TRYING UNLAWFUL COMBATANTS AT GENERAL COURTS-MARTIAL: AMENDING THE UCMJ IN LIGHT OF THE MILITARY COMMISSIONS EXPERIENCE

MAJOR E. JOHN GREGORY*

I. Introduction

On 17 December 2002, one U.S. servicemember drove a Soviet-style jeep in Kabul, Afghanistan while another U.S. servicemember sat in the passenger seat and an Afghan interpreter sat in the back. Suddenly, someone threw a hand grenade into the vehicle, seriously injuring the three occupants.[1] Witnesses identified and Afghan police arrested Mr. Mohammed Jawad, an Afghan present at the time of the attack.[2] No readily apparent clothing, insignia, or markings distinguished Mr. Jawad from other civilians milling about at the time of the attack. Over the next seven years, the United States unsuccessfully sought to try Mr. Jawad by military commission.[3] More broadly, the United States in recent years

---

* Judge Advocate, U.S. Army. Presently assigned as Chief of Military Justice, United States Forces–Iraq, Victory Base Complex, Baghdad, Iraq. LL.M., 2010, The Judge Advocate General's Legal Center & School, Charlottesville, Va.; J.D., 2001, *with highest honors*, University of Florida; B.S., 1995, U.S. Military Academy. Previous assignments include Platoon Leader, A/7-101 Aviation Battalion; Sixth Cavalry Brigade and Area III, Camp Humphreys, Korea (Administrative and Operational Law Attorney, 2001; Trial Counsel, 2001–2002; Senior Trial Counsel, 2002–2004); U.S. Army Trial Defense Service, Fort Lewis, Wash. (Defense Counsel, 2004–2005; Senior Defense Counsel, 2005–2008). Member of the bars of Florida, the Army Court of Criminal Appeals, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the Judge Advocate Officer Graduate Course.

[1] *Afghan Suspect's Gitmo Tribunal to Begin*, CBS NEWS, Mar. 12, 2008, http://www.cbsnews.com/stories/2008/03/12/national/main3928194.shtml?source=related_story.

[2] The facts for this scenario come from the DoD Commissions website, as well as directly from persons familiar with the case. U.S. Dep't of Def. Military Commissions Website, http://www.defenselink.mil/news/ commissions.html [hereinafter DoD Commissions Website] (last visited Dec. 20, 2009). This website contains numerous documents relating to commissions' litigation, including charge sheets, referral documents, motions, responses, and rulings from the commissions' trial judges and appellate judges. Since the time that the author started this article, the U.S. Government has released Mr. Jawad from custody. *See Guantanamo Detainee Released*, N.Y. TIMES, Aug. 25, 2009, at A8.

[3] The recently passed Military Commissions Act of 2009 now provides the statutory basis and procedural rules for the military commissions. *See* Military Commissions Act of 2009, Pub. L. No. 111–84, §§ 1801–07, 123 Stat. 2190 [hereinafter MCA 2009]. The *Jawad* Commission was preferred under the previous statutory regime. *See* Military

has struggled with the prosecution of persons like Mr. Jawad, persons sometimes referred to as "unlawful combatants."[4] Domestically, three potential fora exist to try such persons: federal civilian trials, military commissions, and courts-martial.[5] As for the court-martial option, this article demonstrates that the current framework for jurisdiction over unlawful combatants, in relying on the law of war (LOW), presents substantial impediments to the prosecution of someone like Mr. Jawad. Congress could overcome these shortcomings by making unlawful

---

Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2522 [hereinafter MCA 2006]; *see also* DoD Military Commissions Website, *supra* note 2.

[4] Questions exist whether the term "unlawful combatant" constitutes a proper term under the law of war at all. *See generally* CA 6659/06A & B v. State of Israel [2007] IsrSC, *available at* http: http://elyon1.court.gov.il/ Files_ENG/ 06 /590/066/n04/06066590.n04. pdf. The author uses the term "unlawful combatant" throughout this article to define the class of persons subject to the proposed jurisdictional framework. The recent change from the use of the term "unlawful enemy combatant" in the MCA 2006 to the use of the term "unprivileged enemy belligerent" in the MCA 2009 demonstrates the fungible nature of labels. *Compare* MCA 2006, *supra* note 3, § 948a(1), *with* MCA 2009, *supra* note 3, § 948a(7).

