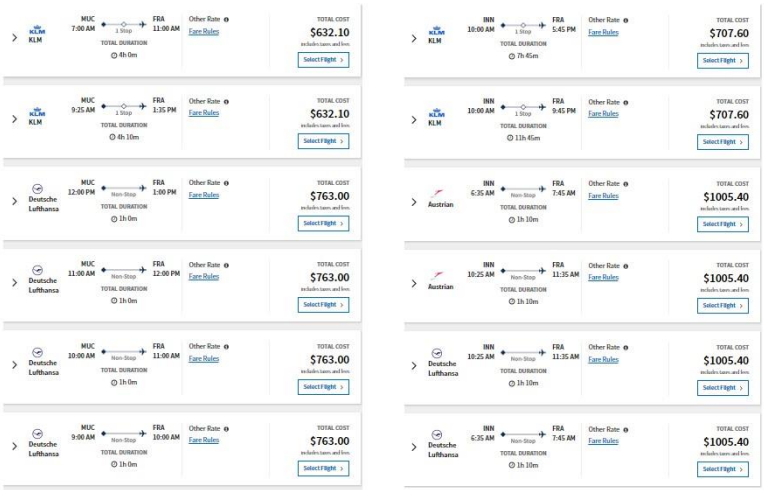

NATO School Oberammergau, Am Raine
Altenstadt Air Base, 86972 Altenstadt, G
Add destination
Leave now
OPTIONS
Send directions to your phone
via B23
Fastest route, the usual traffic
DETAILS
38 min
41.4 km
via B23 and B17
46 min
49.0 km
via B23 and Steingadener Str.
54 min
53.7 km
Altenstadt Air Base
38 min
41.4 km
46 min
49.0 km
54 min
53.7 km
NATO School Oberammergau
Satellite
Google

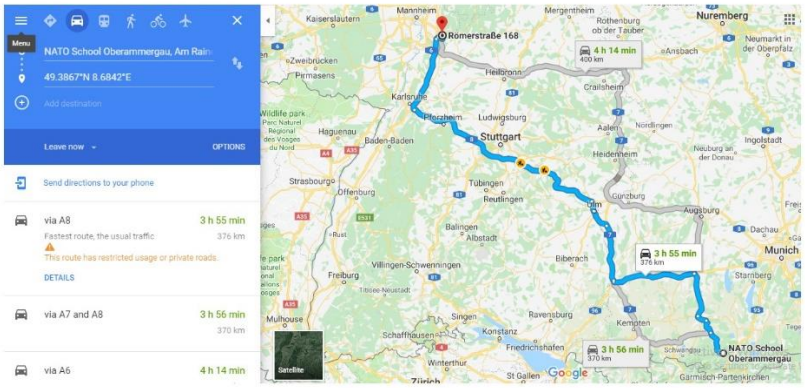
LEG 3: Oberammergau to Heidelberg

Flights to FRA, 5 APR



Flights to FRA, 6 APR




Menu
NATO School Oberammergau, Am Rain
49.3867°N 8.6842°E
Add destination
Leave now
OPTIONS
Send directions to your phone
via A8
3 h 55 min
Fastest route, the usual traffic
376 km
This route has restricted usage or private roads.
DETAILS
via A7 and A8
3 h 56 min
370 km
via A6
4 h 14 min
Römerstraße 168
4 h 14 min
400 km
3 h 55 min
376 km
3 h 56 min
370 km
NATO School Oberammergau
Stuttgart
Munich
Nuremberg
Satellite
Google

KEEPING COMMITMENTS: A BALANCED APPROACH TO TERMINATION FOR CONVENIENCE

MAJOR JUSTIN HESS*

I. Introduction

When the United States Government enters into contracts, it sheds the cloak of sovereign immunity and subjects itself to the same contracting risks as private parties.[1] Like any government action, however, there are exceptions to this basic rule. One major exception is the use of termination-for-convenience clauses. Termination-for-convenience (T4C) clauses are mandated in federal contracts and give agencies discretion to terminate a contract, at any time, without paying expectation or consequential damages.[2]

Termination for the convenience of the government originated as a tool to prevent public waste by cancelling mass wartime acquisitions at the end of armed conflicts.[3] Federal rules have since extended T4C clauses to all federal contracting for use in a wide range of circumstances.[4] While seemingly advantageous to federal agencies, the broad use of T4C clauses creates inequities for innocent contractors that turn costly for the government. These clauses act as a crutch to enable mistakes in

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* Judge Advocate, United States Air Force. Presently assigned as Program Counsel, Air Force Materiel Command Law Office, Wright-Patterson Air Force Base, Ohio. LL.M., 2017, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia; J.D., 2010, Brigham Young University Law School; M.B.A., 2005, Texas A&M University-Texarkana; B.A., 2004, Brigham Young University. Previous assignments include Special Victims' Counsel, Yokota Air Base, Japan 2014-2016; Chief, Military Justice and Chief, Adverse Actions, 374 Airbase Wing, Yokota Air Base, Japan, 2013-2014; Chief, Adverse Actions and Chief, Legal Assistance, 902 Mission Support Group, Joint Base San Antonio-Randolph, Texas, 2011-2013. Member of the Bars of Utah and the United States Court of Appeals for the Armed Forces. This article was submitted in partial completion of the Master of Laws requirements of the 65th Judge Advocate Officer Graduate Course.

[1] Lynch v. United States, 292 U.S. 571, 579 (1934). "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Id.*

[2] FAR 12.403, 49.502, 49.503, 52.212-4(l), 52.249-1 to -6 (2018).

[3] JOHN CIBINIC, JR. ET AL., ADMINISTRATION OF GOVERNMENT CONTRACTS 941–42 (5th ed. 2016).

[4] *See* discussion *infra* Part II.

acquisitions by shifting risk from the government onto its contractors.[5] Because an agency can readily terminate a contract and reset the solicitation process, the government is incentivized to conduct hastily planned acquisitions riddled with mistakes. Contractors then charge the government higher prices to accommodate the additional risks assumed by the use of T4C clauses.[6]

Courts and boards have struggled to find limitations on the use of T4C clauses and have created a confusing, and shifting, set of tests.[7] Cases currently apply either a bad faith or abuse of discretion standard but have not consistently defined those standards.[8] In 1982, however, the Court of Claims proposed a balanced approach based on the original justification for T4C: T4C can only be exercised in response to a post-award change in circumstances.[9] The Court of Appeals for the Federal Circuit later rejected the changed circumstances requirement.[10]

A changed circumstances requirement would provide a better risk balance but may not be the best option for every situation in modern contracting. For example, a strict changed circumstances requirement would eliminate flexibility to use terminations to comply with statutory competition requirements.[11] A multifaceted approach that limits the use of T4C clauses while maintaining some flexibility would mitigate the problems inherent in a discretionary T4C scheme without eliminating an important mechanism to preserve public resources.

To do this, Congress should pass legislation to restrict the use of T4C to three situations: (1) upon agreement of the parties; (2) to comply with competition requirements where the government pays the innocent contractor its total bid and proposal costs; or (3) when circumstances change after award. These changes would shift some risk back to the government. They would also dis-incentivize inefficient contracting,

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[5] *See* Torncello v. United States, 681 F.2d 756, 763–64 (Ct. Cl. 1982).
[6] *See* discussion *infra* Section III.C.
[7] *See* discussion *infra* Section III.A.
[8] *See* discussion *infra* Section III.A; CIBINIC, JR. ET AL., *supra* note 3, at 948–58.
[9] Torncello v. United States, 681 F.2d 756, 772 (Ct. Cl. 1982).
[10] Krygoski Constr. Co. v. United States, 94 F.3d 1537 (Fed. Cir. 1996).
[11] In *Krygoski Constr.*, the Court of Appeals for the Federal Circuit noted that "to accommodate [the Competition in Contracting Act's] fairness requirements, the contracting officer may need to terminate a contract for the Government's convenience to further full and open competition." *Id.* at 1543 (citations omitted). Under a strict changed circumstances rule, the contracting officer would be unable to terminate if the purpose is to correct an error made during initial competition.

lower costs, and provide assurances to contractors that agencies intend to uphold their agreements.

Part II of this article summarizes the history, rationale, and use of T4C clauses. Part III discusses the problems caused by a discretionary T4C scheme. Part IV introduces the proposed changes and discusses implementation of the new requirements.

II. Rationale, Development, and Use of T4C Clauses

Convenience termination schemes appeared after the Civil War and were accepted in common law.[12] The justification for allowing the government to terminate contracts was the public interest in preserving resources after war had ended and mass supplies were no longer needed.[13] The concept "originated in the reasonable recognition that continuing with wartime contracts after the war was over clearly was against the public interest."[14] In the earliest recognized termination case, *United States v. Corliss Steam-Engine Co.*, the Supreme Court assumed that the government had the authority to unilaterally terminate its contracts.[15] The thrust of the case was whether the military had fiscal authority to compensate the innocent contractor to make it whole.[16] Making contractors whole is a primary concern that permeates the development and use of T4C clauses.[17]

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[12] *See Krygoski*, 94 F.3d at 1540–41. The United States Supreme Court expressly acknowledged the military's authority to terminate wartime contracts when the cessation of armed conflict negated the necessity of the procurements. *Id.*

[13] *Torncello*, 681 F.2d at 764. "Terminations for the [g]overnment's convenience developed as a tool to avoid enormous procurements upon completion of a war effort." *Krygoski*, 94 F.3d at 1540.

[14] *Torncello*, 681 F.2d at 764.

[15] United States v. Corliss Steam-Engine Co., 91 U.S. 321, 323 (1875) ("[I]t would be of serious detriment to the public service if the power of [federal agencies] did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors.").

[16] *Id.* This case concerned the cancellation of a contract for two steam engines after the end of the Civil War. Corliss Steam-Engine Co. v. United States, 10 Ct. Cl. 494, 498 (1874).

[17] "'A contractor is not supposed to suffer as the result of a termination for convenience of the [g]overnment . . . ." Jacobs Eng'g Grp. v. United States, 434 F.3d 1378, 1381 (Fed. Cir. 2006) (quoting *In re* Kasler Elec. Co., DOTCAB No. 1425, 84-2 BCA ¶ 17374). *See also* James E. Murray, *Contract Settlement Act of 1944*, 10 LAW & CONTEMP. PROBS. 683, 683 (1944) (noting that a primary principle of the Contract Settlement Act of 1944 was to pay contractors to "avoid mass business failures and

The use of convenience terminations evolved beyond common law authority as procurement law developed. During World War I, the Urgent Deficiency Act of 1917 allowed the President to pay "just compensation" to contractors for wartime contracts that were terminated.[18] The World War II era brought more statutes and regulations facilitating contract terminations for post-war drawdowns.[19] Termination for convenience rules and clauses were subsequently expanded to include peacetime contracting.[20] Laws and regulations began to require T4C clauses in most military and civilian contracts.[21] Those statutes and regulations gave agencies broad discretion to terminate contracts.[22] This discretion is prevalent in the current T4C scheme under the Federal Acquisition Regulation (FAR).[23]

Under the modern T4C scheme, federal agencies can terminate contracts, in whole or in part, if a contracting officer determines that "it is in the [g]overnment's interest."[24] When an agency fails to invoke the T4C clause, but "end[s] the contractual relationship in some other way," courts and boards will find a constructive termination for convenience.[25] Constructive termination "can justify the government's actions" when "the

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widespread unemployment"). The Dent Act of 1919 concerned exclusively with the War Department's ability to compensate contractors that provided goods under agreements that did not meet the technical requirements of the law. Dent Act of 1919, Pub. L. No. 65-322, 40 Stat. 1272 (1919). The Act prohibited payment of expectation damages on terminated agreements, a requirement that has carried forward to modern termination for convenience (T4C) clauses. *Id.*

[18] Urgent Deficiency Appropriation Act of 1917, Pub. L. No. 65-23, 40 Stat. 182 (1917).

[19] *Torncello*, 681 F.2d at 765; CIBINIC, JR. ET AL., *supra* note 3, at 942.

[20] Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1541 (Fed. Cir. 1996). "Thus, termination for convenience—initially developed for war contracts—evolved into a principle for [g]overnment contracts of far-ranging varieties, both civilian and military." *Id.*

[21] CIBINIC, JR. ET AL., *supra* note 3, at 942.

[22] *Id.*

[23] *See* FAR 52.212-4(l), 52.249-1 to -7 (2018); *Torncello*, 681 F.2d at 765 ("For World War II, the Corliss concept was embodied in a mandatory termination clause for fixed-price supply contracts, the direct predecessor of the modern termination for convenience clause.").

[24] FAR 49.101(b), 52.249-1 to -7. Note that the Federal Acquisition Regulation (FAR) prescribes slightly different language for termination of commercial items contracts: the termination must be "in the best interests of the [g]overnment." FAR 12.403(b). Arguably, there is no practical difference between the two standards.

[25] CIBINIC, JR. ET AL., *supra* note 3, at 963. For example, the Court of Federal Claims found a constructive termination when the U.S. Forest Service failed to complete a required environmental assessment, thus preventing the contractor from performing any work. Zip-O-Log Mills, Inc. v. United States, 113 Fed. Cl. 24, 31–32 (2013).

government has stopped or curtailed a contractor's performance for reasons that turn out to be questionable or invalid."[26] Additionally, if an agency fails to include a T4C clause in a contract, courts and boards will read it into the contract because the clause is mandated by regulation and is a "deeply ingrained strand of public procurement policy."[27] Thus, an agency enjoys the benefits of a T4C clause whether it explicitly invokes the clause or just abandons contract performance. These benefits accrue whether or not the contract actually contains the T4C clause. Upon termination, the contractor is entitled to compensation for costs incurred and reasonable profit for any work performed, but the contractor is not entitled to anticipatory profit or consequential damages.[28]

With this expanded use and application, T4C has developed into a broad tool that federal agencies exercise in a variety of situations. Agencies often exercise T4C instead of the termination-for-default or termination-for-cause clauses even when contractor performance is not acceptable. [29] This strategy provides some compensation to the underperforming contractor, but it allows the agency to avoid costly litigation.[30] Agencies also exercise T4C in a variety of other situations to avoid continuing contractual agreements that might otherwise turn sour for the government.[31]

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[26] Torncello v. United States, 681 F.2d 756, 759 (Ct. Cl. 1982).

[27] G.L. Christian & Assoc. v. United States, 312 F.2d 418, 426 (Ct. Cl. 1963).

[28] FAR 49.202(a). For general fixed-priced contracts, the contractor receives cost and profits for work completed, but "[a]nticipatory profits and consequential damages shall not be allowed." *Id.* The clause specific to commercial-items contracts provides for "a percentage of the contract price reflecting" work performed and costs "result[ing] from the termination" but not for anticipatory profit or consequential damages. FAR 52.212-4(l). *See* Red River Holdings, LLC. v. United States, 802 F. Supp. 2d 648, 655 (D. Md. 2011) (noting that courts do not allow anticipatory profit or consequential damages under any T4C clause, including for commercial items). By definition, contractors performing under cost-reimbursement contracts would only receive reimbursement for costs incurred during pre-termination performance. *See generally* FAR 16.301-1. Contractors are also entitled to the cost incurred in settling and closing out the terminated contract. *See, e.g.*, FAR 52.249-2(g)(3).

[29] *See, e.g.*, Nexagen Networks, Inc. v. United States, 124 Fed. Cl. 645, 649 (2015).

[30] Contractors can be liable for damages under terminations for default or cause. *See* FAR 49.4. A contractor's remedy for an improper termination for default is a conversion to a T4C, which will provide some compensation to the contractor. *See, e.g.*, Pinckney v. United States, 88 Fed. Cl. 490, 516 (2009). Thus, the contractor has an incentive to sue for wrongful default termination and conversion to a T4C. If the agency is unsure about the strength of its position, it may rely on a T4C to avoid litigation altogether.

[31] In one case, the agency procured specific software, but terminated because the software was incompatible with the agency's existing systems. McHugh v. DLT Sol., Inc., 618 F.3d 1375, 1382 (Fed. Cir. 2010).

A common use of T4C is to facilitate compliance with contract competition rules.[32] The Competition in Contracting Act requires federal agencies to generally engage in full and open competition when soliciting work.[33] If a federal agency violates the provisions of the Competition in Contracting Act, a disappointed company can protest the contract award with the Government Accountability Office or the Court of Federal Claims.[34] In response to an adverse protest decision, or to avoid an adverse decision altogether, an agency may exercise T4C to terminate the awarded contract and reset the competition process.[35] Even without the threat of protest, agencies exercise T4C clauses when they independently determine the need to preserve full and open competition.[36] These clauses provide a flexible tool to preserve public resources, but discretionary T4C also creates challenges for both the government and contractors.

III. Problems with a Discretionary T4C Scheme

The government's discretionary use of T4C creates inequities for contractors and hurts the efficiency of federal procurement. Courts have struggled to place limitations on this broad power and have developed a confusing history of case law, making it difficult for agencies and contractors to know how courts will interpret their agreements. Additionally, discretionary T4C acts as a crutch that masks mistakes in government acquisition work and leads contractors to increase prices to accommodate the increased risk they assume in each contract.

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[32] CIBINIC, JR. ET AL., *supra* note 3, at 947.

[33] Competition in Contracting Act, Pub. L. No. 98-369, 98 Stat. 1175 (1984). The full and open competition requirement is codified at 10 U.S.C. § 2305(a)(1)(A)(i) (2018) and 41 U.S.C. § 3301 (2018).

[34] *See* 31 U.S.C. §§ 3551–3556 (2018) (establishing the Government Accountability Office's jurisdiction to hear bid protests on contract decisions); 28 U.S.C. § 1491(b)(1) (2018) (giving bid protest jurisdiction to the Court of Federal Claims).

[35] *See, e.g.*, Salsbury Industries v. United States, 905 F.2d 1518, 1521–22 (Fed. Cir. 1990) (noting that the agency was forced to partially terminate the contract to comply with a court order).

[36] *See, e.g.*, T&M Distributors, Inc, v. United States, 185 F.3d 1279, 1281 (Fed. Cir. 1999) (noting that after determining that the value of the contract was over 400% more than originally estimated, the contracting officer elected to terminate the contract and resolicit bids to ensure full and open competition).

A. Courts Struggle to Find a Standard

"The phrase 'termination for the convenience of the government' makes clear that a contractual relationship can been halted by the government simply because it no longer desires to continue it."[37] Despite this clear judicial declaration, courts and boards recognize some need for meaningful limitations on the use of T4C.[38] The cases have struggled to determine what that limitation should be, and they have developed a changing set of rules that seem to shift in reaction to the particular facts of each case.[39] Nevertheless, courts and boards rarely find an exercise of T4C to be improper.[40]

Current cases typically apply a modified version of the common law duty to act in good faith.[41] In 1976, the Court of Claims determined an exercise of T4C to be improper if the agency acted in bad faith or abused its discretion.[42] The court did not distinguish between bad faith and abuse of discretion and suggested they may be the same.[43]

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[37] Securiforce Int'l Am., LLC v. United States, 125 Fed. Cl. 749, 781–82 (2016), *vacated in part*, 879 F.3d 1354 (Fed. Cir. 2018).

[38] "[C]ourts and boards have sought for many years to put some bounds on the [g]overnment's right in order to avoid having all [g]overnment contracts be illusory because the right was so broad that the [g]overnment gave no consideration in entering into a contract." Ralph C. Nash, *Terminations for Convenience: When are They Improper?*, 26 No. 10 NASH & CIBINIC REP. ¶ 52, Oct. 2012 [hereinafter NASH & CIBINIC REPORT (2012)]. They "are still searching for meaningful limitations that will accommodate the government's legitimate needs and leave the contractor with some rights under this clause." CIBINIC, JR. ET. AL., *supra* note 3, at 949.

[39] NASH & CIBINIC REPORT (2012), *supra* note 38. "[I]t is important that we have a clear definition of the limitations on the [g]overnment's right to terminate for convenience. Yet there still seems to be some doubt on this issue." *Id.*

[40] "The judicial interpretation of the government's rights under this clause has led some commentators to conclude that there are 'virtually no limitations on the [g]overnment's right to terminate.'" CIBINIC, JR. ET AL., *supra* note 3, at 948 (quoting Mathew S. Pearlman & William W. Goodrich. Jr., *Termination for Convenience Settlements—The Government's Limited Payment for Cancellation of Contracts*, 10 PUB. CONT. L.J. 1, 7 (1978)).

[41] The Restatement (Second) of Contracts defines the good faith requirement in broad terms. Good faith "may require more than honesty," and prohibits "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (AM. LAW INST. 2016).

[42] Kalvar Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976).

[43] "We need not decide whether bad faith is tantamount to abuse of discretion . . . . However, many of our prior decisions seem implicitly to accept the equivalence of bad faith, abuse of discretion, and gross error." *Id.* at 1306 n.1.

Courts and boards presume that government officials act in good faith,[44] and the general rule is that bad faith requires "some specific intent to injure" the contractor.[45] This subjective animus requirement separates the standard from the common law requirement to deal in good faith.[46] Under the broadest view, extreme recklessness or an intentional disregard for proper procedures by the government would not constitute bad faith without "proof of malice or conspiracy."[47] Additionally, courts require contractors to show this bad faith by clear and convincing evidence,[48] a requirement that also strays from common law.[49] Thus, the limited definition of bad faith as applied to T4C betrays the concept that the government should be treated like any other private party when it contracts.

Colonial Metals Co. vs. United States represents the broadest and most literal application of the intent to injure standard.[50] The Navy contracted with Colonial Metals to provide several thousand tons of copper at above-market prices.[51] The Navy terminated the contract a month later to obtain the copper for a cheaper price.[52] Even if the contracting officer knew about the cheaper price prior to contract award, the Court of Claims found no bad faith because there was no evidence of malice.[53] Rather, prior knowledge of the better price "mean[t] only that the contract was awarded improvidently and d[id] not narrow the right to terminate."[54]

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[44] *See* CIBINIC, JR. ET AL., *supra* note 3, at 951.
[45] *Kalvar*, 543 F.2d at 1302.
[46] Under the common law, "[n]o specific intent, malice, or animus toward the other party need be shown to prove a breach of good faith duties (i.e., bad faith). It can be occasioned by neglect, stupidity, breach of law or other duty, or intent to advantage oneself, one's employer, or other third parties." Frederick W. Claybrook, Jr., *A Twice-Told Tale: The Strangely Repeated Story of 'Bad Faith' in Government Contracts*, 24 FED. CIR. B.J. 35, 61 (2014).
[47] Colonial Metals Co. v. United States, 494 F.2d 1355, 1361 (Ct. Cl. 1974), *overruled by* Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982).
[48] AM-PRO Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239–40 (Fed. Cir. 2002).
[49] In common law, "[b]reach of good faith duties, or bad faith, need only be proven by the same burden as every other contractual breach, by a preponderance." Claybrook, Jr., *supra* note 46, at 61.
[50] *Colonial Metals*, 494 F.2d at 1361.
[51] *Id.* at 1357.
[52] *Id.*
[53] *Id.* at 1361.
[54] *Id.*

In a 1982 opinion, *Torncello v. United States*, the Court of Claims, sitting *en banc*, overturned *Colonial Metals* and introduced a changed circumstances test.[55] In this case, the Navy awarded a multiple line-item grounds maintenance contract.[56] One line item called for as-needed pest control, for which the contractor bid a higher price than other bidders. The Navy never placed an order against this item but hired another bidder at a cheaper price for this specific service.[57] All of the judges agreed that the Navy's actions constituted an improper constructive exercise of the T4C clause.[58]

A plurality of three judges went further by articulating the requirement for a post-award change in circumstances before exercising T4C. The plurality traced the development of T4C as a tool to "allocate the risk of changed circumstances."[59] The plurality noted that a changed circumstances requirement was inherit in past judicial precedent, even though it was not expressly articulated.[60]

The *Torncello* plurality did not expressly reject the bad faith or abuse of discretion standard, and concurring opinions felt the same result could be reached using those tests.[61] The plurality also failed to articulate the boundaries of the changed circumstances test.[62] As a result, lower courts and boards struggled to determine the proper test. Many courts and boards ignored or distinguished *Torncello*, relying instead on the bad faith or

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[55] Torncello v. United States, 681 F.2d 756, 772–74 (Ct. Cl. 1982).
[56] *Id.* at 758.
[57] *Id.*
[58] *Id.* at 763–64, 772–74.
[59] *Id.* at 765.
[60] *Id.* at 765–66 ("[C]ases recognized that the termination for convenience clause was only to be applied where there was some change from the parties' original bargain and was not to be applied as broadly as an untutored reading of the words might suggest.").
[61] Chief Judge Friedman concurred in the result merely stating the Navy could not use T4C to escape an agreement it never intended to fulfill. *Id.* at 773. Judge Davis agreed with overturning *Colonial Metals Co. v. United States*, but felt that both bad faith and abuse of discretion would have given the same result. *Id.* at 773–74. Judge Nichols likewise found the bad faith standard to be adequate. *Id.* at 774.
[62] *See* Major Karl M. Ellcessor, III, *Torncello and the Changed Circumstances Rule: "A Sheep in Wolf's Clothing,"* ARMY LAW., Nov. 1991, at 18, 21.

abuse of discretion standard.[63] "[T]he *Torncello* doctrine began to unravel almost as soon as it was created."[64]

In 1996, the Court of Appeals for the Federal Circuit—the successor to the Court of Claims—expressly rejected the changed circumstances test in favor of the bad faith or abuse of discretion standard.[65] The three-judge panel in *Krygoski Construction Co. v. United States* declared the changed circumstances test to be dicta.[66] The court's opinion centered on the Competition in Contracting Act, which Congress passed after *Torncello*.[67] The court noted that agencies may be forced to terminate contracts to comply with competition requirements, thus there is a need for a "lenient convenience termination standard."[68]

With the *Krygoski* opinion, the bad faith or abuse of discretion standard was fully reinvigorated. But the court did not add clarity to its application. The court approved the *Torncello* result and approved overturning *Colonial Metals* based on bad faith grounds.[69] "A contracting officer may not terminate for convenience in bad faith, for example, simply to acquire a better bargain from another source."[70] This seemed to imply that specific intent to injure was no longer the measure of bad faith. In more recent cases, however, the Federal Circuit affirmed the intent to injure standard without stating whether it would have changed the outcomes in *Torncello* and *Colonial Metals*.[71] To add to the confusion, in

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[63] *See, e.g.*, Simmons, ASBCA No. 34049, 87-3 BCA ¶ 19,984 ("[We] will follow the bad faith/abuse of discretion rule regarding convenience terminations until the 'changed in circumstances' rule is adopted by a clear majority."). *See also* Ralph C. Nash & John Cibinic, *Termination for Convenience: Searching for the Changed Circumstances Rule*, 4 No. 9 NASH & CIBINIC REP. ¶ 55, Sept. 1990 [hereinafter NASH & CIBINIC REPORT (1990)] ("In the eight years since *Torncello*, the courts and boards have struggled with determining whether there is a 'changed circumstances' rule and, if so, what constitutes such a change.").

[64] Joseph J. Petrillo & William E. Conner, *From Torncello to Krygoski: 25 Years of the Government's Termination for Convenience Power*, 7 FED. CIR. B.J. 337, 360 (1997).

[65] Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1542–45 (Fed. Cir. 1996).

[66] *Id.* at 1541. In this case, the Army Corps of Engineers failed to discover the presence of asbestos laden tiles prior to entering a contract for demolition services. Because the amount of asbestos abatement would have significantly increased the cost of the contract, the agency exercised T4C and reset the procurement process to comply with full and open competition requirements. *Id.* at 1539–40.

[67] *Id.* at 1542–43.

[68] *Id.*

[69] *Id.* at 1542.

[70] *Id*.

[71] AM-PRO Protective Agency, Inc. v. United States, 281 F.3d 1234, 1240 (Fed. Cir. 2002).

2010, the Federal Circuit entertained a changed circumstances argument, rather than dismissing it as an invalid test.[72] This suggests that the court may consider changed circumstances arguments from contractors.

Kyrgoski and subsequent appellate cases also failed to clarify whether there is a real difference between bad faith and abuse of discretion. Two recent opinions from the Court of Federal Claims addressed the issue by looking at whether contracting officers failed to exercise independent judgment.[73] These opinions held that without an intent to injure, an exercise of T4C is an abuse of discretion if the contracting officer defers completely to the judgment of other officials.[74] The Federal Circuit circumscribed this rule, allowing a termination decision to be made by an appropriate official other than the contracting officer, unless otherwise specified in the contract.[75] The Federal Circuit was silent on whether any type of official abdication would constitute abuse of discretion. If it survives, this abdication rule will not put a meaningful limitation on the T4C power. It merely serves as a warning to agencies to ensure poor decision-making is independently affirmed by an official with authority to terminate the contract.[76]

Thus, the courts have created a bad faith standard that requires an intent to injure, but not in all cases; an abuse of discretion standard that may just mean abdication by government officials; and a discredited changed circumstances test that courts may nevertheless be willing to entertain. "The bad faith and abuse of discretion standards have been, at best, only superficially examined in the opinions, and many inconsistencies exist between the facts of the cases and the language of the decisions."[77] This superficial approach may be caused, in part, by a tacit

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[72] McHugh v. DLT Solutions, Inc., 618 F.3d 1375, 1382 (Fed. Cir. 2010) ("[I]n light of those findings of changed circumstances, we conclude that the government was justified in utilizing the termination for convenience clause in terminating the contract . . . .").

[73] Securiforce Int'l Am., LLC v. United States, 125 Fed. Cl. 749, 781–82 (2016), *vacated in part*, 879 F.3d 1354 (Fed. Cir. 2018); TigerSwan, Inc. v. United States, 118 Fed. Cl. 447, 452–53 (2014).

[74] *Securiforce*, 125 Fed. Cl. at 785–86 (2016) (finding that the contracting officer deferred to the judgment of a supervisor); *TigerSwan*, 118 Fed. Cl. at 452–53 (2014) (finding that the contracting officer deferred to other officials).

[75] Securiforce Int'l Am., LLC v. United States, 879 F.3d 1354, 1363–64 (Fed. Cir. 2018).

[76] "[T]he government's obligation to avoid clear abuses of discretion is only an illusion. Without any other limits, the concept of discretion is meaningless." Torncello v. United States, 681 F.2d 756, 771 (Ct. Cl. 1982).

[77] CIBINIC, JR. ET AL., *supra* note 3, at 949–50.

recognition that a discretionary T4C scheme results in inequities for contactors and inefficiencies for the government.

B. The T4C Crutch: A Mask for Inefficient Contracting

1. Discretionary T4C Enables Contracting Mistakes

The discretionary T4C scheme enables inefficient contracting processes. Not only do these clauses shift risk, but they also shift the burden of the government's acquisition mistakes onto contractors. This creates perverse incentives that have costs for both the government and contractors.[78] Broad T4C clauses allow federal agencies to substitute T4C for proper procurement planning.[79] For example, rather than obtaining an accurate assessment of needs, agencies may grossly over-procure knowing they can terminate once the needs are filled.[80] This T4C crutch also incentivizes hasty acquisitions that have incomplete compliance with competition or other requirements. In this case, T4C clauses become a do-over switch to cover for mistakes. This problem is likely more pronounced when acquisition offices are undermanned and under pressure to quickly complete purchases.[81]

The facts of a recent case demonstrate this T4C crutch. In *Securiforce International America, LLC v. United States*, the Defense Logistics Agency procured fuel supply services for eight U.S. Department of State sites in Iraq.[82] The agency failed to obtain a necessary waiver for fuel sourced from outside the United States.[83] Procurement officials knew

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[78] *See generally* Daniel R. Fischel & Alan O. Sykes, *Governmental Liability for Breach of Contract*, 1 AM. L. & ECON. REV. 313, 354–57 (1999).

[79] "The Termination for Convenience clause may discourage government agencies from taking steps to accurately and efficiently plan their acquisition strategies . . . ." Marc A. Pederson, *Rethinking the Termination for Convenience Clause in Federal Contracts*, 31 PUB. CONT. L.J. 83, 98 (2001).

[80] *Id.*

[81] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-750, STATE AND DOD SHOULD ENSURE INTERAGENCY ACQUISITIONS ARE EFFECTIVELY MANAGED AND COMPLY WITH FISCAL LAW (2012) ("Underlying that sense of urgency [to quickly procure services for U.S. Department of State locations in Iraq] was the insufficient capacity and expertise of State's acquisition workforce.").

[82] Securiforce Int'l Am., LLC v. United States, 125 Fed. Cl. 749, 786–87 (2016), *vacated in part*, 879 F.3d 1354 (Fed. Cir. 2018).

[83] *Id.*

about the waiver requirement prior to entering the contract.[84] After entering the contract, the agency obtained a waiver for six of the sites but determined that officials from a different agency needed to approve the waiver for the remaining two sites.[85] Rather than seeking an expedited waiver, the agency decided to exercise T4C to find an alternative source of fuel for those two sites.[86] The T4C was necessitated by agency failure to identify and plan for the waiver requirement during acquisition planning.[87] The resulting situation would surely be more costly to a contractor and the government.[88] The contractor lost bargained-for work and the benefit of economies of scale. The government likely paid a higher cost for fuel that was sourced elsewhere and bore the costs of managing two contracts.

2. Discretionary T4C Enables Competition Mistakes

Correcting violations of competition requirements is a common use of the T4C crutch.[89] An agency may lose a bid protest and be forced to reset contract competition,[90] or the agency may independently determine that a violation requires a competition reset.[91] Either way, an agency would terminate the recently awarded contract to effectuate this reset. Termination for convenience provides a low-cost way to reset contract competition, and the government does not bear the full burden of its mistakes. This diminishes the incentive to perform the competition

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[84] *Id.* at 755–56.

[85] *Id.*

[86] *Id.* at 786–787. Note that the Court of Appeals for the Federal Circuit deferred to the agency determination that a waiver would require four to six weeks to obtain, which was too late to meet operation needs. Securiforce Int'l Am., LLC v. United States, 879 F.3d 1354, 1365 (Fed. Cir. 2018). The case facts do not clarify whether the agency thoroughly investigated the possibility of obtaining an expedited waiver.

[87] The trial court found the T4C exercise to be an abuse of discretion. *Securiforce*, 125 Fed. Cl. at 787. This determination hinged on the fact that the contracting officer's supervisor had directed the T4C, and the court concluded that the contracting officer failed to make an independent determination. *Id.* at 785–86. The appellate court vacated this decision, concluding that the government's authority to terminate the contract was not limited to a particular official. *Securiforce*, 879 F.3d at 1365.

[88] As it turned out, the contractor had other problems, leading to a valid default termination for the work it was allowed to keep. *Id.* at 1367–68.

[89] *See* CIBINIC, JR. ET AL., *supra* note 3, at 947–48.

[90] *See, e.g.*, Salsbury Indus. v. United States, 905 F.2d 1518, 1519–20 (Fed. Cir. 1990).

[91] *See, e.g.*, T&M Distributors, Inc. v. United States, 185 F.3d 1279, 1281 (Fed. Cir. 1999).

process correctly in the first instance and may lead acquisition personnel to hastily award contracts using flawed processes.[92]

Because contracting officers make Competition in Contracting Act-based terminations shortly after contract award, government agencies will likely owe little compensation to the innocent, winning contractor.[93] If an agency terminates before the contractor performed any work, the agency will likely owe nothing because contractors are only entitled to compensation for costs and profit for work actually performed.[94] The innocent contractor will not recover consequential damages. The contractor may have also lost alternative opportunities because it committed to the government.[95] Thus, the contractor bears the burden of the agency's failure to abide by competition principles.[96] "[I]f the government [violates competition requirements] when it awards a contract, one should not be surprised when the government forces an innocent recipient of that contract to bear part of the cost of the government's misconduct. Persons doing business with the government should take heed."[97] This T4C crutch may drive away potential contractors that would otherwise efficiently provide goods and services to

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[92] In *T&M Distributors*, the contracting officer failed to understand the scope of a requirement for auto parts. *Id.* A government representative visited the site *after* contract award and discovered the original estimate to be grossly underestimated. *Id.* The contracting officer then exercised T4C to reset the contract competition. *Id.*

[93] Protests on contract award before the Government Accountability Office must be filed within ten days after the protester learned, or should have learned, about the protest basis. 4 C.F.R. § 21.2(a)(2) (2019). The Court of Federal Claims does not have a specific time-limitation to file protests. *See* Michael J. Schaengold et al., *Choice of Forum for Federal Government Contract Bid Protests*, 18 FED. CIR. B.J. 243, 309–11 (2009). But a delay in filing would harm the protestor's ability to obtain the sought after contract. *Id.* Thus, any protest leading to a T4C will likely be filed shortly after contract award.

[94] *See supra* note 28 and accompanying text.

[95] For a contractor, opportunity cost is the value or benefit of other work it could have undertaken had it not committed to work for the government. *See* ALFRED MILL, ECONOMICS 101 at 15 (2016).

[96] In *T&M Distributors, Inc. v. United States* the winning contractor raised questions about the scope of the work, but was still willing to perform. *T&M Distributors*, 185 F.3d at 1280–81. The contractor's questions spurned the site visit by the government representative who discovered the solicitation estimates to be far below the actual need. *Id.* at 1281. Citing the Competition in Contracting Act (CICA), the contracting officer decided to terminate and re-compete the contract because the contractor had not begun performance, and the government's cost to terminate would be "minimal." *Id.* The contractor, although willing to perform, bore the costs of the agency's failure to adequately prepare for the acquisition.

[97] Salsbury Industries v. United States, 905 F.2d 1518, 1524 (Fed. Cir. 1990) (Duff, J., dissenting).

the government.[98] The T4C crutch also drives up costs for the government.

C. The T4C Premium: Increased Costs for the Government

While contractors bear risk for government mistakes, the government pays for this risk in higher contract costs. It is a basic economic principle that increased risk comes with increased costs.[99] Contractors have likely taken heed of the risks posed by T4C clauses and have responded by increasing the price they charge for all contracts that contain these clauses.[100] There is wide agreement that the government pays this T4C premium.[101] Overprotection of the government "inhibits the [g]overnment's freedom to contract, with 'the certain result of undermining the [g]overnment's credibility at the bargaining table and increasing the cost of its engagements.'"[102] To avoid potentially paying large sums of anticipatory profit for a few terminated contracts, T4C

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[98] This is especially true for small business that rely on a small number of contracts to stay in business. Policies, such as discretionary T4C, that discourage small business from bidding on government contracts may lead to limited competition and increased costs for the government. *See* Thomas A. Denes, *Do Small Business Set-Asides Increase the Cost of Government Contracting?*, 57 PUB. ADMIN. REV. 441, 444 (1997) ("[S]mall business set-asides do not lead to higher cost of contracted services as long as the pool of bidders is not reduced.").

[99] *See, e.g.*, LARRY E. SWEDROE, THE ONLY GUIDE TO A WINNING INVESTMENT STRATEGY YOU'LL EVER NEED 97 (2005) ("[I]nvestors must be compensated with higher returns for accepting that higher level of risk.").

[100] In his analysis, Major Bruce D. Page presented a mathematical hypothetical to support his argument that T4C clauses increase costs for all government contracts. Major Bruce D. Page, Jr., *When Reliance is Detrimental: Economic, Moral, and Policy Arguments for Expectation Damages in Contracts Terminated for the Convenience of the Government*, 61 A.F. L. REV. 1, 15 (2008).

[101] "[C]ourts have inferred from the very existence of a termination clause that the [g]overnment pays a premium on the contract price in exchange for the right to terminate." Pederson, *supra* note 79, at 85. "[T]he government's broad right to terminate its contracts for its convenience guarantees the government will pay more for the goods and services it procures, all else being equal." Page, Jr., *supra* note 100, at 15. "[T4C clauses] confer a 'major contract right' on the holder 'with no commensurate advantage' to the other side—though we should expect prices to reflect the agreement and the legal rule." Julie A. Roin, *Public-Private Partnerships and Termination for Convenience Clauses: Time for a Mandate*, 63 EMORY L.J. 283, 284 (2013) (quoting JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 1073 (3d ed. 1995)).

[102] Stuart B. Nibley & Jade Toteman, *Let the Government Contract: The Sovereign has the Right, and Good Reason, to Shed its Sovereignty When it Contracts*, 42 PUB. CONT. L.J. 1, 14 (2012) (quoting United States v. Winstar Corp., 518 U.S. 839, 884 (1996)).

clauses are mandated for all federal contracts under the FAR.[103] But mandating these broad clauses, even for basic goods and services, assumes risk where no risk may actually exist. In response to this fabricated risk, contractors may unnecessarily increase prices, and the government may unnecessarily pay more for its contracts.[104]

The important question for the government is whether the aggregate of the T4C premium paid on all contracts is greater than the savings from the contracts that are terminated.[105] Unfortunately, empirical analysis has not been conducted to measure this effect.[106] Without T4C clauses, there are certainly situations in which an agency would be liable for a large amount of anticipatory profit for contract termination; this would likely occur when an agency terminates the contract shortly after the contractor begins performance.[107] Paying a large amount of anticipatory profit on one contract would be more visible and politically damaging than paying a small increase on all contracts, thus ensuring the staying power of the broad T4C regime. "Ex ante increases in price due to an inefficient termination for convenience clause may be less visible and weigh less heavily" on decisions made by politicians and acquisition professionals.[108] A new approach is needed to mitigate these challenges.

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[103] *See* FAR 12.403, 49.502 (2016).

[104] "[T]he government should always be the possessor of greater information relative to the likelihood of [termination]." Page, Jr., *supra* note 100, at 22. A requirement to include a T4C clause, even when there is little risk of termination, prevents agencies from taking advantage of this superior knowledge. *Id.*

[105] "The resultant contract price reductions [of eliminating the T4C], in the aggregate, may outweigh any potential increase in damages that the [g]overnment may pay as a result of its occasional breach." Pederson, *supra* note 79, at 85.

[106] The lack of uniform and comprehensive data is a pervasive problem for government acquisitions. "Despite the importance of data, most observers believe that the Department of Defense (DOD), and other government agencies lag behind the private sector in effectively incorporating data analyses into decisionmaking. These analysts argue that by using data more effectively to support acquisition decisionmaking, DOD could save billions of dollars, more efficiently and effectively allocate resources, and improve the effectiveness of military operations." MOSHE SWARTZ, CONG. RESEARCH SERV., R44329, USING DATA TO IMPROVE DEFENSE ACQUISITIONS: BACKGROUND, ANALYSIS, AND QUESTIONS FOR CONGRESS, Summary (2016)).

[107] *See, e.g.*, G.L. Christian & Assoc. v. United States, 312 F.2d 418, 423 (Ct. Cl. 1963) (finding that the Army terminated a large construction project after the contractor had completed just over two-percent of the project) .

[108] Fischel & Sykes, *supra* note 78, at 357.

IV. Finding a Balanced Approach

Discretionary use of T4C allows agencies to escape obligations for reasons under government control. This creates a back door that dismantles the premise that the government assumes the same duties as a private party when it contracts.[109] To correct this, Congress should enact a multi-faceted approach that mitigates the problems caused by discretionary T4C while accommodating the complexities of modern contracting. Such an approach should provide flexibility for the government to preserve public resources. It should also dis-incentivize inefficient behaviors and reduce inequities for contractors.