[5] Recent history demonstrates the use of different fora in prosecuting suspected terrorists and unlawful combatants. Prior to the 9/11 Attacks, such prosecutions exclusively followed the so-called Civilian Law Enforcement (CLE) model. *See* Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48 (2009); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1080–82 (2008). Under the CLE model, suspected terrorists are detained by CLE agencies and tried in civilian courts. *See* Chesney & Goldsmith, *supra*, at 1080–82. The prosecution and conviction of those responsible for the 1993 World Trade Center bombing is a well-known example of pre-9/11 Prosecution of Terrorist under the CLE model. *See* Benjamin Weiser, *Two Men Convicted in Bombing at World Trade Center*, N.Y. TIMES, Nov. 16, 1997, at A1. Following the 9/11 attacks, however, the U.S. Government began to emphasize a law of war (LOW) model for detaining and prosecuting suspected terrorists. Despite the shift from the CLE to the LOW model, some prosecutions, such as the well-publicized trial and conviction of Zacarias Moussaoui, continued under the CLE model even after 9/11. *See* Neil A. Lewis, *Last Appearance, and Outburst, from Moussaoui*, N.Y. TIMES, May 5, 2006, at A1; Philip Shenon, *Threats and Responses: The 9/11 Defendant; Early Warnings on Moussaoui Are Detailed*, N.Y. TIMES, Oct. 18, 2002, at A1; *see also* THE OFFICE OF THE PRESIDENT OF THE UNITED STATES, NATIONAL STRATEGY FOR COMBATING TERRORISM 1 (2006) ("We have broken old orthodoxies that once confined our counterterrorism efforts primarily to the criminal justice domain."). At present, it appears that the prosecution of at least some detainees will continue in the military commissions system. William Glaberson, *Vowing More Rights for Accused, Obama Retains Tribunal System*, N.Y. TIMES, May 16, 2009, at A1. While no unlawful combatant has ever been court-martialed, some have suggested using courts-martial as an alternative to military commissions under the LOW model. For example, on 4 March 2009, a resolution was introduced in Congress that would mandate trial of detainees by district court or court-martial. *See* Terrorist Detainee Procedures Act of 2009, H.R. 1315, 111th Cong. (1st Sess. 2009).

combatants expressly subject to the Uniform Code of Military Justice (UCMJ) under Article 2, UCMJ.[6]

This article narrowly focuses on court-martial jurisdiction over someone like Mr. Jawad, a classic "battlefield detainee," detained for hostile acts committed on or near the field of battle against U.S. or coalition forces. By contrast, it does not address court-martial jurisdiction over persons who provide support to terrorism or whose actions are more remote than the direct participation in hostilities standard.[7] For example, the proposal suggested in this article would likely not pertain to the defendant in the well-known *Hamdan* decision because his actions appear too remote.[8] Further, this article focuses on the technical improvement of one aspect of jurisdiction already extant under the UCMJ, not the expansion of jurisdiction. It does not propose a replacement for military commissions or civilian trials and retains a neutral position on the wisdom of using courts-martial, civilian trials, or military commissions to try unlawful combatants.

To demonstrate the value of amending Article 2 to include unlawful combatants, this article first relies on the LOW to examine the current framework for court-martial jurisdiction over unlawful combatants. Next, this article reveals the superfluous nature of the current requirement for practitioners before courts-martial convened under the current Clause 2 to make a finding under the LOW to establish *in personam jurisdiction*,[9] an analysis that is mandated by neither the LOW nor the Constitution. Third, this article applies lessons from *Jawad* and *Hamdan*, two recent military commissions cases, one of which reached the Supreme Court. These cases reveal the impediments to achieving court-martial subject matter jurisdiction over unlawful combatants. Primarily, these difficulties arise from the distinction between general

---

[6] Except where otherwise stated, all references to the *Manual for Courts-Martial* (*MCM*) and the Uniform Code of Military Justice (UCMJ) are to the *MCM, United States* (2008). *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008) [hereinafter MCM].