An approach that includes the changed circumstances requirement would bring T4C within the original rationale that justified its advent. The changed circumstances requirement is "well reasoned and logically sound . . . . [and] is based on a fair allocation of risks."[110] As the *Torncello* plurality demonstrated, T4C developed to avoid wasteful spending when circumstances outside government control make contracts obsolete.[111]

Modern contracting, however, is more complicated in the Competition in Contracting Act era and requires flexibility to ensure compliance with competition requirements.[112] Federal agencies should bear the burden of their contracting mistakes. But requiring anticipatory profit for every competition-based termination could devastate agency budgets while enriching contractors that have completed little or no work. Therefore, a multi-faceted approach to T4C is necessary.

Congress should enact legislation that incorporates the changed circumstances requirement as the default rule but allows variation for agency compliance with competition requirements. To preserve

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[109] "[T]he Supreme Court has held as early as 1923 that the government may not, by simple contract, reserve to itself a power that exceeds that which a private person may have." Torncello v. United States, 681 F.2d 756, 763 (Ct. Cl. 1982) (citing Willard, Sutherland & Co. v. United States, 262 U.S. 489 (1923)).

[110] NASH & CIBINIC REPORT (1990), *supra* note 63.

[111] *Torncello*, 681 F.2d at 765 ("[C]onvenience termination, as it was developing, was intended just to handle changed conditions, relieving the government of the risk of receiving obsolete or useless goods. The risk was shifted to the contractor that it could lose the full benefit of its expectations if circumstances changed too radically.").

[112] The *Krygoski* opinion focused on the CICA, noting that *Torncello* was decided pre-CICA and contracting officers may now be forced to terminate contracts to comply with the law's requirements. Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1542–43 (Fed. Cir. 1996).

flexibility, the legislation should explicitly provide for T4C when the parties agree. The legislation should also allow T4C to comply with competition requirements but require agencies to compensate the innocent contractor for its total bid and proposal costs. For all other situations, T4C should be permitted only when there is a post-award change in circumstances. This modified rule returns T4C to the original rationale of protecting public funds from unforeseen circumstances, but it also accommodates modern contracting realities.

A. Termination by Agreement

Under the discretionary T4C scheme, agencies and contractors have the implicit ability to agree to contract termination. A more restrictive T4C scheme, like that proposed here, should explicitly provide an agreement provision to maintain this flexibility. Providing for T4C by agreement preserves the government's ability to negotiate with contractors. When a contractor fails to adequately perform, the government can still rely on T4C in lieu of a termination for default if it is beneficial for the government.[113] Using T4C compensation as an incentive, the government can persuade the contractor to accept termination and avoid costly litigation. The parties can also terminate when both otherwise agree that the contract is no longer beneficial to both. This might occur when the contractor is operating at a financial loss and the government determines that the final results will not meet the agency's needs.[114]

B. Competition in Contracting Act-Based Termination

When an agency terminates a contract for convenience, it must compensate the contractor for costs incurred.[115] Requiring compensation whenever an agency terminates a contract to comply with competition requirements mitigates the T4C crutch. The costs of the government's mistakes shift back to the government, and this incentivizes agencies to properly plan acquisitions. If an agency is understaffed or overworked, bearing the costs of these mistakes incentivizes the government to make proper resource adjustments. But if a contract is terminated shortly after

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[113] *See supra* notes 29–30 and accompanying text.
[114] *See* CIBINIC, JR. ET AL., *supra* note 3, at 942.
[115] *See supra* note 28 and accompanying text.

award, and "the contractor has incurred no costs, there is no recovery."[116] The innocent contractor cannot recover consequential damages and suffers the opportunity costs of other work it forewent when it committed to the government.[117] A T4C policy that requires compensation even if the contractor has not begun work would ensure the government pays a penalty for acquisition mistakes that affect contractors.

A pragmatic approach should be taken to avoid a waste of public funds. Requiring payment of anticipatory profit for every termination would create unearned windfalls for contractors who have performed little substantive work.[118] This windfall could be very large in some cases.[119]

Under current rules, when an agency exercises T4C, the contractor submits a settlement proposal that includes recovery of the costs it incurred.[120] Federal Acquisition Regulation Part 49 directs contracting officers to apply established cost principles to termination settlements.[121] A termination settlement could presumably include some costs incurred in preparing the bid or proposal, as these costs are allowable under FAR Part 31.[122] The FAR rules governing payment of these costs are complicated, and contractors are not always entitled to full recovery.[123] For example, FAR Part 31 only allows bid and proposal costs to be invoiced through

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[116] CIBINIC, JR. ET AL., *supra* note 3, at 977. Note that FAR 49.109-4 directs contracting officers to enter no-cost settlements if "[t]he contractor had not incurred costs for the terminated portion of the contract." FAR 49.109-2(a)(2018).

[117] Consequential damages have been determined to include "the cost of bankruptcy, the loss of existing business," the loss of future contracts, "damages to the company's standing and reputation, impairment of the company's credit, and loss of production." CIBINIC, JR. ET AL., *supra* note 3, at 977 (citations omitted).

[118] Requiring payment of anticipatory profit for CICA-motivated exercises of T4C will not completely eliminate CICA violations. There will be cases when an agency reasonably believes it complied with the CICA requirements, but the Government Accountability Office or Court of Federal Claims sides with a protestor. This would force an agency to terminate the contract.

[119] The U.S. Air Force's acquisition of tanker aircraft was reset multiple times, including after a bid protest. Had the government paid anticipatory profit when the multi-billion dollar contract was terminated, the innocent contractor would have received a substantial payout for no work. *See* Christopher Drew, *Boeing Wins Contract to Build Air Force Tankers*, N.Y. TIMES (Feb. 24, 2011), http://www.nytimes.com/2011/02/25/business/25tanker.html.

[120] FAR 49.104(h)(2018).

[121] FAR 49.4113.

[122] FAR 31.205-18(c).

[123] "Bid and proposal costs are allowable in accordance with FAR 31.205-18(c) but only under narrowly defined circumstances." J.W. Cook & Sons, Inc., ASBCA No. 39691, 92-3 BCA ¶ 25,053.

indirect cost pools.[124] Contractors are generally not allowed to charge directly for the actual costs of preparing the bid or proposal.[125] Bid and proposal costs are not allowed at all for cooperative agreements.[126] Additionally, because it is not clear in the T4C clauses, a small business or non-traditional defense contractor may not be cognizant of its rights to claim these costs in a termination proposal.

For a competition-based T4C, a bright line rule that requires the government to pay the total bid and proposal costs would more effectively make an innocent contractor whole, which has been a primary concern in the use of convenience terminations.[127] This rule should be a FAR Part 49 terminations provision that is separate from the allowability and allocability rules of FAR Part 31. The termination clauses would outline the contractor's rights to receive the total amount of these costs as if they were charged directly to the contract. Additionally, the government would be required to pay these costs regardless of the specific contractual instrument used. A strict rule requiring the agency to pay the total amount of the bid and proposal costs would eliminate any doubt as to the agency's responsibility to compensate the contractor.

The inherent unfairness of shifting the burden of the government's mistakes onto innocent contractors should be a compelling reason to modify the use of T4C clauses for competition violations.[128] Requiring the payment of total bid and proposal costs would force agencies to bear

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[124] FAR 31.205-18(c).

[125] "Costs incurred pursuant to competitive bidding are costs of doing business and belong in overhead or G&A pools. No contractor has a reasonable expectation that bidding costs, when incurred, will be directly reimbursed by the Government since no contractor has a reasonable expectation of award when it puts together its bid. This should not change when the contract is awarded and subsequently terminated for convenience." Orbas & Associates, ASBCA No. 50467, 97-2 BCA ¶29,107. An indirect allocation of bid and proposal costs to a particular contract is proper if it "[i]s necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown." FAR 31.201-4. If the allocation is less than the amount actually spent on that particular contract, the contractor could theoretically obtain full recoupment through allocations to other contracts from the indirect cost pool. But this would mean that other agencies or customers pay for the costs of the competition mistake. A detailed analysis of the accounting and cost principles of government contracting is beyond the scope of this article. The rules relating to bid and proposal costs are found at 4 CFR § 9904.420 (2019).

[126] FAR 31.205-18(a).

[127] *See supra* note 17 and accompanying text.

[128] *See generally* Page, Jr., *supra* note 100, at 23–33 (arguing the moral reasons for modifying the broad T4C regime).

more of the costs of their acquisition mistakes. This would also help mitigate the T4C crutch.

C. Changed Circumstances

Under the rules proposed here, if a T4C is not based on mutual agreement or exercised unilaterally to comply with competition requirements, it must meet the changed circumstances test. Contractors would still bear the risk of unknown future circumstances outside of the control of the contracting parties.[129] But a government agency would be responsible for its own conduct. It would not matter whether the government is motivated by an intent to injure the contractor or just engages in reckless, negligent, or less culpable conduct. The proposed rule eliminates the confusing bad faith or abuse of discretion standards applied by the courts.[130] This rule balances the need to preserve public resources with the sacrosanct notion that the government should act with fairness and be bound to its own commitments.[131] If an agency terminates without a change in circumstances, it will be liable for anticipatory profit and consequential damages.[132]

This modified changed circumstances rule would likely increase termination settlement costs overall and deter agencies from terminating in some cases. The government would see aggregate benefits as well. The risk borne by contractors is a narrower, better-defined risk, and the T4C premium paid by the government on all contracts should be reduced.[133] Contractors may see the government as more trustworthy, and the number of companies competing for contracts may increase. Additionally, by forcing the government to absorb the costs of its own mistakes, agencies would be incentivized to improve the accuracy of work statements and

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[129] "[C]onvenience termination was an allocation of the risk of changed conditions." Torncello v. United States, 681 F.2d 756, 763 (Ct. Cl. 1982).

[130] *See supra* Section III.A for a discussion of the bad faith and abuse of discretion standards.

[131] "It is as much the duty of [g]overnment to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals." President Abraham Lincoln, First Annual Message (Dec. 3, 1861).

[132] An option beyond the scope of this article is to use a liquidated damages clause against the government. The FAR does not currently provide for liquidated damages against the government, but such clauses could prospectively limit the government's liability for breach to a pre-negotiated figure.

[133] *See* Fischel & Sykes, *supra* note 78, at 356 (noting that of all judicial statements, the changed circumstances test "comes the closest" to an efficient T4C regime).

contract specifications.[134] This should lead to a decrease in protests, disputes, and costly modifications.

A changed circumstances test, however, will inevitably be subject to litigation to determine exactly what constitutes a changed circumstance. The *Torncello* plurality defined it as a "substantial change" in the "expectations of the parties" from their "original bargain."[135] This would include situations where "full performance became unneeded," such as the cessation of military hostilities.[136] Modern contracting also faces a large variety of situations which could be considered to be changed circumstances.[137] For example, the rapid development of better technologies may render previous acquisitions useless, thus necessitating termination to prevent a waste of public resources. A new executive administration may have different political objectives, forcing agencies to abandon specific programs. As situations arise, agencies and contractors will likely find themselves in court to parse out the boundaries of changed circumstances.

This is not necessarily a departure from the current state of case law, which is struggling to determine what constitutes bad faith or abuse of discretion.[138] The advantage of the rules proposed here is a congressional narrowing of the categories of cases that are litigated and a greater assurance that the government is committed to its agreements. This should motivate agencies to make better contracting decisions and should reduce unnecessary costs for both the government and its contractors.

V. Conclusion

The historical use of convenience terminations subsequent to the end of major military action made sense to prevent waste and preserve public resources. The current use of T4C clauses in all federal contracts under

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[134] "[B]ecause government agencies are able to terminate contracts for convenience for virtually any reason, subject to the good faith requirement, they do not have a compelling incentive to carefully plan their procurements in advance." Pederson, *supra* note 79, at 99.

[135] Torncello v. United States, 681 F.2d 756, 766 (Ct. Cl. 1982).

[136] *Id.* at 763.

[137] *See, e.g.*, NASH & CIBINIC REPORT (1990), *supra* note 63 (discussing whether discovery of a cheaper source after contract award should qualify as a changed circumstance).

[138] *See supra* section III.A.

the FAR provides great flexibility to the government at a cost to federal agencies and contractors. Agencies have a cheap do-over switch, which incentivizes hasty and mistake-ridden acquisitions. Contractors, knowing that agencies can terminate their agreements at any time, charge more to accommodate the extra risk. In the face of broad government discretion, courts and boards have not tempered these problems but have created a set of unclear standards that contort the common law definition of bad faith.

The answer is not to eliminate T4C clauses. These clauses can be beneficial tools in preserving public funds. The changed circumstances test, articulated in *Torncello*, advances a balanced approach based on the original rationale for T4C. Requiring changed circumstances for every termination, however, would prove costly and ineffective under modern competition requirements. Rather, a multi-faceted approach that accommodates the challenges of modern contracting should be developed to mitigate the harms caused by the discretionary T4C scheme.

The proposal to allow T4C when the parties agree, to comply with competition requirements for a financial penalty, or when there is a change in circumstances, attempts to create such a balance. Contractors will have a better assurance that the government will adhere to its agreements, thus bringing down the cost of the T4C premium. Agency acquisition personnel will also be better incentivized to perform more accurate and efficient acquisitions. This modified T4C scheme will not solve all problems preventing efficient acquisitions, but it does mitigate the problems caused by discretionary T4C. It should also provide a better balance of risks between the government and its contractors.

SUBSTANTIVE TECHNICALITIES: UNDERSTANDING THE LEGAL FRAMEWORK OF HUMANITARIAN ASSISTANCE IN ARMED CONFLICTS THROUGH THE PRESCRIPTION OF TECHNICAL ARRANGEMENTS

MAJOR TZVI MINTZ*

I. Introduction

Whether one adheres to the view of the Law of Armed Conflict (LOAC) as originating in concepts of chivalry and reciprocity,[1] or emphasizes the nature of LOAC as balancing military necessity with humanitarian considerations,[2] all would accept that one of LOAC's main objectives is the prevention or mitigation of war's horrid effects on the civilian population.[3] Still, the civilian population has remained the primary victim of the exigencies of war,[4] whether as a direct result from kinetic attacks,[5] or for the less publicized reason of depleting supplies

* Military Advocate, Israel Defense Forces' (IDF) Military Advocate General Corps. Presently assigned as Head of Land Law Section at the Military Advisor to Judea and Samaria Department, IDF Military Advocate General Corps. LL.M., 2018, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia; M.A. (Diplomacy and Security), 2011, Tel Aviv University, Israel; LL.B., 2008, Hebrew University of Jerusalem, Israel. Previous assignments include Head of the Palestinian Affairs Section, International Law Department, 2014-2017; Legal Advisor, Security and Criminal Law Section, Office of the Legal Advisor to Judea and Samaria Division, 2011-2014; Instruction and Research Officer, International and Civil Law Section, IDF Military Law School. Member of the bar of Israel. This article was submitted in partial completion of the Master of Laws requirements of the 66th Judge Advocate Officer Graduate Course. The views and opinions expressed in this article are those of the author only, and do not necessarily reflect the positions or views of the Ministry of Defense, the IDF or the Military Advocate General Corps.

[1] *See, e.g.*, GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 3-11 (2nd ed. 2016).

[2] *See, e.g.*, YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 4-5 (2nd ed. 2010).

[3] LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT 7 (2013).

[4] Adam Roberts, *Lives and Statistics: Are 90% of War Victims Civilians?* 52(3) SURVIVAL 115 (2010).

[5] *See, e.g.*, Samuel Oakford, *More than 1,800 Civilians Killed Overall in Defeat of ISIS at Raqqa, Say Monitors*, AIRWARS (Oct. 19, 2017), https://airwars.org/news-and-investigations/raqqa-capture/.

necessary for its survival.[6] It is an issue related to the latter with which this article will be concerned—that is, the LOAC rules governing and protecting consignments of humanitarian assistance delivered to the civilian population.

Although the end of the 'Cold War' has brought an increase in humanitarian assistance offered by third parties to the civilian population of the warring sides,[7] it is by no means a new phenomenon in modern warfare. In fact, in 1914, Herbert C. Hoover (later the 31st President of the United States) headed a large U.S.-led operation to supply humanitarian assistance to the Belgian population under German occupation.[8] On the other hand, the warring parties' obligation not to refuse and obstruct offers for humanitarian assistance to the civilian population is in fact a fairly recent development. Deliberate prevention of food, medicine, and other consignments from the civilian population of the other side has not only been a common occurrence in war "since time immemorial,"[9] but was also a permissible method of warfare until the second half of the twentieth century.[10]

Today, a number of substantive LOAC norms govern the belligerent parties' response to a third party's request to provide humanitarian assistance for the adversary's civilian population. By excluding humanitarian assistance from the lawful means and methods of warfare available to the warring sides, these norms aspire to strengthen the general LOAC objective of preventing war's detrimental effects on the civilian population.[11] In other words, assume the following scenario: State A is in an armed conflict with State B (or an armed non-state actor).

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[6] *See, e.g.*, KLAUS VON GREBMER ET AL., 2015 GLOBAL HUNGER INDEX: ARMED CONFLICT AND THE CHALLENGE OF HUNGER (2015) http://www.ifpri.org/publication/2015-global-hunger-index-armed-conflict-and-challenge-hunger.

[7] Kate Mackintosh, *The Principle of Humanitarian Action in International Humanitarian Law* 1 (HPG Report No. 5, Overseas Development Inst., 2000), https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/305.pdf.

[8] VERNON KELLOGG, FIGHTING STARVATION IN BELGIUM 19-21 (1918).

[9] HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 69 (1986).

[10] Heike Spieker, *The Right to Give and Receive Humanitarian Assistance*, in INTERNATIONAL LAW AND HUMANITARIAN ASSISTANCE: A CROSSCUT THROUGH LEGAL ISSUES PERTAINING TO HUMANITARIANISM 7, 7-8 (Hans-Joachim Heintze & Andrej Zwitter eds., 2011). *See also* DINSTEIN, *supra* note 2, at 220-21.

[11] *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR OF 12 AUGUST 1949, at 179 (Jean S. Pictet ed., 1958) [hereinafter GC IV COMMENTARY]. For a detailed account of the rules, *see infra* Part II.

Party C (another State, a humanitarian organization, or any other actor) seeks to deliver humanitarian aid to the civilian population of State B, whether situated in the territory of State B or in a territory occupied by State A. Whereas in earlier times State A would have acted within its rights if it were to prevent C from delivering aid to B's civilians, State A's conduct regarding C's request is now governed by the norms of LOAC mentioned above. It is with those norms this article is concerned.

Recent scholarly attention has been given to various legal issues regarding the norms governing humanitarian assistance in LOAC, such as their relevance to Armed Non-State Actors (ANSAs)[12] and the consequences of noncompliance.[13] As a result of the U.N. Secretary General's call to further explore the boundaries of a party's prerogative to withhold consent to the transfer of humanitarian assistance to the civilian population,[14] significant research was conducted into the concept of "arbitrary withholding of consent,"[15] culminating in recently published comprehensive legal guidance.[16] Yet, the element of technical arrangements has received relatively little scholarly attention. Sometimes referred to as technical arrangements, or measures of control, it is commonly agreed upon that the belligerent parties hold the ability to prescribe certain arrangements regarding the provision of humanitarian assistance. This is in addition to any arrangements already in place concerning the entry of any goods to the territory in question. Arrangements aimed at securing certain interests or addressing certain considerations the belligerent might have regarding the provision of humanitarian assistance will be collectively referred to in this article as *technical arrangements*. Further exploration into the terminology will follow in Part II.D of this article. The intent of this article is to fill the academic gap surrounding those technical arrangements.

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[12] Tom Gal, *Territorial Control by Armed Groups and the Regulation of Access to Humanitarian Assistance*, 50 ISR. L. REV. 25 (2017).

[13] Dapo Akande & Emanuela-Chiara Gillard, *Promoting Compliance with the Rules Regulating Humanitarian Relief Operations in Armed Conflict: Some Challenges*, 50 ISR. L. REV. 119 (2017).

[14] U.N. Secretary-General, *The Protection of Civilians in Armed Conflict: Rep. of the Secretary-General*, ¶ 58, U.N. Doc. S/2013/689 (Nov. 22, 2013).

[15] Dapo Akande & Emanuela-Chiara Gillard, *Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict*, 92 INT'L L. STUD. 483 (2016).

[16] Dapo Akande & Emanuela-Chiara Gillard, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* (commissioned and published by the United Nations Office for the Coordination of Humanitarian Affairs 2016) [hereinafter OXFORD GUIDANCE] (UNOCHA) https://www.unocha.org/sites/unocha/files/Oxford%20Guidance%20pdf.pdf.

By carefully examining the legal framework pertaining to the issue, this article is intended to achieve two interrelated goals. First, this article will provide the reader with a detailed outline on the issues regarding the prescription of technical arrangements for humanitarian assistance in LOAC. By doing so, it will hopefully contribute to a better understanding of the term "technical arrangements" in and of itself, including the legitimate reasons for prescribing such technical arrangements. Those reasons include ensuring the humanitarian nature of the consignment; preventing interference with military operations; and protecting the consignment, the beneficiaries or others concerned—as well as the proper balancing formula between those reasons and relevant humanitarian concerns. Second, this article will demonstrate that the prescription of technical arrangements is in fact a subject of great substantive value within the humanitarian assistance general framework , vital to the understanding of the governing norms on the matter. Specifically, it will demonstrate that both theoretical and practical considerations favor the analysis of the issue of humanitarian assistance through the prism of technical arrangements. A binary concept such as consent and arbitrariness can only serve as a guiding principle in the most extreme cases, whereas applying the legal framework relative to humanitarian assistance can be better served by examining and understanding the more nuanced element of the existing legal framework. Namely, the issue of technical arrangements. Therefore, it will be demonstrated that understanding the issue of technical arrangements can assist in both theoretically understanding and practically implementing the issue of humanitarian assistance in LOAC as a whole.

In Part II, this article will review the key elements of the norms regulating humanitarian assistance in LOAC, attempting to both frame the issue of technical arrangements and point out gaps in the current legal understanding of the issue as a whole. Part III will provide a detailed examination of considerations that can be lawfully addressed by prescribing technical arrangements. Part IV analyzes the balancing act required to examine the influence of the technical arrangements on the humanitarian assistance. Finally, Part V will demonstrate the theoretical and practical benefits of examining the entirety of the issue of humanitarian assistance in armed conflict through the prescription of technical arrangements.

II. The Legal Framework Regulating Humanitarian Assistance

A. General

The rules of LOAC governing humanitarian assistance seemingly vary between three different frameworks, namely the law governing International Armed Conflict (IAC) other than belligerent occupation (referred hereto as IAC);[17] Belligerent Occupation; and Non-International Armed Conflict (NIAC). All three legal classifications have distinct and specific rules governing the belligerent's response to a request to deliver humanitarian assistance to the civilian population of the other side to the conflict.

In an IAC, the belligerent party is not under a proactive obligation to satisfy the humanitarian needs of the other side's civilian population.[18] Instead, under Article 23 of the Fourth Geneva Convention of 1949 (GC IV)[19] the belligerent party is only obligated to allow the free transfer of two categories of consignments to the civilian population of the other side: medical supplies[20] and objects necessary for religious practices meant for civilians in general and food and clothing meant for expectant mothers, maternity cases, and children under the age of fifteen. Article 70 of the First Additional Protocol (AP I),[21] accepted as reflecting customary

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[17] Strictly speaking, the Law of Belligerent Occupation is a specific sub-category within the rules governing international armed conflict. *See* YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 3 (2009). Yet for the purpose of this article we will treat it distinctly from the IAC regime governing the conduct of ongoing hostilities.

[18] *See, e.g.,* Akande & Gillard, *supra* note 15, at 487; OXFORD GUIDANCE, *supra* note 16, at 11; INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS –REPORT PREPARED FOR THE 32ND INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT 27 (2015) (all referring to the proactive responsibility a belligerent has solely towards the civilian population under its control). *See also* Ariel Zemach, *What Are Israel's Legal Obligations towards the Gaza Population?*, 12 MISHPAT U'MIMSHAL 83, 108-13 (2009) (Isr.) (a Hebrew article specifically stating and demonstrating the lack of proactive obligation absent a state of belligerent occupation).

[19] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 23, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[20] Regarding medical supplies, note that their transfer is protected also if it is meant for the military, owing to the special rules regarding the treatment of the sick and wounded soldiers under LOAC. *See* OXFORD GUIDANCE, *supra* note 16, at 23. That issue is beyond the scope of this article.

[21] Protocol (I) Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 70, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

international law by the ICRC,[22] the U.S.,[23] and Israel,[24] has expanded the obligation to include all forms of humanitarian goods and related services[25] destined to the civilian population of the other side in general, while expectant mothers, maternity cases, children, and nursing mothers are only prioritized.[26] Note that the belligerent party is not only obligated to simply allow the transfer of humanitarian assistance to the civilian population of the other side, but also to protect it and facilitate its rapid transfer.[27] Some commentators argue that similar rules apply in a NIAC,[28] even though the text of Common Article 3 (CA 3)[29] and Article 18 of the Second Additional Protocol (AP II)[30] seems narrower.[31]

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[22] INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOL. 1, 193-194 (Jean-Marie Henckaerts & Louise Doswald Beck eds., 2005) [hereinafter ICRC STUDY].

[23] Michael J. Matheson, Deputy Legal Adviser, Department of State, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law* (Jan. 22, 1987), 2 AM. U. J. INT'L L. & POL'Y 419, 426 (1987).

[24] HCJ 9132/07 Jaber al-Bassiouni Ahmad et al. v. The Prime Minister and the Minister of Defense, ¶ 14 (Jan. 30, 2008), Nevo Legal Database (By subscription, in Hebrew) (Isr.) [hereinafter Al-Bassiouni Case] (in which the Supreme Court acknowledged the customary status of article 70 API, based on the Government's position).

[25] Article 70(1) refers to Article 69(1), which states some specific examples as well as a general rule – all measures required for the survival of the civilian population, as well as religious objects. *See* AP I, *supra* note 21, art. 69-70. Related services are not specifically mentioned, but are logically inferred. *See* OXFORD GUIDANCE, *supra* note 16, at 8.

[26] AP I, *supra* note 21, art. 70(1).

[27] *Id.* art. 70(4).

[28] *See* Akande & Gillard, *supra* note 15, at 487; INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 18, at 26-30; Charles A. Allen, *Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law*, 19 GA. J. INT'L & COMP. L. 1, 11 (1989);

[29] An Article appearing in all four Geneva Conventions of 1949. *See, e.g.*, GC IV, *supra* note 19, art. 3.

[30] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) art. 18(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

[31] The *Oxford Guidance* lists some issues where there is a possible divergence between the humanitarian assistance rules in IAC and NIAC, such as the issue of the exact scope of responsibility by ANSAs in NIAC regarding the territories under their control; or the scope of obligation imposed upon non-belligerent States through which the humanitarian aid is planned to transfer. *See* OXFORD GUIDANCE, *supra* note 16, at 16-18, 40-41. *See also* Gal, *supra* note 12.

The rules regarding the transfer of humanitarian assistance are sometimes perceived as a specific application of the prohibition to cause the starvation of the civilian population,[32] with starvation understood by some as relating not only to actual malnourishment but to the survival of the population in general.[33] In any case, since the rules regarding humanitarian assistance are only meant to enable the survival of the civilian population and not the continued free-flow of goods between belligerents (or any other State or Non-State Actors),[34] commentators have noted two qualifications to the rule allowing the passage of humanitarian assistance: preliminary conditions ensuring the humanitarian nature of the assistance delivered, and the required consent of the belligerent party concerned.[35] The issue of technical arrangements prescribed and implemented has been dealt with as a secondary stage, considered only after consent is granted.[36]

The rules regarding the transfer of humanitarian assistance to the civilian population during *belligerent occupation* are seemingly different. Article 59 of GC IV stipulates that if the civilian population's basic needs are not met, "the Occupying Power shall agree to relief schemes on behalf of the population, and shall facilitate them by all means at its disposal."[37] The obligation to allow the delivery

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[32] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 653 & 1456 (Yves Sandoz et al. eds., 1987) [hereinafter AP COMMENTARY].

[33] Knut Dörmann, *Preparatory Commission for the International Criminal Court: The Elements of War Crimes–Part II: Other Serious Violations of the Laws and Customs Applicable in International and Non-International Armed Conflicts*, 83 INT'L REV. RED CROSS 461, 475-476 (2001); *Cf.* Michael Cottier & Emilia Richard, *Paragraph 2(b)(xxv): Starvation of Civilians as a Method of Warfare*, in THE ROME STATUTE OF THE ICC–A COMMENTARY 508, 512 (Otto Triffterer & Kai Ambos eds., 3rd ed. 2016).

[34] *Compare* Amichai Cohen, *Economic Sanctions in IHL: Suggested Principles*, 42 Isr. L. Rev. 117, 124-126 (2009); Abraham Bell, *A Critique of the Goldstone Report and Its Treatment of International Humanitarian Law*, 104 ASIL PROCEEDINGS 79, 80-81 (2010); Anna Segall, *Economic Sanctions: Legal and Policy Constraints*, 81 INT'L REV. RED CROSS 763 (1999).

[35] *See, e.g.*, Akande & Gillard, *supra* note 15, at 492-503; Akande & Gillard, *supra* note 13, at 121-122; Michael Bothe, *Relief Action*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, VOLUME IV 168, 171 (R. Bernhardt ed., 2000); INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 18, at 27; Marco Sassoli, *When Are States and Armed Groups Obliged to Accept Humanitarian Assistance?*, PROFESSIONALS IN HUMANITARIAN ASSISTANCE AND PROTECTION (Nov. 5, 2013).

[36] A most telling example can be found in the *Oxford Guidance*, referring to the right to prescribe technical conditions only "once consent has been granted.". *See* OXFORD GUIDANCE, *supra* note 16, at 26.

[37] GC IV, *supra* note 19, art. 59.

of humanitarian assistance in the context of belligerent occupation is perceived as the mirror image of the occupier's proactive duty to ensure the civilian population's survival, articulated in Article 55, GC IV.[38] This, coupled with the absence of reference to the occupier's required 'consent' in the treaty text, has led prominent commentators to say that the obligation is in fact "unconditional,"[39] and some suggest that the occupier is actually under an obligation to actively seek the necessary humanitarian assistance.[40] Yet, it is agreed that the humanitarian nature of the assistance is still a key element,[41] as it is in the rules governing humanitarian assistance in NIAC and IAC. This element will be discussed next.

B. Preliminary Conditions Defining Humanitarian Assistance

The belligerent party is under no obligation to allow the free passage of all goods and services, even if meant solely for the benefit of the civilian population. Only those goods and services that are humanitarian in nature are those governed by the LOAC rules regarding humanitarian assistance.[42] Two elements are to be considered when deciding whether to classify a request as humanitarian assistance: a need-based purpose and impartiality.[43]

To qualify as a *need-based purpose*, the humanitarian assistance has to offer supplies that the civilian population requires for its survival, as evident from the explicit text of the relevant provisions.[44] The need must be assessed on concrete factual evidence, not speculation and assumptions.[45] Naturally, the factual basis of what actually constitutes a need, the lack of which is threatening the survival of the population, may vary depending on the situation on the

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[38] GC IV, *supra* note 19, art. 59. *See also* DINSTEIN, *supra* note 17, at 150-51.
[39] *See* DINSTEIN, *supra* note 17, at 192; GC IV COMMENTARY, *supra* note 11, at 320; OXFORD GUIDANCE, *supra* note 16, at 18.
[40] *See* Rebecca Barber, *Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law*, 91 INT'L REV. RED CROSS 317, 384 (2009).
[41] GC IV COMMENTARY, *supra* note 11, at 321.
[42] Spieker, *supra* note 10, at 12.
[43] *Id.* at 12-13. *See also* Akande & Gillard, *supra* note 15, at 492-93.
[44] *See* AP I, *supra* note 21, art. 69 (stipulating that the belligerent occupier's minimum standard requires the supply of goods "essential to the survival of the civilian population"); *id.* art. 70(1) (referring to Article 69 AP I); AP II, *supra* note 30, art. 18(2).
[45] *See* Spieker, *supra* note 10, at 12-13.

ground,[46] which can be affected by the intensity and length of the fighting, as well as other contextual circumstances. Similarly, the goods provided as humanitarian assistance are not limited to the specific examples listed in the relevant provisions of the treaties, as long as they are meant to satisfy the basic needs required for the civilian population's survival. However, goods and services which are not required for the survival of the population, such as materials needed for economic development and reconstruction (e.g. wood for the manufacturing of furniture, construction material required for development and reconstruction), are not considered humanitarian assistance,[47] and are therefore subject to whatever policy the belligerent party prescribes, as it is under no obligation to allow their transfer.[48] Contrary to one commentator's opinion,[49] policies prescribed in this regard cannot affect the classification of goods and somehow subject them to the rules regarding humanitarian assistance even though they are not needed for the survival of the population. For example, if the belligerent party decides to prescribe certain limitations on the transfer of raw material meant to manufacture household furniture, this decision in and of itself does not affect the determination of whether this raw material or the furniture constitute humanitarian assistance. Such a determination can only be made by examining the need for said furniture for the survival of the population. In more general terms, the humanitarian nature of the assistance is solely determined by fact-based examination concerning the needs for the survival of the civilian population.[50]

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[46] *Cf.* Cottier & Richard, *supra* note 33, at 513 (discussing changing circumstances affecting the classification of certain facilities as 'indispensable' for the survival of the population).

[47] *Cf.* Spieker, *supra* note 10, at 7 (explaining that the term 'humanitarian action' is wider than humanitarian assistance, and includes the issues of reconstruction and development); G.A. Res. 46/182, ¶ 9 (Dec. 19, 1991) (mentioning that humanitarian assistance is "a step towards long-term development," thus indicating that it is not in and of itself meant for development); INSTITUTE OF INTERNATIONAL LAW, RESOLUTION ON HUMANITARIAN ASSISTANCE (2003), http://www.idi-iil.org/app/uploads/2017/06/2003_bru_03_en.pdf (stating that "humanitarian assistance is only the first necessary step to rehabilitation, recovery and long-term development," thus indicating that it is not in and of itself meant for "rehabilitation, recovery and long-term development"). *Id*.

[48] *See supra* note 34 and accompanying text. *See also* U.K. MINISTRY OF DEFENCE, JSP 383, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, ¶ 9.12.3 (2004) [hereinafter UK MANUAL].

[49] *See* Sari Bashi, *Justifying Restrictions on Reconstructing Gaza: Military Necessity and Humanitarian Assistance*, 49 ISR. L. REV. 149, 165-66 (2016).

[50] Note that in its new commentary regarding CA 3, the ICRC has espoused a very broad definition of "humanitarian activity" but when discussing relief has reiterated the 'survival' standard, and in any case maintained that the concept might put on different forms owing to factual (rather than legal) considerations. INTERNATIONAL COMMITTEE OF

It is also pertinent to note that the need fulfilled must be that of the *civilian* population, not sustaining or contributing to military efforts.[51] This means the belligerent party is under no obligation to allow the passage of goods it has "serious reasons" to suspect will be used by the fighting forces on the other side,[52] ranging from weapons and other military equipment [53] to provisions of food. [54] This does not necessarily mean the belligerent party must have concrete and specific information that a particular consignment is meant for the adverse fighting forces. The belligerent party can employ various other methods meant to ensure that assistance is not supplied to the other side's armed forces, such as limiting the quantities so that they will not exceed those required by the civilian population, which prevents the adverse party from using the surplus for its benefit;[55] or implement other measures meant to ensure the humanitarian assistance will be delivered to civilians alone.[56]

THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, ¶ 812, 813, 820 (2nd ed., 2016) [hereinafter ICRC 2016 COMMENTARY]. *See also* Sean Watts, *The Updated First Geneva Convention Commentary, DoD's Law of War Manual, and a More Perfect Law of War, Part I*, JUST SECURITY (July 5, 2016), https://www.justsecurity.org/31749/updated-geneva-convention-commentary-dods-lowm-perfect-law-war/ (mentioning some criticism regarding the extensive reliance of the new ICRC commentary on academics and other organizations rather than state practice).

[51] GC IV, *supra* note 19, art. 23. *See also* Cedric Ryngaert, *Humanitarian Assistance and the Conundrum of Consent: A Legal perspective*, 5:2 AMSTERDAM L. F. 5, 9-10 (2013).

[52] GC IV, *supra* note 19, art. 23. Some claim that the reference to the "serious reasons" is subjective and prone to misuse, explaining why it no longer appears in AP I (*See* AP COMMENTARY, *supra* note 32, at 827), but both the U.S. and the U.K have maintained reference to this standard in their new military manuals. *See* U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL para. 5.19.3 (May 2016) [hereinafter LAW OF WAR MANUAL]; UK MANUAL, *supra* note 48, ¶ 9.12.1.

[53] *Cf.* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 242 (distinguishing between the provision of weapons as intervention, and the provision of humanitarian assistance which doesn't constitute intervention). Note that in any case, delivery of military equipment is by definition not meant to supply the need of the population and therefore doesn't qualify as humanitarian assistance to begin with.

[54] *See* LAW OF WAR MANUAL, *supra* note 52, para. 5.20.1. *But see supra* note 20.

[55] In 2007 Israel limited the amount of fuel entering the Gaza Strip based on the quantities needed for the civilian population, thus preventing, at least in part, the use of fuel by militants. *See* Al-Bassiouni Case, *supra* note 24, ¶ 4.

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

As for the issue of *impartiality*, the texts of both AP I Article 70(1) and AP II Article 18(2) mention that humanitarian assistance must be "impartial" and "conducted without any adverse distinction."[57] This means that humanitarian assistance is to be supplied and distributed based solely on consideration regarding the extent and gravity of the need, i.e. not on the basis of nationality, political considerations, and the like.[58] The concept of impartiality is recognized by the ICRC[59] and the International Court of Justice (ICJ)[60] as a core element of humanitarian assistance, and is generally considered one of the main characteristics of the broader concept of humanitarian actions.[61] Yet, it is pertinent to understand that it is a "micro-level principle," regulating the specific operation of a specific humanitarian assistance delivery.[62] It is distinct from the wider concept of neutrality, which is at the macro-level,[63] and is not required when providing humanitarian assistance.[64] The third party providing humanitarian assistance, be it a humanitarian organization or another State, is not under any LOAC obligation to be politically neutral to the conflict, nor obligated not to have wider political issues motivating its efforts to assist.[65] It is merely under an obligation to provide and distribute the assistance in an impartial manner, based on the gravity of the need, for it to be considered humanitarian assistance.

In order for a consignment to be considered as humanitarian assistance it must be aimed at satisfying a need of the civilian population required for its survival and must be delivered impartially. Assistance not included in this definition is at the complete discretion

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[57] AP I, *supra* note 21, art. 70(1); AP II, *supra* note 30, art. 18(2).
[58] *See* Spieker, *supra* note 10, at 12-13; AP COMMENTARY, *supra* note 32, at 818.
[59] ICRC STUDY, *supra* note 22, at 193-94.
[60] Nicaragua case, *supra* note 53, ¶ 242.
[61] Kubo Macak, *A Matter of Principle(s): The Legal Effect of Impartiality and Neutrality on States as Humanitarian Actors*, 97 INT'L REV. RED CROSS 157, 161-162 (2016). *Cf.* Spieker, *supra* note 10, at 7 (explaining the distinction between humanitarian assistance and the broader term of humanitarian action).
[62] Macak, *supra* note 61, at 161.
[63] *Id.* Note that the concept of neutrality is wider and different than the *Jus Ad Bellum* 'neutrality' which simply means the State is not a side to the conflict. *See* Macak, *supra* note 61, at 158.
[64] *See* ICRC 2016 COMMENTARY, *supra* note 50, ¶ 798.
[65] Thus, for example, the U.S. State Department views humanitarian assistance a part of its toolkit. *See* Captain Bertrand A. Pourteau, *Answering the Call: A Guide to Humanitarian Assistance and Disaster Relief for the Expeditionary Judge Advocate*, ARMY LAW., Oct. 2016. *See also* AP COMMENTARY, *supra* note 32, at 818 ("traditional links, or even the geographical situation, may prompt a State to undertake such actions, and it would be stupid to wish to force such a State to abandon the action.").

of the belligerent side, which is free to deny its transfer to the other side's civilian population. However, even the delivery of assistance well within the definition of humanitarian assistance would sometimes require the consent of the belligerent party. This issue will be discussed next.

C. The Scope of an Obligation to Consent

As mentioned above, most commentators point out that when a belligerent party is occupying the adversary's territory, it has an "unconditional" duty to allow the passage of humanitarian assistance for the occupied civilian population.[66] On the other hand, in situations other than occupation (namely IAC and NIAC), the transfer of humanitarian assistance to the civilian population of one side to the conflict would require the consent of the belligerent party.[67] The treaties' texts fall short of clarifying the applicable legal standard for consent. Article 23, GC IV, lists some criteria for withholding consent, mainly referring to the risk of humanitarian assistance being diverted from its intended goal (which would, in any case, negate its 'humanitarian' character altogether) or assisting the enemy's war effort.[68] Article 70, AP I, does not mention criteria, leading some to say the criteria are "obsolete,"[69] yet it explicitly refers to the need to secure the belligerent party's consent prior to transferring humanitarian assistance. On the other hand, commentators note that article 70, AP I, can be read as more authoritative because it states that humanitarian assistance initiatives "shall be undertaken."[70] The only clear rule provided by AP I is that refusal cannot be based on the claim that offering humanitarian assistance constitutes an interference in the armed conflict.[71]

Commentators agree that the consent is not completely discretionary and cannot be withheld arbitrarily or capriciously,[72] but

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[66] *See supra* notes 39-40 and accompanying text.

[67] *See, e,g,* OXFORD GUIDANCE, *supra* note 16, at 16; ICRC STUDY, *supra* note 22, at 193. *See also supra* notes 14-16 and accompanying text.

[68] GC IV, *supra* note 19, art. 23. *See also* Ryngaert, *supra* note 51, at 9-10.

[69] AP COMMENTARY, *supra* note 32, at 828. *But see supra* note 52.

[70] *Id.* at 819. *See also* Bothe, *supra* note 35, at 170.

[71] AP I, *supra* note 21, art. 70(1) ("Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts.").

[72] *See, e.g.,* OXFORD GUIDANCE, *supra* note 16, at 16; ICRC STUDY, *supra* note 22, at 193; DINSTEIN, *supra* note 2, at 227; Akande & Gillard, *supra* note 15, at 488; Bothe, *supra* note 35, at 171.

different commentators espouse different meanings to the rule. Whereas one commentator notes that "there are a host of non-arbitrary and practical reasons" a belligerent can justifiably invoke to withhold consent for humanitarian assistance,[73] other commentators seem to have a more absolutist view of the legal rule, claiming that if the civilian population is in need of assistance and humanitarian assistance is offered, any refusal would be arbitrary.[74] Since the need of the civilian population is actually a prerequisite for classifying assistance as humanitarian,[75] the latter proposition would actually have the effect of creating an obligation to allow the passage of humanitarian assistance absent an occupation, that is essentially unconditional as well.

Another commentator proposed that consent may be withheld if the assistance does not meet the preliminary criteria for 'humanitarian assistance' detailed above, or for "security reasons,"[76] whereas others claim that military necessity can never be invoked to justify such withholding of consent.[77] A commendable effort to theorize the concept of arbitrarily-withheld consent has listed different legal concepts and frameworks from which a better understanding of the belligerent party's discretion in these decisions can be achieved,[78] including the doubtfully applicable International Human Rights Law,[79] but has stopped short of offering actual parameters of concrete decision-making (such as the relevance of military considerations).

To add more confusion to the matter, consider the question of who actually needs to grant consent. The treaties refer to the parties

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[73] DINSTEIN, *supra* note 2, at 227.