[7] As demonstrated in Part V.C, "direct participation in hositilities," as used in this article, is a term of art. *See infra* Part V.C.

[8] In addition to conspiracy, Mr. Hamdan was charged with four "overt acts," none of which would meet the "direct participation in hostilities" test suggested in Part V.C. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 570 (2006).

[9] *Black's Law Dictionary* defines "jurisdiction in personam" as "[p]ower which a court has over the defendant's person and which is required before a court can enter a personal or in personam judgment" and "subject matter jurisdiction" as "[p]ower of a particular court to hear the type of case that is then before it." BLACK'S LAW DICTIONARY 854 (6th ed. 1990).

criminal activity and LOW violations. Finally, this article provides a narrow definition for the term "unlawful combatant" under the UCMJ, which focuses on an accused's direct participation in hostilities.

The appendices to this article compare the *Jawad* facts under the different fora and jurisdictional frameworks, discussed. While Appendix A provides the relevant charges from the *Jawad* Commission, Appendix B offers hypothetical court-martial charges based on *Jawad's* same factual scenario, but under the current framework for court-martial jurisdiction. After providing language to amend the *Manual for Courts Martial* (MCM) to implement the proposed jurisdictional framework, Appendix C articulates new charges under the proposed jurisdictional framework.

II. Identifying and Addressing Shortcomings in the Current Jurisdictional Framework

A. Current Framework for Jurisdiction over Unlawful Combatants

On its face, Article 18, UCMJ, already provides a wide grant of jurisdiction to try persons who violate the LOW by general court-martial. This article does not propose to narrow or expand this jurisdiction, but rather to clarify it and facilitate its use. There are two clauses contained in Article 18, referred to throughout this article as "Clause 1" and "Clause 2": "[Clause 1] [G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter . . . . [Clause 2] General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."[10] Clause 1 derives its meaning from Article 2, UCMJ, which defines "persons subject to this chapter." Cases charged under Clause 1

[10] UCMJ art. 18 (2008). Various provisions of the *MCM* support Clause 2. For instance, Rule for Courts-Martial (RCM) 202(b) states that "Nothing in this rule limits the power of general courts-martial to try persons under the law of war." Likewise, RCM 201(f)(1)(B) provides that general courts-martial may try cases under the law of war for offenses which are (1) against the law of war or (2) against the law of an occupied territory. MCM, *supra* note 6, R.C.M. 201, 202. Current policy calls for unlawful combatants to be tried by military commission, not court-martial. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, LAW OF LAND WARFARE app. A-5, para. 13 (18 July 1956) (C1, 14 July 1956) [hereinafter FM 27-10]. Even with the changes proposed in this article, the Army would have to change this policy in order to try unlawful combatants by court-martial.

rely on the punitive articles of the UCMJ[11] as well as federal and state offenses under Article 134.[12] Article 2 does not currently define unlawful combatants as "persons subject" to the UCMJ.[13]

Whereas Clause 1 relies on those persons subject to the UCMJ under Article 2 for *in personam* jurisdiction (trial of this particular individual by military tribunal), Clause 2 sets forth plenary jurisdiction for "any person" (not just persons subject to "this chapter") whom the LOW would otherwise subject to trial by a military tribunal.[14] Two conditions must exist for a court-martial to assert jurisdiction over an unlawful combatant: first, the LOW must permit *in personam* jurisdiction and second, the LOW must recognize the particular offense as an actionable violation (subject-matter jurisdiction).[15]

B. Charging and Predictability under the Proposed Framework

The proposed framework would greatly simplify prosecuting unlawful combatants at court-martial because the practitioner would be on the familiar ground of domestic law under Clause 1, rather than trying to discern the applicability of the LOW to a particular prosecution. If the UCMJ made unlawful combatants subject to the UCMJ, as this article argues it should, then the punitive articles and certain federal crimes under Article 134, UCMJ, such as the War Crimes Act,[16] would apply. If Mr. Jawad were subject to the UCMJ, trial counsel could charge Article 80 (attempts), UCMJ, and Article 128 (assaults), UCMJ, without additional jurisdictional authority. Appendix C outlines this approach.[17]

---

[11] *See* UCMJ arts. 77–134.