[74] *See* ICRC 2016 COMMENTARY, *supra* note 50, ¶ 834; Jelena Pejic, *The Right of Food in Situations of Armed Conflict: The Legal Framework*, 83 INT'L REV. RED CROSS 1097, 1103 (2001); ICRC STUDY, *supra* note 22, at 194; Felix Schwendimann, *The legal framework of humanitarian access in armed conflict*, 93 INT'L REV. RED CROSS 993, 999 (2011).

[75] *See supra* Part II. B.

[76] Ryngaert, *supra* note 51, at 9-10.

[77] *See* ICRC 2016 COMMENTARY, *supra* note 50, ¶ 838; INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 18, at 29.

[78] Akande & Gillard, *supra* note 15; OXFORD GUIDANCE, *supra* note 16.

[79] *See, e.g.,* LAW OF WAR MANUAL, *supra* note 52, paras. 1.6.3-1.6.3.4 (presenting the U.S position on the applicability of international human rights law in armed conflict); Alan Baker & Ady Schonmann, *Presenting Israel's Case Before International Human Rights* Bodies, 19 JUSTICE - THE INT'L ASS'N OF JEWISH LAW. AND JURISTS 23 (1998); Captain Brian J. Bill, *Human Rights: Time for Greater Judge Advocate Understanding*, ARMY LAW., June 2010, 58-59.

"concerned,"[80] which begs the question—when is a belligerent party actually "concerned"? Some suggest the belligerent party is "concerned" only when the consignments are actually planned to go through a territory under its control.[81] However, it seems unreasonable not to allow any discretion to the belligerent side even when assistance is delivered without going through its territory, but goes through an area where its forces are operating.[82] Practically speaking, failing to secure the consent from a military operating in a theater of hostilities might result in serious risk to the humanitarian assistance and its recipients.

Essential issues require further clarification, such as: the actual scope to withhold consent; the legitimate considerations justifying withholding consent; the actual difference between consent in the field of belligerent occupation compared with IAC and NIAC; and the belligerent party's ability to withhold consent concerning assistance delivered to the theater of hostilities. As will be demonstrated below, the analysis of the issue of technical arrangements can provide further clarification on the issues.

D. The Authority to Prescribe Technical Arrangements within the General Framework

The rules regarding the passage of humanitarian assistance provide a myriad of measures the belligerent party can utilize to exercise control over the humanitarian assistance delivered to the civilian population of the other side to the conflict. Those measures are generally meant to address concerns the belligerent party might have regarding consignment transferred to its adversary's territory. Regarding IACs, the treaties' text stipulate that the belligerent party is entitled to prescribe technical arrangements; demand that the distribution of the humanitarian assistance be supervised by a third party; and exert some control over the identity and free movement of

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[80] AP I, *supra* note 21, art. 70(1) ("subject to the agreement of the Parties concerned"); AP II, *supra* note 30, art. 18(2) ("subject to the consent of the High Contracting Party concerned.").

[81] *See* AP COMMENTARY, *supra* note 32, at 819; Bothe, *supra* note 35, at 171.

[82] Note the fact that military forces are operating in a certain area does not, in and of itself, render the area 'under control' of the fighting forces. *See* DINSTEIN, *supra* note 17, at 38-42. As the International Criminal Tribunal for Yugoslavia put it, "battle zones may not be considered as occupied territory." *See* Prosecutor v. Pelic, Case No IT-04-74-A, Judgment, ¶ 320(2) (Nov. 29, 2017).

the personnel involved.[83] In belligerent occupation, Article 59, GC IV, only refers to the right of other parties (i.e. not the occupying power) to prescribe technical arrangements,[84] but it would be illogical and contrary to the existing provisions of GC IV to suggest the occupying power does not possess the authority to prescribe technical arrangements and measures of control.[85] In a NIAC, the authority to prescribe specific measures of control is not specifically mentioned,[86] but the existence of that authority is assumed.[87] Therefore it would only make sense that such an authority will be assumed in a situation of belligerent occupation, where the occupying power actually holds wide legal and administrative authorities with regard to the territory under occupation.[88] It therefore follows that the belligerent party has the authority, under all three legal classifications (IAC, NIAC, and belligerent occupation), to prescribe technical arrangements, conditions for the delivery, or measures of control.

For the sake of clarity and uniformity, from here on out all different terms describing the belligerent party's ability to place conditions on the delivery of humanitarian assistance to the other side's civilian population will be referred to as "technical arrangements." However, it is necessary to understand that technical arrangements are not a collective nomenclature for any and all standard procedures and applicable legal arrangements. The laws, regulations and procedures applicable in the relevant territory apply to the consignments of humanitarian assistance and accompanying personnel, just as they apply to any other consignment or person in that territory. Naturally, a sovereign is entitled by definition to exert its authority over a territory by enacting laws and regulating activities within its territories.[89] While the mere obligation to allow the

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[83] AP I, *supra* note 21, art. 70(3), 71; GC IV, *supra* note 19, art. 23.

[84] GC IV, *supra* note 19, art. 59.

[85] *See, e.g.*, OXFORD GUIDANCE, *supra* note 16, at 18; Spieker, *supra* note 10, at 10; Emanuela-Chiara Gillard, *The Law Regulating Cross-Border Relief Operations*, 95 INT'L REV. RED CROSS 351, 357 (2013) (all assuming such an authority does exist in belligerent occupation).

[86] AP II, *supra* note 30, art. 18(2) (making no reference to measures of control or technical arrangements).

[87] *See, e.g.*, ICRC STUDY, *supra* note 22, at 197; AP COMMENTARY, *supra* note 32, at 1480 (discussing the "conditions that might be imposed" in the context on a NIAC humanitarian assistance); OXFORD GUIDANCE, *supra* note 16, at 28-29 (discussing the issue of technical arrangements without distinguishing between an IAC and a NIAC).

[88] For an elaborate discussion on different authorities held by the occupying power, including legislation, security measures, and a criminal law system, *see* DINSTEIN, *supra* note 17, at 89-145.

[89] *See* MALCOLM N. SHAW, INTERNATIONAL LAW 483-487 (8th ed. 2018).

transfer of humanitarian assistance can be understood as a qualification on the sovereign's absolute discretion,[90] it does not mean all laws previously applicable to people and goods transferring through the territory suddenly cease to be relevant.[91] The fact that the obligation to facilitate humanitarian assistance[92] is understood to mandate some alleviations on entry-visas, customs requirements, or taxation of consignments[93] is an indication that, absent the facilitation requirement, those procedures and laws would have applied to the humanitarian assistance consignments and personnel in full.[94] Yet, despite the fact that regularly applicable laws and procedures would generally apply to humanitarian assistance, the text of the treaties still opt to mention the belligerent party's ability to prescribe technical arrangements. Had such specific wording meant only to indicate the continued application of applicable law, it would have been redundant.[95] Had it meant to encapsulate all possible applicable laws, it would have been too narrow.[96] Therefore, it seems technical

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[90] *See, e.g.*, Gal, *supra* note 12, at 37 (stating that the relevant rules reflect a balance between sovereignty and humanitarian considerations); Akande & Gillard, *supra* note 15, at 500 (noting that sovereignty cannot be used in and of its own as a reason to refuse the transfer of humanitarian assistance); AP COMMENTARY, *supra* note 32, at 819 (indicating that although the demand for a belligerent party's consent was derived from sovereignty consideration, it was nevertheless indicated by States that the sovereign's authority on the matter is not absolute).

[91] Consider, for example, the speed limit applicable in a territory. Is a truck driver carrying humanitarian assistance allowed to go beyond the speed limit once consent to transfer the humanitarian assistance was granted? It seems the answer is in the negative. *See* Spieker, *supra* note 10, at 12.

[92] *See supra* note 27 and accompanying text.

[93] OXFORD GUIDANCE, *supra* note 16, at 27; *ICRC Q&A and Lexicon on Humanitarian Access*, 96 INT'L REV. RED CROSS 359, 370 (2015) [hereinafter *ICRC Lexicon*]. *See also* U.N. Secretary-General, *Protection of and Assistance to Internally Displaced Persons: Note of the Secretary-General*, ¶ 91, U.N. Doc. A/65/282 (Aug. 11, 2010) (in which the secretary general calls for alleviating the taxation requirements for humanitarian assistance, as part of the obligation to allow and facilitate humanitarian assistance). Note that the issue of taxing humanitarian assistance in belligerent occupation is specifically regulated in the treaty text. *See* GC IV, *supra* note 19, art. 16.

[94] Note that although some of the analysis in this article might be relevant and helpful for the question of facilitating humanitarian assistance, it is a separate issue deserving of its own scholarly and practical attention which is beyond this article's scope.

[95] This is contrary to the interpretive rule stipulating that no term in a treaty should be interpreted in a way that renders it ineffective. *See* Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), preliminary objections, 2016 I.C.J. Rep. 100, ¶ 41 (March 17).

[96] E.g., can the fact that the belligerent party has power to prescribe technical arrangements or determine measures of control, include its ability to tax the assistance?

arrangements are to be understood as adding another layer of authorities, beyond those regularly contained within the domestic legal regime, and applying to all goods and persons. In other words, technical arrangements are to be understood as the specific arrangements the belligerent party can prescribe regarding the humanitarian assistance meant for the civilian population of the other side to the conflict.

The rules of LOAC equip the belligerent party with specific authority to control and regulate the humanitarian assistance consignments, due to the understanding that the belligerent party might still have some legitimate concerns regarding the consignments entering the war zone.[97] Simply put, not all procedures required for the transfer of humanitarian assistance in coordination with a belligerent party are to be analyzed in accordance with the proposed analysis in this article. Those terms and conditions that are simply a manifestation of the domestic legal and administrative framework concerning the entry of goods and personnel to an area are to be examined in accordance with local law and the obligation to allow and facilitate humanitarian assistance. The subject of this article's inquiry are those terms and conditions prescribed specifically for the humanitarian assistance meant for the civilian population of the other side to a conflict. In the section that follows, this article addresses the legitimate considerations for prescribing technical arrangements.

III. Considerations for the Prescription of Technical Arrangements

A. General

As mentioned above, technical arrangements are often referred to secondary to the issues of defining 'humanitarian assistance' and the requirement for consent.[98] Consequentially, no significant systematic analysis of the possible considerations justifying the prescription of technical arrangements has been conducted. The most thorough reference to the issue of technical arrangements can be found in the recently published *Oxford Guidance on the Law Relating to Humanitarian Relief*

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[97] Such as military considerations, protection of the consignment, prevention of misusing the consignments, and so on. *See infra* Part III.

[98] *See supra* note 36 and accompanying text. *See also* GC IV COMMENTARY, *supra* note 11, at 184.

Operations in Situations of Armed Conflict,[99] noting that the belligerent parties can address legitimate concerns through the prescription of technical arrangements. It goes on to specify that such technical arrangements: "may allow parties to an armed conflict to assure themselves that relief consignments are exclusively humanitarian; they may prevent humanitarian relief convoys from being endangered or from hampering military operations; and they may ensure that humanitarian relief supplies and equipment meet minimum health and safety standards."[100] The guidance document goes on to list certain examples of such technical arrangements, and notes that those arrangements are to be prescribed in good faith so that they do not unjustly impede the delivery of humanitarian assistance.[101] In identifying the legal rules governing unjust impediment, the guidance document refers to the rules regarding arbitrary withholding of consent,[102] thus indicating that reasons which could be justified for refusing the transfer of humanitarian assistance can also constitute the basis for justifying the imposition of technical arrangements upon a humanitarian consignment.

This allows for an excellent starting point for this article's analysis. Following similar logic to that demonstrated in the guidance document, this article will identify the legitimate and relevant considerations for the prescription of technical arrangements using the basic purposes listed by the guidance: verification of the humanitarian nature; military considerations; and protection considerations. Using different examples and considerations for technical arrangements, as well as legal rules derived from past works regarding the issue of consent, define the specific scope of each consideration with regard to technical arrangements will be defined.

B. Verification of the Humanitarian Nature of the Consignment

The first consideration justifying the prescription of technical arrangements is the verification of the humanitarian nature of the assistance requested for transfer to the civilian population of the other side to the armed conflict. As indicated above, in order to be

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[99] OXFORD GUIDANCE, *supra* note 16, at 28-29.
[100] *Id.* at 28.
[101] *Id.* at 28-29.
[102] *Id. at* 29.

considered as humanitarian assistance, a consignment must be aimed at satisfying a need of the civilian population, required for its survival, and then be delivered impartially.[103] Since the belligerent party is entitled to prevent the transfer of consignments not meeting those preliminary conditions,[104] it would only be logical that the belligerent party have the ability to verify the humanitarian nature and prescribe technical arrangements to that end.[105] In fact, measures verifying the humanitarian nature of assistance are so crucial to the legal framework, that even when deciding to allow for humanitarian assistance without the consent of a State, the U.N. Security Council still maintained the ability of States to "confirm the humanitarian nature of these relief consignments."[106]

The purpose of verifying the humanitarian nature of the assistance offered can be examined through a number of subsets. The first subset is the verification of the goods intended for transfer, for example, by searching the consignments prior to their transfer. Commentators have noted that search can be instigated in order to detect weapons and other military equipment within the consignments, [107] but technical arrangements can be utilized more expansively to detect everything that is not humanitarian in nature. This can include not only foodstuffs or other products meant for the fighting forces of the other side,[108] but also any goods which are not humanitarian. That is, items which are not meant to sustain the civilian population's ability to survive—even if those are meant solely for the civilian population. In other words, the belligerent party's ability to condition humanitarian assistance upon verification of the nature of the goods included in the consignment, is to be viewed as directly linked to its right to refuse any non-humanitarian goods. Thus, the belligerent party has the authority to prescribe technical arrangements meant to locate and prevent the transfer of all consignments of goods meant for military use, as well as all goods not necessary for the survival of the civilian population. Measures to that end can include mandatory searches of designated consignments, [109] as well as searches at the provider's warehouses used to store potential humanitarian aid meant to be

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[103] *See supra* Part II. B.
[104] *See supra* notes 34, 42, 47-48, 52 and accompanying text.
[105] *See* OXFORD GUIDANCE, *supra* note 16, at 28; INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 18, at 30.
[106] S.C. Res. 2165, ¶ 3 (July 14, 2014).
[107] OXFORD GUIDANCE, *supra* note 16, at 28.
[108] *See* LAW OF WAR MANUAL, *supra* note 52, para. 5.20.1. *But see supra* note 20.
[109] *See* AP I, *supra* note 21, art. 70(3)(a); GC IV, *supra* note 19, art. 23, 59.

delivered, [110] and preliminary verification of the humanitarian assistance schemes planned.[111] Technical arrangements, to this end, can additionally be prescribed to monitor the quantity of goods transferred, since the belligerent party has the option of limiting the quantities of goods provided. This ensures that only the quantity of goods actually needed—and therefore, actually of a humanitarian nature—will be transferred.[112]

A second subset of the verification of the humanitarian nature of the assistance concerns the verification of the proper distribution of the humanitarian assistance. Humanitarian assistance in fact ceases to be "humanitarian" if it is distributed to the armed forces[113] or in a way that discriminates between civilians not on the basis of need.[114] In recognition of this point, the text of the treaties provides for the discretion to condition the transfer of humanitarian assistance upon the supervision of a "protecting power."[115] Naturally, the same purpose that is the foundation of this specific authority—i.e. maintaining a strict check on the distribution of the humanitarian assistance and preventing it from reaching the hands of the adversary's armed forces[116]—can justify a myriad of other technical arrangements meant for the same purpose. The belligerent party is not bound to use only a "protecting power"[117] for the purpose of monitoring the delivery of the humanitarian assistance, but is free to utilize any third party for the matter.[118] Additionally, other monitoring measures can be prescribed, such as a demand from the distributor to present receipts

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[110] GC IV COMMENTARY, *supra* note 11, at 183. Note that the options concerning preliminary searches as described might be circumstantially more limited, as determinations concerning the exact need are sometimes more difficult to make at an early stage.

[111] *Id.*

[112] *See supra* note 55 (discussing the example of the Israeli decision to limit the amounts of fuel transferred to the Gaza Strip, to those quantities actually required for the survival of the civilian population).

[113] *See supra* notes 52-54 and accompanying text.

[114] *See supra* notes 57-65 and accompanying text.

[115] *See* AP I, *supra* note 21, art. 70(3)(b); GC IV, *supra* note 19, art. 23, 59.

[116] *See* GC IV COMMENTARY, *supra* note 11, at 180.

[117] For clarification on the term "protecting power" and its role within the framework of the Geneva Conventions, *see* GC IV, *supra* note 19, art. 9. See also DINSTEIN, *supra* note 17, at 64-66.

[118] *See* GC IV COMMENTARY, *supra* note 11, at 183. *See also* GC IV, *supra* note 19, art. 11 (specifically mentioning the ability to allow an international organization to assume the place of the protecting power). The question of the criteria for selecting the third party, which could justify a discussion in and of itself, is beyond the scope of this article.

for the delivery of specific consignments or general reports on the matter.[119]

The belligerent party can also condition the transfer of humanitarian assistance upon excluding certain personnel or beneficiaries from the process due to them operating to transfer humanitarian assistance consignments to the armed forces of the other side (thus negating the humanitarian nature of the assistance). [120] However, it cannot prohibit any coordination or contact with the other side's fighting forces or responsible authorities. Maintaining contact with local actors, including members of terrorist organizations or illegitimate de-facto governments, is an imperative element for the successful coordination of humanitarian assistance in the modern battlefield,[121] and in any case should not be viewed as recognition of the legitimacy of a side to the conflict or otherwise intervening with the conflict. [122] This has led prominent voices within the international humanitarian community, including the U.N. Secretary General, to note that the belligerent party cannot use its authority to completely prohibit the contact between humanitarian workers and de-facto authorities on the ground.[123]

The third subset of the verification of the humanitarian nature of the assistance concerns the verification of the existence of humanitarian need. As shown in Part II of this article, in order for assistance to be considered humanitarian, one must demonstrate that the civilian population would actually require assistance for its survival.[124] It therefore logically follows that the belligerent party can prescribe technical arrangements aimed at verifying the actual existence of the need, including relying mainly on their own inspections and monitoring of the humanitarian situation.[125] For

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[119] *See* GC IV COMMENTARY, *supra* note 11, at 183.

[120] *See* AP COMMENTARY, *supra* note 32, at 835; Gillard, *supra* note 85, at 360.

[121] *See* THE SWISS CONFEDERATION'S FEDERAL DEPARTMENT OF FOREIGN AFFAIRS, HUMANITARIAN ACCESS IN SITUATIONS OF ARMED CONFLICT: PRACTITIONERS' MANUAL 99 (2nd ed. 2014) [Hereinafter HUMANITARIAN ACCESS MANUAL].

[122] *See* AP I, *supra* note 21, art. 70(1) ("Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts.").

[123] *See* U.N. Secretary-General, *The protection of Civilians in Armed Conflict: Rep. of the Secretary-General*, ¶ 53, U.N. Doc. S/2017/414 (May 10, 2017). *See also* HUMANITARIAN ACCESS MANUAL, *supra* note 121, at 99; Ryngaert, *supra* note 51, at 16-17.

[124] *See supra* notes 44-46 and accompanying text.

[125] Thus, for example, Israel utilizes one of its military units, the Gaza Coordination and Liaison Administration, to monitor the civilian population's situation, including in times

example, a belligerent party can surely demand that all requests for the transfer of humanitarian assistance be submitted to a specific agency or office, if that office is best qualified to verify the existence of need. Technical arrangements can also be prescribed in order to satisfy the need to prove the humanitarian necessity of the population,[126] for example, by demanding or prescribing a process for the provision of information regarding the humanitarian situation of the population.[127] The belligerent party can also decide on a certain actor which is deemed more reliable than others and condition all or some of the humanitarian assistance upon that actor vouching for the existence of the proper need within the civilian population of the other side.[128]

An interesting example can be found in the technical arrangements concluded in 2014 between U.N. agencies, Israel, and the Palestinian Authority, regarding the transfer of construction materials to the Gaza Strip, called the Gaza Reconstruction Mechanism. This mechanism allows for the entry of construction materials through Israel into the Gaza Strip, by prescribing a process in which the actual need is established by professional teams on the ground, followed by a request submitted through a joint system indicating the exact materials to be transferred at a certain consignment, and a monitoring system operated by U.N. personnel, meant to ensure the construction materials are indeed used for the purpose for which their entry was approved.[129]

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of conflict. *See* STATE OF ISRAEL, THE 2014 GAZA CONFLICT: FACTUAL AND LEGAL ASPECTS 374-75 (2015) [hereinafter THE ISRAELI GAZA REPORT]. *See also* Al-Bassiouni Case, *supra* note 24, ¶ 3.

126 *See supra* note 45 and accompanying text.

127 Not to be confused with conditioning the transfer upon delivery of information regarding military issues, which is perceived as prohibited and will be further discussed ahead. *See infra* notes 145-149 and accompanying text.

128 For example, Israel conditions most requests for entry of goods into the Gaza Strip upon a request submitted to the representatives of the Palestinian Authority and verified by them. This coincides with the fact that information Israel considers more reliable concerning the civilian population in the Gaza Strip is that provided by the Palestinian Authority's representatives. *See* JACOB TURKEL, ET. AL., THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010: REPORT, PART ONE 75-79 (2011).

129 See *The Gaza Reconstruction Mechanism*, COORDINATION OF GOVERNMENT ACTIVITIES IN THE TERRITORIES, http://www.cogat.mod.gov.il/en/Gaza/Pages/GRMgazasection.aspx (last visited June 6, 2019); GRM.REPORT, https://grm.report/#/About (last visited June 6, 2019); *Supporting the Gaza Reconstruction Mechanism: Working Together to Rebuild After Conflict*, UNOPS, https://www.unops.org/news-and-stories/stories/supporting-the-gaza-reconstruction-mechanism-working-together-to-rebuild-after-conflict (last visited June 7, 2019).