[12] *E.g.*, Major Michael J. Davidson, *Fetal Crime and its Cognizability as a Criminal Offense Under Military Law*, ARMY LAW., July 1998, at 23, 33–36 (discussing considerations related to offenses charged as assimilated crimes).

[13] *See* UCMJ art. 2.

[14] According to the preamble to the *MCM*, "[t]he sources of military jurisdiction include the Constitution and international law. International law includes the law of war." MCM, *supra* note 6, at I-1; *see also id.* R.C.M. 307(c)(2) ("Ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war.").

[15] In *Hamdan v. Rumsfeld*, the Court reiterated that "law of war" in the context of Article 21, UCMJ (which is similar to Article 18, UCMJ), depends on the law of war. 548 U.S. 557, 628 (2006) ("And compliance with the law of war is the condition upon which the authority set forth in *Article 21* is granted.") (italics added).

[16] 18 U.S.C.A. § 2441 (Westlaw 2010).

[17] *See infra* Appendix C.

C. Eliminating the Anomaly between Lawful and Unlawful Combatants

Just as this article proposes amending Article 2 to make unlawful combatants subject to the UCMJ, the Military Commissions Act of 2006 (MCA) amended Article 2 to make "lawful enemy combatants" subject to Clause 2 jurisdiction.[18] This change created the current anomaly between the treatment under the UCMJ of persons who commit similar misconduct based on their status as lawful or unlawful combatants. To be sure, both groups were previously subject to Clause 2 jurisdiction.[19] But, based on the 2006 change, the advantages of prosecution under

---

[18] The *MCM, United States* (2008) does not contain this amendment. *See* MCM, *supra* note 6, at A2-1–A2-2. The MCA 2006 added a paragraph 13 to Article 2: "(13) Lawful enemy combatants (as that term is defined in section 948a(2) of this title) who violate the law of war." MCA 2006, *supra* note 3, § 4(a)(1). The referenced definition closely tracks GCIII. *See* GCIII, *infra* note 18, art. 4(A)(1)–(3). Consistent with its wholesale elimination of the term "enemy combatant," the MCA 2009 further amended Article 2(13) from "lawful enemy combatant" to "Individuals belonging to one of the eight categories enumerated in Article 4 of the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316), who violate the law of war." MCA 2009, *supra* note 3, § 1803(a)(13). For purposes of this article, the more relevant provisions of the Third Geneva Convention defining those who are considered prisoners of war follow:

> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
>
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.

Convention Relative to the Treatment of Prisoners of War art. 142, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII]. Several other categories of persons also receive prisoner of war status. *See id.*

[19] Arguably, lawful combatants are still concurrently subject to Clause 2 jurisdiction as Clause 2 was not amended to exclude them when Congress made lawful combatants explicitly subject to Clause 1.

Clause 1 now accrue to a prosecution of a lawful combatant, but not an unlawful combatant.

For a concrete example, consider the following hypothetical. In a U.S. contingency operation in the fictional country of Ahuristan, U.S. forces within the same operational environment face both lawful combatants, the Ahuristan Army (AA), and unlawful combatants, the Jihad Front (JF). At one point, a U.S. Soldier surrenders to an AA member who promptly and deliberately executes him. At the same time, one mile away, another U.S. Soldier surrenders to a member of the JF, who promptly and deliberately executes him. Later, the U.S. Army detains both the AA and JF members. Because Article 2 includes lawful combatants but not unlawful combatants, the AA member is subject to Clause 1 jurisdiction. The JF member, however, is only subject to Clause 2 jurisdiction. This article argues for amending Article 2 to include unlawful combatants, thus making both persons subject to Clause 1. The ease with which Congress amended Article 2 to include lawful enemy combatants also underscores the facility of adding unlawful combatants to Article 2's scope.

III. *In Personam* Jurisdiction

A. Overview

This part justifies eliminating the the requirement to find *in personam jurisdiction* under the LOW as currently required by Clause 2. As explained in greater detail below, a practitioner seeking to charge an unlawful combatant under Clause 2 has to determine first whether the LOW would sanction the trial of the individual by "military tribunal."[20] This approach may have made sense at a time when the LOW arguably focused more on the class of individuals subject to trial by military tribunal rather than the underlying procedures of the tribunals themselves. Whatever its previous focus, the LOW now focuses on the underlying tribunal itself and requires a regularly constituted court respecting certain judicial guarantees.[21] Over the course of fifty years, the United States has witnessed great changes in military justice and

[20] UCMJ art. 18 (2008).

[21] *See*, *e.g.*, GCIII, *supra* note 18, art. 3(1)(3) (requiring a "regularly constituted court affording all the judicial guarantees which are recognized as indispensible by civilized people").

court-martial procedure. As a result, courts-martial today always meet the "regularly constituted" and "judicial guarantees" requirements under the LOW. Thus, with the types of combatants at issue in this article, there no longer exists a need to test whether a court-martial, under the LOW, properly has jurisdiction over any particular individual. This article thus proposes substituting a domestic definition of unlawful combatant under Rule for Courts-Martial (RCM) 109 for purposes of determining court-martial *in personam* jurisdiction. One potential objection to this proposal is that removing the LOW analysis from the individual case risks violating international law by subjecting someone not otherwise amenable to military trial to a court-martial. In response, the proposal does not remove the LOW from the jurisdictional analysis, but rather transfers it from the individual case to a systemic level by building it into the definition of unlawful combatant under the UCMJ.[22]

B. Compatibility with the Law of War of the Proposed Framework

1. The Law of War's Previous Focus on the Class of Persons

Prior to the 1949 Geneva Conventions, the LOW, at least as the U.S. Supreme Court interpreted it during World War II, appears to have focused less on the underlying procedures of a military tribunal and more on the class of persons subject to trial by military tribunal. Procedurally, pre-1949 military tribunals appear to have spanned from those that were indistinguishable from courts-martial to *ad hoc* and more expedient variants.[23] This history formed part of the intellectual background

---

[22] *See infra* Part V.

[23] In *Ex parte Quirin*, the Supreme Court provided an extensive catalog of military tribunals from the Revolutionary War, the Mexican-American War, the U.S. Civil War, and various other pre-UCMJ military tribunals. *See Ex parte* Quirin v. Cox, 371 U.S. 1, 31–33 (1942). By no means were all military tribunals summary. For instance, the subject tribunal in *In re Yamashita* lasted more than a month and heard "two hundred and eighty-six witnesses, who gave over three thousand pages of testimony." *In re* Yamashita v. Styer, 327 U.S. 1, 5 (1946). Even such an elaborate tribunal may have lacked indispensible due process protections as suggested by Yamashita's contentions before the Supreme Court:

> [T]he commission was without authority and jurisdiction to try and convict petitioner because the order governing the procedure of the commission permitted the admission in evidence of depositions, affidavits and hearsay and opinion evidence, and because the commission's rulings admitting such evidence were in violation of the 25th and 38th Articles of War . . . and the Geneva Convention . .

behind the current language in Clause 2, originally found in Article 12 of the 1916 Articles of War.[24] Clause 2 thus permitted trial by court-martial (more due process) when the LOW already permitted a military tribunal (less due process) in the same case.[25] As such, the LOW acted as a safety valve to ensure that military tribunals would have jurisdiction only over a limited number of persons; contrariwise, the LOW appears to have focused little on the actual underlying procedures of the tribunal itself.