Since the declared purpose of the mechanism is to allow for the reconstruction of the Gaza Strip, and by and large does not constitute humanitarian assistance,[130] this mechanism can serve as an example for a technical arrangement meant to address the requirement to demonstrate a need, inspect a consignment against a specifically approved request, and monitor the actual delivery of the consignment to its destination. In this regard, the Mechanism serves as an example for possible technical arrangements which can be prescribed for the purpose of verifying the humanitarian nature of an assistance offered.

C. Military Considerations

It seems the chief military concern regarding humanitarian assistance is its misuse by transferring weapons or other goods for the adversary's armed forces. Yet, as explained above, technical arrangements addressing this concern should be properly classified as measures aimed at ensuring the humanitarian nature of the consignment, since any assistance meant for the armed forces is by definition not "humanitarian." Are there any other military considerations which might justify the prescription of technical arrangements to consignments that are in fact of a humanitarian nature?

Many commentators suggest that the belligerent party has the ability to prescribe certain routes or timeframes for the delivery of humanitarian assistance, citing security considerations as a possible justification.[131] Security considerations are also specifically referred to in the context of limiting the movement of personnel operating in the field of humanitarian assistance.[132] Yet some commentators assert that military considerations can never be invoked to justify withholding consent to the transfer of humanitarian assistance,[133] which can be understood as preventing military considerations from justifying any and all limitations on the

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[130] *See supra* note 47 and accompanying text. Although, some amounts of construction materials might be required for strictly humanitarian purposes in some instances of dire need. *See* U.N. Secretary-General, *supra* note 93, 57.

[131] *See, e.g.*, GC IV COMMENTARY, *supra* note 11, at 184, 322 (regarding both occupation and IAC); OXFORD GUIDANCE, *supra* note 16, at 28; Akande & Gillard, *supra* note 15, at 502; Sassoli, *supra* note 35; Spieker, *supra* note 10, at 14; Bothe, *supra* note 35, at 172; Gillard, *supra* note 85, at 360; *ICRC Lexicon*, *supra* note 93, at 364; Ryngaert, *supra* note 51, at 9.

[132] AP I, *supra* note 21, art. 71(3).

[133] *See supra* note 77 and accompanying text.

transfer of humanitarian assistance.[134] The ICRC's assertion that military considerations cannot be invoked to refuse the transfer of humanitarian assistance but can be invoked to regulate it,[135] seems to encapsulate the conflicting views rather than reconcile them. It is unclear whether the difference between military considerations for refusal or regulation lies in content or quantity, and what actions would constitute regulation as opposed to refusal. Mostly, it is unclear how the same set of considerations—military considerations—can justify one form of limitation (i.e. regulating the assistance) but cannot justify another form of limitation (i.e. withholding consent altogether).

These seemingly conflicting views can be reconciled when examining the issue from the technical arrangements perspective. Since the rules regarding humanitarian assistance are not meant to debilitate the efficient use of force during armed conflict,[136] it would only make sense that the belligerent party be able to prescribe technical arrangements preventing the interruption or hampering of military operations. Thus, the belligerent party can condition the transfer of humanitarian assistance on the use of certain routes, locations, or times of delivery, so that they will not conflict with planned or ongoing operations.

One commentator has suggested that some difference exists between short-term military considerations such as limiting the route of a convoy going into an active war zone and long-term considerations such as ensuring a future potential battlefield would not have objects blocking visibility, basing her conclusion mainly on the "imperative military necessity"[137] allowing the limitation on activities of personnel engaged in humanitarian assistance.[138] Yet, even if one attempts to conclude a widespread rule based on the wording of one

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[134] Since, as demonstrated above, reasons for the prescription of technical arrangements mirror those pertaining to withholding of consent. *See supra* note 102 and accompanying text.

[135] *See* ICRC 2016 COMMENTARY, *supra* note 50, ¶ 838-39.

[136] *See* Allen, *supra* note 28, at 16. *See also* Geoffrey Corn, *The Inevitable Benefits of Greater Clarity in Relation to Humanitarian Relief Access*, EJIL: TALK! (Dec. 16, 2016), https://www.ejiltalk.org/the-inevitable-benefits-of-greater-clarity-in-relation-to-humanitarian-relief-access/#more-14829.

[137] AP I, *supra* note 21, art. 71(3).

[138] Bashi, *supra* note 49, at 162. Note, that the Oxford Guidance does assert that limitations upon the freedom of movement of the humanitarian personnel can only be imposed temporarily, but does not go as far as assuming that the temporal limitation extends to all military considerations. *See* OXFORD GUIDANCE, *supra* note 16, at 27-29.

specific article,[139] the term "imperative" cannot be understood as completely synonymous with "urgent" or "imminent" as the commentator suggests,[140] and no other commentator has indicated that. Considering the aforementioned purpose not to obstruct the use of military force,[141] coupled with the general wording of the treaties' text emphasizing the belligerent party's right to prevent the enemy from gaining military advantages from the humanitarian assistance,[142] it seems more reasonable to assume the belligerent party actually holds significant discretion with regard to the authority to prescribe technical arrangements aimed at preventing the obstruction or hampering of military operations. In other words, preventing a humanitarian convoy from taking a route that conflicts with immediate plans for military maneuver is as important as regulating the delivery of humanitarian assistance so that the military maintains its battlefield tracking capabilities.

A different analysis ensues when technical arrangements are prescribed in order to gain a military advantage. Consider the following historical example: during the Mau-Mau Uprising against the British colonial rule of Kenya, it was reported that British military forces prescribed a simple technical arrangement for the delivery of foodstuff to the population—determining certain locations, situated within the villages, for the distribution of foodstuff, thus preventing its distribution outside of those villages. Research done on the matter speculated that the purpose of this technical arrangement was meant to lure the Mau-Mau fighters out of hiding.[143] It seems such an act would run contrary to the underlining purpose of the rules regarding humanitarian assistance, which is to keep the humanitarian assistance outside the scope of the conduct of hostilities,[144] and could also be perceived as perfidious due to the utilization of a protection or a right awarded to the civilian population for military purposes.[145]

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[139] Note that no other commentators attempting to make the same claim was found.

[140] Bashi, *supra* note 49, at 162.

[141] *See* Allen, *supra* note 28, at 16. *See also* Geoffrey Corn, *The Inevitable Benefits of Greater Clarity in Relation to Humanitarian Relief Access*, EJIL: TALK! (Dec. 16, 2016), https://www.ejiltalk.org/the-inevitable-benefits-of-greater-clarity-in-relation-to-humanitarian-relief-access/#more-14829.

[142] *See, e.g.*, GC IV, *supra* note 19, art. 23 (discussing the prevention of the other side's military advantage due to assistance provided).

[143] Andrew Thompson, *Humanitarian Principles Put to the Test: Challenges to Humanitarian Actions During Decolonization*, 97 INT'L REV. RED CROSS 45, 58-59 (2015).

[144] *See supra* note 11 and accompanying text.

[145] For a general account on the issue of perfidy, *see* SOLIS, *supra* note 1, at 457-462.

In this context, it is pertinent to note that an important element of the rules governing humanitarian assistance is the exclusion of objection to the transfer of humanitarian assistance on the basis of viewing it as interference with the conflict itself.[146] Allowing the warring sides to utilize the humanitarian assistance for their military advantage would actually negate the humanitarian (and specifically, impartial) nature of the assistance,[147] thus transforming the assistance from one that is protected from refusal based on interference with the conflict, into *actual interference* with the conflict. In other words, allowing the prescription of technical arrangements for the purpose of gaining military advantage would mean that the party prescribing these technical arrangements has the ability to negate the humanitarian nature of the assistance by utilizing legal authorities granted in the rules governing humanitarian assistance. Simply put, if side A prescribes technical arrangements for a humanitarian consignment, meant to secure its military advantage, then side B (controlling the territory to which the aid is meant) will be justified in refusing it on the basis of interference with the conflict, and the civilian population will be left with no protected humanitarian assistance.[148]

Therefore, a belligerent party cannot prescribe technical arrangements aimed at providing it with a military advantage, since such a purpose would run contrary to the current rules and principles governing humanitarian assistance in LOAC, and could in some circumstances be considered perfidious. The belligerent party can, however, prescribe technical arrangements meant to prevent the hampering or obstruction of military operations, such as prescription of routes or timeframes for the transfer of humanitarian assistance, meant to distance the consignments from the theater of hostilities.

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[146] AP I, *supra* note 21, art. 70(1) ("Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts.").

[147] *See* Macak, *supra* note 61, at 179; *ICRC Lexicon*, *supra* note 93, at 374. *See also* AP COMMENTARY, *supra* note 32, at 835 (stating that humanitarian personnel, in order to maintain their status, "should not pass any foodstuffs or any other supplies to combatants." This can be seen to include other forms of valuables transferred to the combatants, such as information).

[148] As a side note, it is worth mentioning that forcing the humanitarian personnel to collaborate with the military forces would also practically impair their ability to accomplish their mission, due to potential deterioration of the local population's trust in them. *See* U.N. Secretary-General, *supra* note 93, ¶ 64-65; HUMANITARIAN ACCESS MANUAL, *supra* note 121, at 84 (discussing how the mere appearance of association with military forces impairs the trust of the civilian population).

This distinction can serve as a better and more nuanced understanding of the role of military considerations within the legal framework, compared with the seemingly contradictory assertions discussed in the beginning of this subpart.

D. Protection of the Consignment, the Beneficiaries, and Others

The belligerent party's obligation to protect the consignments is specifically mentioned in AP I[149] and is relevant to all forms of conflict (IAC, NIAC, and occupation) since it is a subset of the obligation to allow the entry of humanitarian assistance.[150] This obligation can be performed, amongst other options, by prescribing technical arrangements to the consignments such as limiting the possible routes or timeframes of delivery in order to distance the consignments from the fighting, for their own protection. Some have asserted that the belligerent party has an obligation not only to protect the consignment from the war itself, but also from the dangers of rioting, looting, or other attacks on the consignment.[151] There are different technical arrangements that can contribute to achieving that goal, such as compelling the consignment to carry tracing devices or means of communication, or even condition the humanitarian assistance upon a military escort. Regarding the latter, note that although the military escort does not in and of itself nullify the humanitarian nature of the consignment (i.e. it does not constitute collaboration with a side of the conflict),[152] technical arrangements of that sort need to be carefully prescribed, in order to avoid both the legal ramification of what might appear as forced collaboration, as well as practical ramifications concerning the agitation of distrust towards the humanitarian actors.[153] In any case, it is doubtful whether humanitarian actors can be forced to be accompanied by military personnel if they do not wish that,[154] though such objection can result in other more stringent technical arrangements if the belligerent party indeed believes that

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[149] AP I, *supra* note 21, art. 70(4).

[150] *See* GC IV COMMENTARY, *supra* note 11, at 322 ("The obligation to authorize the free passage of relief consignments is accompanied by the obligation to guarantee their protection."). *See also id.* at 184; Spieker, *supra* note 10, at 15-16.

[151] AP COMMENTARY, *supra* note 32, at 828-829.

[152] *See* Bothe, *supra* note 35, at 174.

[153] *See* Geneva Graduate Institute of International Studies, *supra* note 146, at 908; U.N. Secretary-General, *supra* note 93, ¶ 65.

[154] Thus, the ICRC chose not to be accompanied by U.S. Military personnel in Iraq since 2003, and the U.S. forces did not force the matter. *See* Geneva Graduate Institute of International Studies, *supra* note 146, at 907-08.

defending the humanitarian assistance in a specific environment is essential.

It is pertinent to note that protection of the consignments is ultimately not meant to serve the consignments themselves or their providers, but rather for the civilian population meant to benefit from it.[155] Therefore, it logically follows that the belligerent party can prescribe technical arrangements to ensure not only the protection of the consignment itself, but also that of the beneficiaries. Note, that even though in an IAC the belligerent party has no positive obligation toward the other side's civilian population,[156] it might still possess the authority to exert some control over the consignments (i.e. prescribe technical arrangements) for the benefit of the population. One example can be found in the belligerent party's express authority to divert humanitarian assistance from its original destination when it is "in the interest of the civilian population concerned."[157] Note that the diversion must be based on genuine need-based prioritization, i.e., impartiality, otherwise the assistance loses its humanitarian nature.[158] Another example indicated by commentators is the possibility of setting health and safety standards for the consignments.[159] Naturally, when an adverse party possesses authorities meant for the benefit of the other side's civilian population, it might be suspected of 'hidden motives' when setting such health or safety standards. A possible solution can be found in the form of a 'litmus test' suggested by a prominent commentator in another context.[160] The test would seek to examine the authenticity of the belligerent party's intentions to protect the civilian population by comparing the health and safety standards the belligerent party is prescribing, with those applicable with regard to its own population. Thus, if a belligerent party seeks to enforce health and safety standards more cumbersome than those applied on its own population, the conditions are *prima facie* suspected of serving a purpose other than protecting the population of the other side.

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155 *See* OXFORD GUIDANCE, *supra* note 16, at 29.
156 *See supra* note 18 and accompanying text.
157 AP I, *supra* note 21, art. 70(3)(c).
158 *See* Gillard, *supra* note 85, at 361. For the issue of impartiality, *see supra* notes 56-65 and accompanying text. For a similar discussion concerning the problem of prescribing technical arrangements that negate the humanitarian nature of a consignment, *see supra* notes 148-150 and accompanying text.
159 Gillard, *supra* note 85, at 28-29.
160 DINSTEIN, *supra* note 17, at 120-23.

Note that it is not only the potential beneficiaries of the humanitarian assistance who might have an interest the belligerent party can protect through the prescription of technical arrangements. The belligerent party has an obligation for the survival and wellbeing of those under its control, be it the civilian population in an occupied territory (other than the specific designated beneficiaries of the humanitarian assistance)[161] or its own civilians in its own territory.[162] Therefore, it logically follows that the belligerent party has the ability and authority to prescribe technical arrangements aimed at protecting other groups. This is not to be understood as trumping the scope of legitimate military considerations, since it cannot justify considerations that are otherwise prohibited.[163] Rather, the belligerent party's obligation to the wellbeing of other civilian population groups means that it can prescribe technical arrangements meant to ensure that those groups will not be adversely affected by the transfer of humanitarian assistance. For example, the belligerent party might have a legitimate interest in prescribing health and safety standards not specifically for the benefit of the beneficiaries, but for ensuring that dangerously low-quality goods will not end up in the hands of its own population.

In conclusion, the belligerent party has the ability to prescribe technical arrangements meant not only for its own military needs such as prevention of non-humanitarian goods or preventing the interruption of military operations, but also in order to protect other vital interests: the protection of the consignment itself (including relevant personnel); the protection of the interest of the beneficiaries; and the protection of other groups which the belligerent party is obligated to protect.

E. Interim Remarks

This article began by pointing out that reasons and considerations governing the prescription of technical arrangements could be generally inferred from considerations deemed legitimate for withholding consent

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[161] *See id.* at 89-94, 148-151. *See also* LAW OF WAR MANUAL, *supra* note 52, para. 11.1 (stating that "the Occupying Power is also bound to provide for the interests and welfare of the civilian population of the occupied territory.").

[162] *See, e.g.*, INTERNATIONAL COMMITTEE OF THE RED CROSS, *supra* note 18, at 27 (stating that the belligerent party's obligation toward its own people in the context of an armed conflict is inferred from the "object and purpose" of LOAC).

[163] *Cf.* Allen, *supra* note 28, at 17-20.

for the transfer of humanitarian assistance altogether.[164] Yet by analyzing different possible considerations regarding the legitimacy of prescribing technical arrangements, this analysis has demonstrated the wider scope and nuanced nature of the considerations that can be considered legitimate for the prescription of technical arrangements. While measures meant to verify the humanitarian nature of the assistance offered are but a mirror-image of the rules governing the definition of humanitarian assistance covered by the rules of LOAC, the issue of military considerations indicates a more nuanced relation with the legitimate reasons for possible refusal. Thus bridging the gap between assertions negating the place of military necessity in the realm of humanitarian assistance and those recognizing its importance. The issue of considerations regarding the protection of civilian populations, discussed in subpart D, exposed an array of considerations relevant to the realm of technical arrangements, which might bear no direct relevance to the issue of consent or the withholding thereof.

Yet settling the possible considerations for the prescription of technical arrangements is only the first stage in gaining a meaningful insight into the issue of humanitarian assistance. The second issue, discussed in the following part, regards the limits on the prescription of technical arrangements, even if they are prescribed for arguably legitimate reasons.

IV. The Limits on the Prescription of Technical Arrangements

It is widely accepted that any refusal of a belligerent party to the transfer of humanitarian assistance to the other side's civilian population must be based on a valid reason.[165] It logically follows that every other limitation—short of complete refusal, such as technical arrangements prescribed, has to also be founded on a valid reason.[166] In the context of technical arrangements, Part III of this article lists and analyzes the possible valid reasons. Therefore, technical arrangements prescribed without any of the legitimate reasons listed in the previous part would be

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[164] *See supra* note 102 and accompanying text.

[165] *See, e.g.*, Akande & Gillard, *supra* note 15, at 490; Bothe, *supra* note 35, at 171; Gillard, *supra* note 85, at 356; OXFORD GUIDANCE, *supra* note 16, at 21. *See also supra* note 72 and accompanying text.

[166] *See supra* note 102 and accompanying text.

considered arbitrary and unlawful.[167] This analysis begs the question—can the invocation of a valid reason justify *any* technical arrangement prescribed?

Commentators have noted that technical arrangements cannot be prescribed in a manner resulting in impeding and effectively preventing the consignment of actual humanitarian assistance, and are to be prescribed in good faith,[168] as well as in a "necessary and proportionate" manner.[169] The ICRC has noted that prescribing cumbersome technical arrangements can be seen as a mere façade for the intention of a belligerent to prevent humanitarian assistance from being delivered,[170] and other commentators went as far as suggesting that if those cumbersome technical arrangements' apparent result is the starvation of the civilian population, intent can be inferred for the purpose of international criminal law.[171] It seems no existing legal sources actually provide specific guidance as to such limits on prescribing technical arrangements in the context of humanitarian assistance. Therefore, the analysis set forth in this part will attempt to suggest a way of understanding the proper balancing act to be employed when prescribing technical arrangements for humanitarian assistance.

At the basis of the analysis is the basic obligation of the belligerent party to allow the transfer of humanitarian assistance to the civilian population of the other side as rapidly as possible.[172] The belligerent party's authority to prescribe technical arrangements logically cannot render its basic obligation ineffective.[173] Therefore, it can be argued that the prescription of technical measures must be exercised subject to the general prohibition of *an abuse of rights*.[174] The scope of this purported

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[167] *Cf.* OXFORD GUIDANCE, *supra* note 16, at 25; Akande & Gillard, *supra* note 15, at 501.

[168] *See, e.g.*, OXFORD GUIDANCE, *supra* note 16, at 29; ICRC STUDY, *supra* note 22, at 197-98; AP COMMENTARY, *supra* note 32, at 824-26;

[169] *See* OXFORD GUIDANCE, *supra* note 16, at 29. *See also* Akande & Gillard, *supra* note 13, at 125-26. For a discussion of the difficulty with the label of 'proportionality,' *see* discussion *infra* notes 194-196 and accompanying text.

[170] *See, e.g.*, *ICRC Lexicon, supra* note 93, at 360.

[171] Cottier & Richard, *supra* note 33, at 519.

[172] *See generally, supra* Part II. A.

[173] *See* GC IV COMMENTARY, *supra* note 11, at 184; AP COMMENTARY, *supra* note 32, at 824.

[174] Free Zones of Upper Savoy and the District of Gex (Fr. V. Switz.), Judgment, 1932 P.C.I.J. (ser. A/B) No. 46, at 167 (June 7); WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, ¶ d158

general principle of law,[175] and the degree to which it has been transposed into international law, is a matter of disagreement.[176] However, Bin Cheng is seemingly correct when he writes that "wherever the law leaves a matter to the judgment of the person exercising the right, this discretion must be exercised in good faith, and the law will intervene in all cases where this discretion is abused."[177] This position appears to have been reflected in the ICJ's *Djibouti v. France* judgment, where it stated that, while the relevant treaty provision in that case provided "a State . . . with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties."[178] It must be emphasized, however, that a "misuse [of a right] cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement."[179] Indeed, the presumption of good faith is well-established in international law.[180]

(Oct. 12, 1998); Metal-Tech Ltd. v. Uzbek., ICSID Case No. ARB/10/3, ¶ 127 (Oct. 4, 2013). *See also* Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L.J. 389 (2002).

[175] As is well known, "the general principles of law recognized by civilized nations" are a formal source of international law. *See* Statute of the International Court of Justice art. 38 ¶ 1(c), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S 933. *See also* South West Africa (Eth. v. S. Afr.; Liberia v. S. Afr.), Second Phase, Judgment, 1966 I.C.J. 6, ¶ 88 (July 18). *Cf.* North Sea Continental Shelf (Fed. Rep. Ger./Den.; Fed. Rep. Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 132 (Feb. 20) (separate opinion of Judge Ammoun) ("the term 'civilized nations' is incompatible with the relevant provisions of the United Nations Charter, and the consequence thereof is an ill-advised limitation of the notion of the general principles of law"). *Contra* Hans Kelsen, *Collective Security under International Law*, 49 INT'L L. STUD. 1, 192 (1954) ("it is doubtful whether such principles common to the legal orders of the civilized nations exist at all, especially in view of the ideological antagonism which separates the communist from the capitalist and the autocratic from the democratic legal systems").

[176] *Cf.* G.G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: General Principles and Substantive Law*, 27 BRIT. Y.B. INT'L L. 1, 12 (1950).

[177] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 132-33 (1953).