Ex parte Quirin, decided in 1942 prior to the enactment of the UCMJ or the United States' ratification of the 1949 Geneva Conventions, demonstrates the LOW's previous focus on the class of persons rather than the underlying procedural distinctions of the particular tribunal.

> . and deprived petitioner of a fair trial in violation of the due process clause of the Fifth Amendment. . . .

Id. One must keep in mind that under the pre-UCMJ Articles of War, even servicemembers facing courts-martial had far less due process protections than under current law.

[24] *See* Articles of War of 1916, ch. 418, 3, art. 12, 39 Stat. 619, 652 (1917); *see also* Tara Lee, *American Courts-Martial for Enemy War Crimes*, 33 U. BALT. L. REV. 49, 53 (2003). The language contained today in Article 18, UCMJ, first appeared in Article 12 of the 1916 Articles of War, which stated, "General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals." Post-UCMJ, this authority has only been exercised one time, and that was under "occupational jurisdiction" in the case of an American civilian in occupied Japan, and never in the case of an alleged unlawful combatant for a violation of the LOW. *See* United States v. Schultz, 4 C.M.R. 104, 113 (C.M.A. 1952) ("We hold that this general court-martial had jurisdiction over the accused as a person subject to the law of war – not as a person subject to military law."). This article does not address occupational jurisdiction which is that jurisdiction which an occupying army exercises within the territory it controls. This is a traditionally recognized type of jurisdiction, having been explicitly recognized as part of Article 18 "law of war" jurisdiction. *See id.* Finding support in Winthrop's *Military Law and Precedents*, the U.S. Supreme Court has also recognized occupational jurisdiction. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 595–96 (2006). Describing this type of military tribunal, the Court stated, "[C]omissions have been established to try civilians 'as part of a temporary military government over occupied enemy territory.'" *Id.* at 595 (citing Duncan v. Kahanamoku, 327 U.S. 304, 314 (1946)); *see also* Madsen v. Kinsella, 343 U.S. 341 (1952) (illustrating the use of this type of commission to try civilians in occupied Germany); COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 837 (2d ed. 1920).

[25] When Congress re-enacted the language from the 1916 Article of War into Clause 2 of Article 18, UCMJ, for the first time it placed some statutory limits on the procedures used in tribunals requiring uniformity to the maximum extent possible except when impracticable. *See* UCMJ art. 36 (2008); *see also Hamdan*, 548 U.S. at 623, 632–33. Even prior to Article 16, common law provided a general idea of the composition and procedures of tribunals. *See* WINTHROP, *supra* note 24, at 835–40.

Quirin involved several members of the German Armed Forces during World War II who had infiltrated the United States via submarine to commit acts of sabotage.[26] After they landed on shore, they buried their uniforms and proceeded in civilian clothes. Once captured, the *Quirin* defendants, in a petition to the Supreme Court, challenged their trial by military tribunal.[27]

Without delving into the procedures of the tribunal itself, the Supreme Court agreed that a military tribunal legally had jurisdiction over the defendants because they were "unlawful belligerents."[28] Other than references to the Fourth Hague Convention of 1907 from which the Supreme Court culled the meaning of unlawful belligerent, the Court cited only domestic law and customary international law in its decision.[29] The Court considered the language now found in Article 21, UCMJ, which states that the existence of courts-martial does not "deprive . . . military tribunals of . . . jurisdiction with respect to offenders or offenses that by . . . the law of war may be tried by . . . military tribunals."[30] The Court interpreted this language to mean that, *in the absence of a statute*, Congress intended that the "Law of War" provide jurisdiction.[31] The Court further explained:

> By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war. . . . Unlawful combatants . . . are

---

[26] *Quirin*, 317 U.S. at 20–21.

[27] The President had ordered the tribunal into existence and promulgated procedures for the tribunal only after the capture, thus the tribunal was *ad hoc*. *Id.* at 23, 31–38.

[28] The Court used the term "unlawful belligerents," however, to refer to belligerents who would not otherwise be entitled to prisoner of war status, if captured. *Id.* at 30–31.