[178] Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), Judgment, 2008 I.C.J. 177, ¶ 145 (June 4). *Cf.* Stephan Schill & Robyn Briese, *"If the State Considers": Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK Y.B. U.N. L. 61, 118 (2009). Note that it is perfectly possible that only certain aspects of a general principle of law found in various legal systems are part and parcel of international law. *See* Ori Pomson, *The Clean Hands Doctrine in the Yukos Awards: A Response to Patrick Dumberry*, 18 J. WORLD INVEST. & TRADE 712, 715-16 (2017).

[179] German Interests in Polish Upper Silesia (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 30 (May 25).

[180] Lac Lanoux Arbitration (Fr./Sp.), 24 I.L.R. 101, 126 (Arb. Trib. 1957); Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J.

When may technical arrangements amount to *an abuse of rights* regarding the discretion provided to a party to an armed conflict? One such instance would be where "it is apparent that there is clearly no reasonable relationship between the stated objectives and the means used."[181] Indeed, this position appears to be implied in the ICJ's dictum in the *U.S. Nationals in Morocco* case, where it recognized that custom authorities had a power of valuation, but emphasized that the "power . . . must be exercised *reasonably* and in good faith."[182]

Therefore, justifying a technical arrangement by invoking an unrelated reason is contradictory to the idea of exercising a right in good faith, in the sense of exercising a right in a manner for which it was not intended. It logically follows from the abovementioned analysis, that the proper and lawful prescription of technical arrangements requires them to be rationally aimed at addressing one (or more) of the legitimate considerations listed in Part III. Technical arrangements are meant to address legitimate concerns of the belligerent party, not to hinder the transfer of humanitarian assistance.[183]

An abuse of rights may also occur where the measures taken to secure legitimate considerations of the state are excessive to what is necessary to protect such an interest.[184] Hence, prescribing technical arrangements of a certain form would also seemingly amount to *an abuse of rights* if less cumbersome arrangements can achieve the same objective.

Rep. 213, ¶ 150 (July 13); Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl.), Provisional Measures, Order, 2014 I.C.J. 147, ¶ 44 (Mar. 3).

[181] Whaling in the Antarctic (Austl. v. Jap.: N.Z. Intervening), Judgment, 2014 I.C.J. Rep. 226, 330 (Mar. 31) (dissenting opinion of Judge Abraham). Note that the Court's opinion in that case focused not on issues relating to good faith, but rather on what may or may not reasonably constitute measures for the purposes of "scientific research." *Id*. at 254, ¶ 67. In any event, the Court's judgment is of less relevance for our purposes, considering that "[t]he ICJ can simply be seen as responsive to the language used by the litigants in these proceedings . . . and the parties were largely content for the Court to proceed on the basis of objective reasonableness." *See* Stephen R. Tully, *'Objective Reasonableness' as a Standard for International Judicial Review*, 6 J. INT'L DISPUTE SETTLEMENT 546, 565 (2015).

[182] Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. Rep. 176, 212 (Aug. 27) (emphasis added).

[183] *See generally supra* Parts II. D. and III. A.

[184] *Cf.* Certain Questions of Mutual Assistance in Criminal Matters, *supra* note 178, at 281-82 (declaration of Judge Keith). *See also* Whaling in the Antarctic, *supra* note 181, at 330-31 (dissenting opinion of Judge Abraham).

Furthermore, an argument can be made that the rules concerning humanitarian assistance were formulated with an inherent balance between humanitarian considerations and imperatives of military necessity. As one commentator contended, the "discretionary provisions" in Article 70 to AP I "should not be confused with a negation of a clear obligation. On the contrary, they are essential concessions to military necessity, without which the duty to allow free passage would be out of touch with the demands of armed conflicts. . . . The result is a common-sense balancing of these conflicting interests, establishing clear but workable obligations."[185]

Applying this argument more concretely, the determination of a technical arrangement's legality will be done by weighing the effect on the civilian population against the effectiveness and importance of the purpose served by the technical arrangement. If the adverse effects on the civilian population cannot be justified by the purpose served by the technical arrangement, then the technical arrangement would be unlawful. Note that said adverse effect can only be that affecting the survival of the civilian population. Any effect that is lesser than that is *a priori* not prohibited or taken into account, as it is outside the scope of protected humanitarian assistance.[186]

Acknowledging that the rules concerning humanitarian assistance were formulated with an inherent balance between humanitarian considerations and imperatives of military necessity, when will the purpose served by the technical arrangement justify the adverse effects on the civilian population? Surprisingly, many sources fail to provide any meaningful insight on this question.[187] Three primary options exist. First, one could claim that any adverse effect on the civilian population (i.e. endangering their survival) automatically renders any technical arrangements unlawful. This would seemingly be the position of those speculating that withholding consent to humanitarian assistance actually

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[185] René Provost, *Starvation as a Weapon: Legal Implications of the United Nations Food Blockade Against Iraq and Kuwait*, 30 COLUM. J. TRANSNAT'L L. 577, 635 (1992).

[186] *See supra* Part II. B.

[187] *See, e.g.*, Spieker, *supra* note 10, at 16 (stating that "if the survival of the civilian population is threatened, the authorities responsible cannot withhold their consent without good grounds." Note that this assertion is essentially tautological, since the survival of the population is a prerequisite for the assistance to be considered humanitarian, and the 'good reasons' are a prerequisite for the technical arrangements to be lawfully prescribed); Akande & Gillard, *supra* note 15, at 498-499 (mentioning on the one hand the three stages of the proportionality assessment, yet exemplify their applicability by demonstrating just the "first" and "second" stages).

required for the survival of the civilian population is under no circumstances justified.[188] Second (and alternatively), one could claim that all technical arrangements addressing a legitimate concern in a rational and least intrusive manner (i.e., those conforming to the prohibition of an abuse of rights) are legitimate and lawful even if adversely affecting the civilian population. It seems those who believe any legitimate reason can justify preventing the transfer of humanitarian assistance[189] would adhere to that position. Those adhering to this position could find further support in the traditional understanding that violating the prohibition to starve the civilian population requires actual intent to achieve that purpose as opposed to the starvation being the mere outcome of any limitation.[190] Finally, the third option is undertaking a balancing exercise similar to that of the proportionality rule, which is part of LOAC's targeting regime and only applies to "attacks."[191] In such an exercise, the technical arrangement prescribed would not be lawful if its effects on the survival of the civilian population are excessive in relation to the military purpose underlying it. This may be the position held by the United States, based on its assertion that military action intended to starve enemy forces is subject to a proportionality rule.[192]

Which of the three options is most desirable? This article asserts that the rules should be interpreted as requiring a balancing exercise of the sort stipulated by the third option—i.e. an excessiveness test—because the legal rules governing the transfer of humanitarian assistance specifically provide military commanders with the discretion to *balance* between military necessity and humanitarian considerations.[193] This does not mean, however, that "proportionality" is the correct label for such an exercise, even if the two are alike. In the context of LOAC, "proportionality" is a term of art that only exists in the specific case of attacks, and states have not established it as an overarching principle in any other context.[194] For this reason, the position of the United States,

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[188] *See supra* note 74.
[189] *See supra* note 73 and accompanying text.
[190] *See* Allen, *supra* note 28, at 52, 62.
[191] Article 57(2)(a)(iii) of Additional Protocol I is reflective of the requirements of customary international law in this regard. *See* AP I, *supra* note 21, art. 57(2)(a)(iii).
[192] *See* LAW OF WAR MANUAL, *supra* note 52, para. 5.20.2.
[193] *See also* Corn, *supra* note 136.
[194] A possible exception in this regard is alluded to in the context of naval blockades. *See San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, INT'L COMM. RED CROSS, 12 June 1994, https://ihl-databases.icrc.org/ihl/INTRO/560?OpenDocument (last visited Mar. 26, 2019). However, the customary status of this novel assertion is the subject of considerable

which refers to proportionality in the context of "military action intended to starve" (arguably, even beyond attacks) is not without difficulties. It is based on a previously written legal opinion addressing a completely different subject, [195] and, more importantly, it is not supported by meaningful state practice or *opinio juris* other than that of the United States itself.[196] Nevertheless, as explained above, an excessiveness test, rather than a "proportionality" test, seems to be better suited to the unique context of technical arrangements due to the specific balancing discretion that commanders are required to exercise.

In concluding this part of our analysis, we have seen that a belligerent party's discretion in prescribing technical arrangements is not unfettered, even if these are prescribed on the basis of legitimate considerations. The prescription of technical arrangements may not be done in a manner that amounts to *an abuse of right*, in that it has to have a reasonable relationship between the stated objectives and the means used; and cannot be prescribed by the belligerent side if less cumbersome arrangements can achieve the same objective. Moreover, the specific rules governing humanitarian assistance require the belligerent sides, in exercising the discretion provided to them by law, to balance humanitarian concerns and military considerations.

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disagreement because it does not appear to be based on a sufficient amount of actual state practice and *opinio juris*. The Israeli Supreme Court has also applied the proportionality principle to other contexts seemingly related to the application of LOAC (*see, e.g.*, HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel, 58(5) PD 807 (2004) (Isr.)), although it is unclear whether it was applied as an international law principle or rather is part of the Israeli constitutional legal system.

[195] Fred Buzhardt, *DoD General Counsel, Letter to Chairman Fulbright, Senate Committee on Foreign Relations, Apr. 5, 1971*, 10 INT'L LEGAL MATERIALS 1300 (1971) (an opinion given on the issue of using 'Agent Orange' against crops in Vietnam).

[196] For example, the British Manual contains no provisions on the matter of proportionality regarding humanitarian assistance. *See* UK MANUAL, *supra* note 48, ¶ 9.12-9.12.3. Israel has maintained that it is monitoring the humanitarian situation in the Gaza Strip to ensure it does not go below a minimal humanitarian necessity, but has never professed its opinion with regards to a situation where limitations would actually endanger the survival of the civilian population. *See* TURKEL, *supra* note 128, at 98-99; Al-Bassiouni Case, *supra* note 24, ¶ 3; THE ISRAELI GAZA REPORT, *supra* note 125, at 374-75.

V. The Practical and Theoretical Importance of Technical Arrangements

Unlike the academic attention given to the subject of humanitarian assistance, focused mainly on the binary concept of granting or withholding consent,[197] practitioners such as U.N. bodies or humanitarian activists have given somewhat more attention to the issue of measures imposed on an otherwise approved humanitarian consignment, i.e. technical arrangements. For example, belligerent parties are often criticized by practitioners, not for outright denial of consent for humanitarian assistance, but rather for cumbersome technical arrangements (and other constraints) limiting the ability to supply humanitarian assistance or rendering it ineffective altogether.[198] Recently, the U.N. Secretary General has indicated that 'bureaucratic impediments' are being used to effectively prevent humanitarian assistance from reaching the civilian population, in lieu of clear denial of consent.[199] When dealing with the conflict in Syria, the U.N. Security Council has criticized the sides to the conflict for "the persistence of conditions" hampering the delivery of humanitarian assistance,[200] and went on to directly deal with what seems like technical arrangements—namely, determining the specific border-crossings humanitarian assistance can be delivered through.[201]

Some practitioners have noted the importance of finding the middle-ground by constructing measures concerning control of access and delivery of humanitarian assistance, meant to satisfy some concerns the belligerent party might have while still allowing the transfer of humanitarian assistance.[202] Similarly, practical guidance documents meant for humanitarians operating on the ground include significantly detailed matrices aimed at providing guidance for dealing with possible conditions imposed upon the transfer of humanitarian assistance. One

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197 *See supra* notes 11-16 and accompanying text. *See also supra* Part II. B.

198 *See, e.g.*, OXFORD GUIDANCE, *supra* note 16, at 2; Barber, *supra* note 40, at 377-81.

199 U.N. Secretary-General, *supra* note 123, ¶ 47.

200 S.C. Res. 2165, Preamble (July 14, 2014) ("*Deeply disturbed* by the continued, arbitrary and unjustified withholding of consent to relief operations and the persistence of conditions that impede the delivery of humanitarian supplies to destinations within Syria.").

201 *Id.* at ¶ 2.

202 *See* Peter Maurer, *Humanitarian Diplomacy and Principled Humanitarian Action, 97* INT'L REV. RED CROSS 445, 449 (2016); Soledad Herrero, *Negotiationg Humanitarian Access: Between a Rock and a Hard Place*, PHAP 5-8 (Feb. 11, 2014), https://phap.org/articles/negotiating-humanitarian-access-between-rock-and-hard-place.

example can be seen in the *Practitioners' Manual* published by the Swiss Government discussing potential compromises regarding measures of control imposed by belligerents, and attempts to provide guidance as to dealing with possible contradictions in humanitarian principles.[203] United Nations Office for the Coordination of Humanitarian Affairs, a leading U.N. agency dealing with humanitarian assistance, has published a document meant to assist in identifying and evaluating, amongst others, measures of control and technical arrangements imposed by the belligerents on humanitarian assistance operations.[204] Similarly, the Centre for Humanitarian Dialogue has published a practical handbook for humanitarian negotiations, in which it demonstrates how understanding the belligerent party's interest can assist in achieving an agreement which includes some technical arrangements while still achieving the desired humanitarian outcome.[205]

Practitioners' increased attention to the issue of technical arrangements can be quite simply explained. In practice, the field of humanitarian assistance to the civilian population is one of negotiations, rather than invocation of clear-cut legal rules indicating a single lawful outcome.[206] From the humanitarian organizations' perspective, reaching the intended result of delivering the humanitarian assistance to those in need might require an active engagement with the armed forces aimed at alleviating some legitimate concerns those forces might have, thus removing objections and obstacles which could otherwise prevent the safe delivery of humanitarian assistance altogether.[207] From the belligerent parties' perspective, there could be serious benefits from the delivery of humanitarian assistance to the other side's civilian population, whether it is due to genuine concern for innocent lives, because of a strategic desire to decrease possible hostility within the civilian population, or possibly reduce objections and criticism toward the

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[203] HUMANITARIAN ACCESS MANUAL, *supra* note 121, at 12-13, 20, 24, 65-76, 88-109.

[204] *OCHA Access Monitoring & Reporting Framework*, HUMANITARIANRESPONSE.INFO, https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/OCHA_Access_Monitoring_and_Reporting_Framework_OCHA_revised_May2012.pdf (last visited June 6, 2019).

[205] DEBORAH MANCINI-GRIFFOLI & ANDRE PICOT, HUMANITARIAN NEGOTIATION: A HANDBOOK FOR SECURING ACCESS, ASSISTANCE AND PROTECTION FOR CIVILIANS IN ARMED CONFLICT 61-68 (2004). *See also id.* at 23-28.

[206] *See* Akande & Gillard, *supra* note 13, at 132-133; Gillard, *supra* note 85, at 354; Herrero, *supra* note 202, at 1.

[207] *See* AP COMMENTARY, *supra* note 32, at 1480.

actual fighting.[208] Yet the belligerent parties will not necessarily agree to relinquish their crucial military interests for that purpose. Therefore, it is to be expected that practitioners actually needing to engage in negotiating the delivery of humanitarian assistance during armed conflict will grant more attention to the issue of technical arrangements, since it is a tool capable of a more nuanced approach to the issue of humanitarian assistance.

Assume the following simple scenario: a humanitarian organization wants to transfer a certain humanitarian consignment through a route which interferes with a belligerent party's maneuvering plans. In a theoretical world with no technical arrangements, both sides are faced with an impossible choice—either allow the humanitarian consignment to pass, thus potentially hampering the military operations; or deny the humanitarian consignment's transfer, thus preventing it from reaching the suffering civilian population. The same logic would apply to seemingly more complex examples. Assume a consignment of foodstuff is meant to be delivered to the starving civilian population, yet the belligerent party suspects some of it is actually meant for the other belligerents rather than their civilian population. One scholar suggested such a consignment should still be viewed as humanitarian even though part of it is meant for military use.[209] Such a position would adversely affect the belligerent's ability to starve the members of the other side's armed forces, which is a legitimate military tactic under contemporary LOAC rules.[210] The *DoD Manual* suggests that the belligerent side apply a proportionality test in order to make the determination concerning the 'mixed' consignment.[211] Another scholar has suggested there is no bright-line rule on the matter.[212]

Though not necessarily capable of completely solving the problem, technical arrangements can be prescribed in such a situation in order to attempt a better solution encompassing consideration for both the

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[208] *See* Herrero, *supra* note 202, at 3; JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 8 (June 2015); JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 105 (2007).

[209] Yoram Dinstein, *The Right to Humanitarian Assistance*, 53 NAVAL WAR C. REV. 77, 81 (2000).

[210] Whereas intentionally starving the civilian population is prohibited, no such limitation exist vis-à-vis combatants. *See* LAW OF WAR MANUAL, *supra* note 52, para. 5.20.1; AP I, *supra* note 21, art. 54(3). *See also supra* note 51-54 and accompanying text.

[211] LAW OF WAR MANUAL, *supra* note 52, para. 5.20.2.

[212] Ryngaert, *supra* note 51, at 9-10.

population's legitimate need and the belligerent party's legitimate interest in preventing foodstuff from the other side's fighting forces. For example, the belligerent party could prescribe conditions aimed at monitoring the actual destination of the food, or impose searches meant to ensure only the quantities required for the civilian population are actually transferred. Depending on the specific facts at hand, such technical arrangements may have potential in addressing the belligerent party's concerns, thus allowing the entry of foodstuff for the other side's civilians while preventing it from being used for non-humanitarian purposes.

Technical arrangements are, therefore, a tool through which a more nuanced solution to practical problems concerning humanitarian assistance can be achieved. Before invoking a certain concern or interest supposedly justifying complete denial of humanitarian assistance, a belligerent party is logically and practically required to examine its ability to address those concerns with prescribed technical arrangements, thus possibly finding the "golden trail"—allowing the humanitarian assistance to pass through while properly addressing other concerns. Understanding the legal issues pertaining to technical arrangements can assist in finding that "golden trail," and in that sense provide better legal guidance in applying the rules of humanitarian assistance supplementing the lack of practical guidance in the black letter rules.[213]

This practical understanding coincides with a basic legal concept previously discussed—if the same legitimate concern can be addressed by a less drastic measure, the more drastic measure can be considered unlawful.[214] In the context of humanitarian assistance, a belligerent party might have legitimate considerations and concerns regarding a certain request for the delivery of humanitarian assistance, but if those can be addressed by technical arrangements prescribed for the delivery, the belligerent party cannot invoke those concerns as a reason for withholding consent.[215] On the other hand, if those delivering the humanitarian consignment refuse to accept properly prescribed technical arrangements, this can be invoked to justify a

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[213] *See* Guy B. Roberts, *The New Rules of Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 150-55 (1985) (criticizing the lack of guidance in article 70 AP I for commanders operating in the field).

[214] *See supra* notes 184-186 and accompanying text.

[215] *See* OXFORD GUIDANCE, *supra* note 16, at 24; GC IV COMMENTARY, *supra* note 11, at 182.

refusal to allow the transfer of humanitarian assistance. In other words, more compatible with previous academic research on the subject, withholding consent due to a concern which can otherwise be addressed by prescribing technical arrangements will be regarded as arbitrary and therefore unlawful withholding of consent. Conversely, withholding consent due to a refusal to abide by the properly prescribed technical arrangements, by any of the interested parties, cannot be considered arbitrary or unlawful.

It therefore follows that the issue of technical arrangements assist in clarifying the concept of arbitrary withholding of consent which has been an epicenter of disagreement.[216] It is clear, on the one hand, that not all seemingly legitimate concerns can automatically justify outright refusal of consent,[217] since some might be fully addressed by technical arrangements and therefore cannot justify complete withholding without first prescribing technical arrangements. On the other hand, it is clear that reasons for (non-arbitrary) withholding of consent can be invoked even if the civilian population is indeed in dire need,[218] since it is obviously legitimate to withhold consent if the other actors refuses to follow the technical arrangements legitimately prescribed in accordance with the framework set forth in this article. Similarly, since technical arrangements can be prescribed for humanitarian assistance delivered to the population of an occupied territory, [219] understanding the legal framework governing technical arrangements can assist in understanding the occupier's actual prerogatives concerning the delivery of humanitarian assistance. If an occupying power has the ability to prescribe technical arrangements, followed—as stipulated above—by the right to withhold consent if the technical arrangements are not followed, then the assertion that the occupier's obligation is 'unconditional'[220] seems unfounded. In other words, the occupier's position is theoretically not different than that of a belligerent party in an IAC or a NIAC. A belligerent party in each of those frameworks is similarly allowed to address certain concerns using technical arrangements, and is therefore justified in refusing consent if the deliverers of the humanitarian assistance refuse to abide by their lawfully prescribed conditions.[221]

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[216] *See supra* Part II. C.
[217] *Cf. supra* note 73 and accompanying text.
[218] *Cf. supra* note 74 and accompanying text.
[219] *See supra* notes 84-88 and accompanying text.
[220] *Cf. supra* notes 39-40 and accompanying text.
[221] Note that unlike the belligerent parties in an IAC or a NIAC, the occupying power is actually obligated to find other ways of supplying the population in need if it refuses to

The nuanced nature of technical arrangements can also serve to better understand and resolve other conundrums in the realm of humanitarian assistance. The interplay between military necessity and humanitarian assistance, which initially seems a point of disagreement between scholars, can be better understood when examined through the prism of technical arrangements. As shown above,[222] military necessity cannot justify arrangements aimed at gaining an advantage, but can justify certain qualifications aimed at preventing the hampering of military operations. Given this conclusion, combined with the notion that consent can be withheld when technical arrangements are not followed, it seems both the statements asserting that military necessity is irrelevant to the issue of consent, as well as those elevating it to a principle justifying refusals for consent altogether, are similarly inaccurate.

The legal balancing standard between possibly conflicting humanitarian concerns and the belligerent party's concern is also better understood when examined through the technical arrangements prism. As has been demonstrated above,[223] the use of a legal tool allowing a variety of means to deal with certain concerns (i.e., technical arrangements), allows for a better understanding of the application of a proportionality and necessity based balancing act, in a way that allows the understanding of proportionality not simply as a binary "go/no-go" concept, but as a more nuanced guidance requiring the consideration of the rational relationship. The relationship is between the means (i.e. the technical arrangements) and the ends (i.e. the legitimate considerations) as well as selecting the least intrusive measure to achieve that end. Trying to apply the more subtle balancing act proposed in this article to the binary concept of arbitrary withholding of consent seems less effective, since when faced with a binary option (refuse or allow the passing of the consignment), one cannot practically consider a less intrusive measure of securing her legitimate interests.

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grant consent to humanitarian assistance, due to its obligations toward the population as an occupier. *See* DIETER FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 270 (2nd ed. 2009). This legal obligation, which is undeniable, might have been the cause of some commentators viewing the issue of humanitarian assistance in occupation as different from that in other kinds of armed conflicts.

222 *See supra* Part III. C.

223 *See supra* Part IV.

Furthermore, the idea that the belligerent parties concerned might also include belligerent parties which are not effectively controlling an area through which the humanitarian assistance is meant to transfer[224] seems less controversial when considering the nuanced framework of technical arrangements. On the one hand, it is clear that a belligerent party conducting military operations in a certain territory might have legitimate concerns which should be addressed with technical arrangements, such as prescribing an alternate route to avoid the obstruction of military operations, or preventing non-humanitarian goods from arriving to the other belligerent party. On the other hand, some issues might be less of a concern for a belligerent party if the said consignment is not meant to pass through its territory. If defining that belligerent party as "concerned" is understood primarily as allowing it to prescribe technical arrangements, which are more nuanced than the binary concept of consent, it seems easier to accept that this concerned party might also be the party conducting operations in a theater, not only the party through which a consignment is meant to transfer.

Finally, it is pertinent to note that the proper location of the technical arrangements within both the practical and the theoretical analysis of the issue of humanitarian assistance is different than the location traditionally assigned.[225] The prescription of technical arrangements has the practical ability of finding the "golden trail" mentioned above, thus rendering the absolute denial of humanitarian assistance irrelevant in some cases. It also has the ability to further the debate in concrete situations regarding the arbitrariness of decisions to deny consent. It therefore logically follows that the process of considering and prescribing technical arrangements as detailed in this article must *precede* the considerations regarding the consent. In other words, a belligerent party receiving a request for the delivery of humanitarian assistance to the civilian population of the other side to the conflict, after determining that the assistance is indeed humanitarian,[226] is required to consider the issue of technical arrangements *before* addressing the issue of granting or denying consent. It is practically beneficial since it can nullify the need to deal with possible denial, as well as theoretically correct since the proper prescription of technical arrangements is crucial to analyzing the question of consent.

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[224] *See supra* notes 80-82 and accompanying text.
[225] *See supra* note 36 and accompanying text.
[226] *See supra* Part II. B.

VI. Conclusion

This article set out to achieve two interrelated goals. First, this article has systematically analyzed the issue of a belligerent party's ability to prescribe technical arrangements for the transfer of humanitarian assistance to the other side's civilian population, during armed conflict. Next, Part II has outlined the general legal framework applicable to the delivery of humanitarian assistance in LOAC, noting the preliminary conditions defining "humanitarian assistance"—assistance that is aimed at providing those goods and services needed for the survival of the population, delivered in an impartial manner. This article then examined the current discussion regarding a belligerent side's discretion to withhold consent to such assistance, demonstrating both the agreed concepts (i.e. that consent cannot be withheld arbitrarily) and the standing disagreements (i.e. what constitutes an arbitrary withholding of consent). The final subpart outlined the basic legal framework of the issue of technical arrangements, as preparation for the more detailed analysis that followed. Part III was dedicated to mapping the legitimate considerations a belligerent can invoke to justify different technical arrangements prescribed—verifying the humanitarian nature of the assistance; the place of military considerations or "military necessity"; and the protection of the consignments, the intended beneficiaries of the assistance or other relevant actors. Part IV explained the standard for examining the validity of technical arrangements prescribed in accordance with legitimate considerations, by balancing them against the humanitarian consideration foundational to the issue of humanitarian assistance. It was first emphasized that the belligerent party's authority to prescribe technical arrangements must be rationally connected to the legitimate purpose they seek to achieve, as well as not exceeding what is required to attain that particular purpose. This part concluded with a discussion about the applicability of the strict-sense proportionality principle (i.e. balancing the effect on the civilian population with the benefit the belligerent party incurs from an otherwise properly prescribed technical arrangement) to the issue of technical arrangements. Thus, Parts II-IV lay down a detailed account of the legal issues pertaining to the prescription of technical arrangements, hoping to provide some previously lacking legal guidance on the matter.

Second, by utilizing the detailed account of the legal issues pertaining to the prescription of technical arrangements, this analysis

has demonstrated that examining the issues regarding humanitarian assistance in LOAC through the prism of technical arrangements can contribute to a better understanding of the issue of humanitarian assistance as a whole. Thus, Part V was not only dedicated to show the practical importance of a more substantive legal account of technical arrangements, but also sought to emphasize how such an account assists in solving or narrowing down some standing theoretical issues. By referring to previous analyses made in this article, Part V demonstrated how technical arrangements allow a more nuanced approach to issues relating to humanitarian assistance, thus allowing a better understanding of legal issues, such as the place of military necessity; the proper balancing standard between competing humanitarian and other interests; the definition of the parties "concerned" who have the authority to prescribe technical arrangements; and, most importantly, the issue of arbitrary withholding of consent.

As has been demonstrated throughout this article, both practical and theoretical considerations favor the analysis of the issue of humanitarian assistance through the prism of technical arrangements. Similar to an observation made in a different LOAC context,[227] a binary concept such as the issue of consent and arbitrariness can only serve as a guiding principle in the most extreme cases where, for example, a consignment is clearly not humanitarian or the belligerent clearly has no legitimate concern other than starving the population. Yet, reality is significantly more nuanced; therefore, applying the legal framework relative to humanitarian assistance can be better served by examining and understanding the more nuanced element of the existing legal framework—namely, the issue of technical arrangements. Understanding the issue of technical arrangements can assist in both practically implementing and theoretically understanding the issue of humanitarian assistance in LOAC as a whole. Those "technicalities" are, in other words, an issue of great substantive importance.

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[227] *See* Geoffrey S. Corn, *War, Law, and the Oft Overlooked Value of Process as a Precautionary Measure*, 42 PEPP. L. REV. 419, 422-25, 465-66 (2014).

AUSTRALIA'S WAR CRIMES TRIALS 1945-51[1]

REVIEWED BY FRED L. BORCH III*

This important book deserves to reach a wide audience in our Corps for at least three reasons. First, the legal and policy issues faced by Australian judge advocates in prosecuting war crimes at specially created military courts between 1945 and 1951 are very similar to the issues faced by American military lawyers today when deciding what war-related crimes may be prosecuted at military commissions and what procedures should be used at these trials. Second, the expertly written chapters on command responsibility and obedience to superior orders in *Australia's War Crimes Trials 1945-51* provide useful insights into two areas of the law that continue to vex American military lawyers. Finally, the book is the first comprehensive study of Australia's 300 war crimes trials. Consequently, it is worth reading simply for its unique contribution to legal history.

Between 1945 and 1951, the Australians prosecuted 952 individuals, most of whom were Japanese nationals, at 300 war crimes trials held in eight different geographic locations. These proceedings occurred at special military courts created by the Australian War Crimes Act of 1945. The court panels deciding guilt, and an appropriate sentence if an accused was found guilty, consisted of a minimum of three officers. None of the

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* Fred L. Borch is the Regimental Historian and Archivist for the U.S. Army Judge Advocate General's Corps. He graduated from Davidson College (A.B., 1976), from the University of North Carolina (J.D., 1979), and from the University of Brussels, Belgium (LL.M, *magna cum laude*, International and Comparative Law, 1980). Mr. Borch also has advanced degrees in military law (LL.M, The Judge Advocate General's School, 1988), national security studies (M.A., *highest distinction*, Naval War College, 2001), and history (M.A., Univ. of Virginia, 2007). From 2012 to 2013, he was a Fulbright Scholar to the Netherlands and a Visiting Professor at the University of Leiden's Center for Terrorism and Counterterrorism. He also was a Visiting Researcher at the Netherlands Institute of Military History.

Fred Borch is the author of a number of books and articles on legal and non-legal topics, including JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001); JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA (2004); FOR MILITARY MERIT: RECIPIENTS OF THE PURPLE HEART (2010); MEDALS FOR SOLDIERS AND AIRMEN (2013); and MILITARY TRIALS OF WAR CRIMINALS IN THE NETHERLANDS EAST INDIES (2017).

[1] GEORGINA FITZPATRICK, TIM MCCORMACK, AND NARRELLE MORRIS, AUSTRALIA'S WAR CRIMES TRIALS 1945-1951 (2016).

panel members were required to have any legal training, much less required to be a licensed attorney. A war crimes court panel might have a legally qualified judge advocate assigned to it, to provide legal advice and counsel to the officer members, but the War Crimes Act did not require that the panel receive such legal assistance.[2]

At trial, the prosecutor was usually an Australian attorney (solicitor or barrister) who was a member of the Australian Army Legal Corps (AALC).[3] The defense counsel sometimes were AALC officers but most often were Japanese lawyers, who were at a considerable disadvantage because they were not educated in Anglo-Australian criminal law and procedure and, even if they spoke some English, often worked through interpreters. This language barrier also affected the accused, who rarely could understand English (much less speak the language) and consequently likewise were dependent on interpreters to understand the nature of the proceedings against them. As for the evidence at trial, there was some live testimony (subject to cross examination), but much of the evidence consisted of sworn statements from witnesses or admissions or confessions from the accused.[4] In this regard, the use of sworn affidavits was the norm in all war crimes proceedings conducted by the Allies in the Pacific, if for no other reason than it was not feasible to hold the victim-witnesses for weeks, if not months, before trial proceedings commenced. This was because almost all of these witnesses were men who had been prisoners of war (POW), had been in very poor health at the time of their release from Japanese POW camps, and thus had been quickly repatriated to their homes in 1945.

Australia's War Crimes Trials consists of three parts. Part I consists of essays that explain why Australia established special military courts to prosecute the mostly Japanese combatants who had violated the laws and usages of war. This section also includes essays about various legal issues in the trials, including jurisdiction, command responsibility, obedience to superior orders and related defenses, and the imposition of death sentences.[5] Part II examines war crimes trials by geographic location of the tribunals, and consequently there are eight chapters in this section—

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[2] *Id*. at 810-15.

[3] While the United States has a unified bar, Australia—like the United Kingdom—has a bifurcated bar, with solicitors engaged in the practice of law except for court appearances, which are handled exclusively by barristers.

[4] FITZPATRICK, MCCORMACK, & MORRIS, *supra* note 1, at 800-01.

[5] *Id*. at 5-372.

one for each court location.[6] Part III is devoted to post-trial issues, including a discussion of the repatriation of convicted Japanese war criminals in Australian custody back to Tokyo to serve the remainder of their sentences and a wrap-up essay by the authors evaluating the fairness of Australia's war crimes proceedings.[7] There also are four appendices, nine maps, and more than fifty photographs, many of which are of Japanese accused. All add value to the book by providing a context for understanding the trial proceedings.

Judge advocates will be especially interested in how the Australian military legal authorities handled command responsibility in trials involving Japanese commanders. Where the evidence was that a Japanese commander had *ordered* his subordinates to violate the laws of war, liability was clear. Consequently, when Rear Admiral Okada Tametsugu was tried at Rabul for ordering the execution of five Australian POWs, the court found him guilty given that he had a "guilty mind" and the unlawful killings were the result of his "voluntary act."[8]

On the issue of criminal liability for war crimes committed by subordinates, however, Australian judge advocates recognized that the law was unsettled at the time. Ultimately, the Australians adopted the view that actual knowledge was not required for command responsibility for war crimes committed by subordinates when the accused "was so willfully and culpably negligent in his duties that he did not care whether or not any offense was committed in his command."[9] In this regard, the Australians very much looked to the American military commission results in *In re Yamashita* [10]as "authoritative precedent," with the essential elements for command responsibility being the commander's mens rea and his breach of command duties using a due diligence standard.[11] Due diligence was interpreted to mean that a "commander must use due diligence to foresee the possibility of crimes being committed within his command, or to take

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[6] *Id*. at 373-688.
[7] *Id*. at 689-809.
[8] *Id*. at 61.
[9] *Id*. at 151.
[10] In re Yamashita, 327 U.S. 1 (1946). For more on the Yamashita case, *see* GARY D. SOLIS, THE LAW OF ARMED CONFLICT 442-47 (2d ed. 2016). *See also*, PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL 49-62 (1979); YUMA TOTANI, JUSTICE IN ASIA AND THE PACIFIC REGION 1945-1952 at 21-40 (2015); ALLAN A. RYAN, YAMASHITA'S GHOST: WAR CRIMES, MACARTHUR'S JUSTICE, AND COMMAND RESPONSIBILITY (2012). Note that *Yamashita's* "must have known" standard is today expressed as a "should have known" test for command responsibility.
[11] FITZPATRICK, MCCORMACK, & MORRIS, *supra* note 1, at 172-73.

such action as within his power, having regard to all the circumstances, to prevent those crimes being committed."[12] Using this test, General Adachi Hatazō was convicted for the ill-treatment of Indian, Australian, and American prisoners of war by his subordinates (including mutilation and cannibalism) because the "volume and character of the crimes committed in his command area" was so significant that Adachi "could not have been otherwise than aware" and "should have had knowledge of the crimes."[13]

Judge advocates and others familiar with military commissions will also be interested in how the Australians dealt with the admissibility of evidence. At the American war crimes trials held in Europe and the Pacific, any evidence having probative value to a reasonable person was admissible, and this is the same standard for admissibility at the ongoing military trials at Guantanamo Bay.[14] The Australians adopted the same basic standard for admissibility in Section 9(1) of their War Crimes Act. This provision stated that:

> At any hearing before a military court the court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the court to be of assistance in proving or disproving the charge, notwithstanding that the statement or document would not be admissible in evidence before a field general court martial.

While some commentators[15] have criticized this evidentiary standard—chiefly because the accused were denied the ability to confront their accusers through cross-examination—the fact is that there was nothing inherently unreliable about any of the statements, even though most of them corroborated each other. Additionally, in virtually every case tried by the Australians, the identity of the accused was not in question, and the accused usually claimed superior orders as a defense. Therefore, it was reasonable to use these sworn statements as evidence. In

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[12] *Id*. at 154.

[13] *Id.* at 149. General Adachi committed suicide (hanged himself) after being convicted of war crimes. *Id*. at 556.

[14] MANUAL FOR MILITARY COMMISSIONS, UNITED STATES, 2010. Military Commission Rule of Evidence 402: "All evidence having probative value to a reasonable person is admissible . . . evidence that does not have probative value to a reasonable person is not admissible." *Id.*

[15] FITZPATRICK, MCCORMACK, & MORRIS, *supra* note 1, at 198.

any event, given the shortages of aircraft for transportation of personnel in the immediate aftermath of the war, and the generally poor health of ex-prisoners of war, it was simply not feasible to transport these men to testify at the eight locations where the Australian trials were held. After all, some of these men were Dutch citizens and had returned to the Netherlands; some were Americans and had been repatriated to the United States. That said, there were some exceptions: victims did appear as witnesses in trials involving the so-called Sandakan-Ranau death marches across Borneo. One of the six survivors—Warrant Officer William Sticpewich—appeared at three trials at Labuan. He and two other survivors—Private Keith Botterill and Corporal William Moxham—testified in person at the Rabul trial of Captain Yamamoto Shoichi and ten others in May 1946.[16] Other examples include the appearance of a Dutch prisoner of war, Staff Sergeant Fredrik Waaldijk, at the only trial held in Ambon. He was available to give testimony under oath because he had remained on Ambon after his liberation from a Japanese POW camp—because he was married to a local Indonesian woman and Ambon was now his home.[17] But these were rare exceptions and the use of sworn affidavits was the rule in the proceedings.

The 300 war crimes trial proceedings examined in Part II are discussed by location rather than by subject matter. As a matter of policy, the Australians selected locations for their criminal trials based on the proximity of the location to the war crimes committed.[18] This makes perfect sense, but since similar offenses were prosecuted in more than one location, it might have been better to structure this section of the book by offense subject matter rather than location. In any event, the reader looking for information about unlawful killings of prisoners of war or mistreatment of civilians will not find it in one section or chapter. For example, the chapter detailing the twenty-five trials conducted at Morotai, one of the Molucca Islands that were part of the Netherlands East Indies in 1945, contains details on the execution of downed and captured Australian airmen. But so too does the chapter on the twenty-three Australian-run trials conducted in Singapore, many of which involved ill-treatment of prisoners of war working on the Burma-Thailand Railway.[19] Likewise, the section on the sixteen trials held on Labaun also contains

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[16] FITZPATRICK, MCCORMACK, & MORRIS, *supra* note 1, at 443-46.
[17] *Id*. at 386.
[18] Trials were held at Morotai, Wewak, Labuan, Darwin, Rabaul, Singapore, Hong Kong, and Manus Island. FITZPATRICK, MCCORMACK, & MORRIS, *supra* note 1, at xxxix.
[19] FITZPATRICK, MCCORMACK, & MORRIS, *supra* note 1, at 576-581.

information on POW killings, in this case Formosan camp guards who were prosecuted for the massacre of thirty-three POWs.[20]

The only exception to the text's discussion of crime by location is that *Australia's War Crimes Trials 1945-1951* does have stand-alone essays on crimes committed by the Japanese against captured airmen and cannibalism. It was not unusual for the Japanese to decapitate captured Allied airmen in ritual beheading ceremonies and, while this was bad enough, claims that the Japanese had eaten portions of Australian and Allied captives caused a tremendous uproar when reported in the Australian press in World War II. The gruesome and controversial nature of this crime no doubt explains why the editors included an essay on it, including the story of a captured fighter pilot who was decapitated, his flesh cut into pieces, and who was then fried and served to about 150 Japanese army personnel.[21] There also is a special essay on crimes against Asians in command responsibility trials and one on the use of the death penalty.

Were the war crimes trials conducted by Australia fair? Was justice done? The last essay in the volume answers this question in the affirmative (the trials "generally" were "fair and just"),[22] and this reviewer agrees. This was not 'victor's justice.' On the contrary, the Australians carefully weighed the evidence and did not hesitate to find the accused not guilty. Witness the Australian acquittal rate of 29.31%—higher than any other Allied war crimes trials, which had an overall acquittal rate of 18.9%. Yet another indication of fairness and justice is the fact that 20% of the sentences imposed by the trial courts were reduced or commuted on review, including some death sentences, which were reduced to terms of confinement.[23]

A final note: those who continue to insist that the Australian war crimes trials were unfair and unjust because they had evidentiary standards and procedures that differed from civilian criminal courts simply do not understand the history or the purpose of war crimes courts. These tribunals of extraordinarily narrow subject-matter jurisdiction exist precisely because civilian criminal proceedings are ill-equipped to deal with war crimes and those accused charged with war crimes. Additionally, the

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[20] *Id.* at 429-70, 804.
[21] *Id.* at 313.
[22] *Id*. at 795.
[23] *Id*. at 794-95.

nature of the battlefield and combat—witnesses to crimes are killed, wounded, or simply vanish, and forensic evidence is hard to come by or non-existent—means that rules of evidence and procedure that work in civilian criminal courts are ill-suited for war crimes courts. Consequently, the issue is not whether rules of evidence and procedure used by Australian authorities after World War II were the same as in Australian civilian courts, but whether the war crimes courts provided full and fair trials for the accused. The text shows that the Australians were sincere in their efforts in trying war criminals for horrific offenses, and their efforts were grounded in moral integrity.

Australia's War Crimes Trials 1945-1951 is unique as the only book in print that examines Australia's war crimes prosecution in a comprehensive and systematic manner. While there have been recent books devoted to trials of Class B and Class C war criminals,[24] they are few in number: *Hong Kong's War Crimes Trials* and *Military Trials of War Criminals in the Netherlands East Indies*.[25] But these two books only cover Hong Kong and the Netherlands East Indies, which means that there is—as yet—no *comprehensive* study about war crimes prosecutions conducted by the French in Indo-China, the United States in the Philippines and Guam, the Soviets in Russia, or the Chinese (Communist and Nationalist) in China.[26]

Australia's War Crimes Trials 1945-1951 is first-rate scholarship that deserves to be widely read. But that will not happen because the book is prohibitively expensive; a popular online bookseller lists it for $370 (the discount price from $390 retail). While it is true that the book runs more than 800 pages (plus appendices, endnotes and indices), and is a wealth of

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[24] Class A war criminals were tried at Nuremburg and Tokyo for crimes against peace ("planning, preparation, initiation or waging a war of aggression"). Class B war criminals were prosecuted for conventional war crimes, like the unlawful killing of POWs. SOLIS, *supra* note 10, at 103-04. Class C war criminals were those individuals charged with crimes against humanity. *Id.* These B-C war criminals were prosecuted by each Allied authority at special war crimes courts. *Id.* In the Pacific Theater, the Americans, British, Chinese, Dutch, French, Filipinos, and Russians all convened special tribunals at which these Class B-C accused—chiefly Japanese nationals—were prosecuted. *Id.*

[25] SUZANNAH LINTON, HONG KONG'S WAR CRIMES TRIALS (2013); FRED L. BORCH, MILITARY TRIALS OF WAR CRIMINALS IN THE NETHERLANDS EAST INDIES (2017).

[26] A few books in print, however, provide some details on these trials of B and C war criminals, including: BARAK KUSHNER, MEN TO DEVILS, DEVILS TO MEN: JAPANESE WAR CRIMES AND CHINESE JUSTICE (2015); YUMA TOTANI, JUSTICE IN ASIA AND THE PACIFIC REGION 1945-1952 (2015)

information to be found nowhere else, its price means that it is beyond the means of almost all individuals and most libraries.