[29] *Id.* at 34; Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, 2295. Interestingly, only a couple years later in 1946, the Supreme Court extensively cited the 1929 Geneva Conventions in deciding *Yamashita*. *In re* Yamashita v. Styer, 327 U.S. 1 (1946).

[30] *Quirin*, 317 U.S. at 29. The Supreme Court was considering Article 15 of the Articles of War, which is the direct predecessor of Article 21, UCMJ. The identical language appears in both. *See id.* at 27. "Article 15 was first adopted as part of the Articles of War in 1916. . . . When the Articles of War were codified and reenacted as the UCMJ in 1950, Congress determined to retain Article 15 because it had been 'construed by the Supreme Court [*Ex Parte Quirin*].'" *Hamdan*, 548 U.S. at 593 n.22.

[31] This italicized language supports this article's position that Article 2, UCMJ, a statute, should include "unlawful combatants."

> [additionally] subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[32]

Accordingly, under *Quirin*, an accused alleged to have engaged in hostilities with no distinctive insignia[33] would have satisfied the *in personam* requirements of Clause 2 because the LOW subjected such a person to trial by military tribunal.[34] The Supreme Court's near complete omission of any discussion of the underlying procedures proposed in the *Quirin* tribunals demonstrates the LOW's previous focus on the offender, not the tribunal. Similarly, in *Yamashita*, a 1946 case involving the military tribunal of a Japanese World War II commander, the Supreme Court did not consider the underlying procedures of the tribunal itself.[35] Whether *Quirin* and *Yamashita* accurately reflected international law or were mere domestic aberrations,[36] this lack of focus on the underlying procedures of the tribunal changed dramatically in *Hamdan*, discussed below.

---

[32] *Quirin*, 317 U.S. at 30–31. Likewise, the Court stated:

> Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who though combatants do not wear "fixed and distinctive emblems." And by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to "the law of war."

Id. at 35.

[33] The lack of distinctive insignia relates to the LOW principle of distinction. *See supra* note 18; *infra* note 86.

[34] The Supreme Court's position here disagrees with the military judge's finding in the *Jawad* commission that unlawful combatant status does not *ipso facto* convert criminal activity into a violation of the LOW. *See infra* Part IV.B.2.

[35] *In re* Yamashita v. Styer, 327 U.S. 1 (1946); *see also Hamdan*, 548 U.S. at 618 (discussing the limited precedential value of *Yamashita*).

[36] Indeed, prior to the World War II cases, American military tribunals, for the most part, appear to have followed court-martial procedure. *See, e.g.*, David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantanamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 138–47 (2008). Because pre-UCMJ court-martial procedures provided far less due process protection than the current UCMJ, whether such commissions generally followed court-martial procedure prior to the World War II cases does not significantly affect the instant analysis.

2. The Current Requirement for Regularly Constituted Courts

Whereas the LOW previously appeared to focus more on the status of the accused than the underlying procedures of the tribunal, it now clearly focuses on the tribunal. By the terms of current, positive international law, the determination of whether a given tribunal has jurisdiction over a given actor under the LOW turns on whether the tribunal is both (1) "regularly constituted" and (2) affords the accused certain "judicial guarantees." This holds true in both international and non-international armed conflicts.

Turning first to non-international armed conflict (NIAC) under Common Article 3 (CA3) of the Geneva Conventions of 1949,[37] the article requires trial "by a regularly constituted court affording all the judicial guarantees which are recognized as indispensible by civilized people."[38] Additional Protocol II to the 1949 Geneva Conventions does not expressly require a regularly constituted court, but it does require "essential guarantees of independence and impartiality" in any court and incorporates the regularly constituted requirement of CA3 which it develops and modifies.[39]

Turning next to international armed conflict (IAC) under Common Article 2 (CA2),[40] the regularly constituted requirement similarly applies. For instance, Additional Protocol I to the Geneva Conventions requires trial by a "regularly constituted court respecting the generally recognized principles of regular judicial procedure."[41] Under the Fourth Geneva

---

[37] Article 3, commonly referred to as "Common Article 3" (CA3), is identical in all four 1949 Geneva Conventions. *See, e.g.*, GCIII, *supra* note 18, art. 3(1).

[38] The 1949 Geneva Conventions do not define these "guarantees." *E.g.*, *id.* art. 3(1)(d).

[39] Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts art. 6, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter APII]. The United States has not ratified Additional Protocols II, however, the United States recognizes certain aspects of Protocol II as indicative of customary international law. *See* Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *reported in* 2 AM. U. J. INT'L L. & POL'Y 428 (1988).

[40] Article 2, commonly referred to as "Common Article 2" (CA2), is identical in all four 1949 Geneva Conventions. *See, e.g.*, GCIII, *supra* note 18, art. 2.

[41] 1977 Geneva Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75(4), Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter API]. The United States has not ratified Additional Protocols I, however, the United States recognizes certain aspects of the Protocol I as indicative of customary international law. *See* generally Michael J. Matheson, *The*

Convention, in certain circumstances, an occupying power may try nationals of an occupied country by its "properly constituted, non-political military courts."[42] The terms "properly" and "regularly" constituted are interchangeable.[43] Even as to prisoners of war, the regularly constituted requirement, while not expressly stated, applies.[44]

The LOW requires a regularly constituted court in both CA2 and CA3 conflicts. Further, the Supreme Court has determined that an armed conflict falls only within CA2 (IAC) or CA3 (NIAC).[45] Thus, in any armed conflict, a regularly constituted court requirement applies.[46] As for the required judicial guarantees, they include at least the following: a right to be present at trial, a right against self-incrimination, a right to be informed of the allegations and to present a defense, a prohibition against

---

United States Position on the Relation of Customary International Law to The 19977 Protocols Additional to the 1949 Geneva Conventions, 2 AM. U.J. INT'L L & POL'Y 419 (1987).

[42] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 66, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV]. The Convention prefers that the occupied nation's tribunals continue in force. Article 72 guarantees certain fundamental due process rights as well.

[43] "The commentary's assumption that the terms 'properly constituted' and 'regularly constituted' are interchangeable is beyond reproach; the French version of Article 66, which is equally authoritative, uses the term 'regulierement constitues' in place of 'properly constituted.'" Hamdan v. Rumsfeld, 548 U.S. 557, 632 n.64 (2006).

[44] GCIII, *supra* note 18, art. 84. Under the Third Geneva Convention, prisoners of war must generally be tried by the same type of courts as the detaining power's own Armed Forces; moreover, such courts, at a minimum must "offer the essential guarantees of independence and impartiality." *Id.* Because the courts that try the members of a country's owned armed forces presumably must be "regularly constituted," it follows that Article 84 implies a "regularly constituted" requirement.

[45] *See Hamdan*, 548 U.S. at 629–31 ("The term 'conflict not of an international character' is used here in contradiction to a conflict between nations.").

[46] In a non-international armed conflict (NIAC), according to CA3, "persons taking no active part in the hostilities" must be tried "by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people." One must distinguish the "taking no active part in hostilities" language found in CA3 from the "taking direct part in hostilities" found in Additional Protocols I and II. Additional Protocols I and I state that "Civilians shall enjoy the protections afforded by this section, unless and for such time as they take a direct part in hostilities." API, *supra* note 41, art. 51(3); APII, *supra* note 39, art. 13(3). The former language merely describes all persons who, for whatever reason—including detention—are no longer in the fight. The latter language describes unprivileged belligerents. Assuming a CA3 conflict, by definition then, anyone under trial must be tried by a regularly constituted court because they are not then taking "active part in hostilities."

collective guilt, a prohibition against punishment pursuant to *ex post facto* laws, and the presumption of innocence.[47]

Hamdan v. Rumsfeld, a 2006 Supreme Court case involving a Yemini national detained in Afghanistan who challenged his trial by military commission, demonstrates the LOW's current focus on regularly constituted courts.[48] *Hamdan* involved the military commissions convened under President Bush's executive order[49] prior to the enactment of the MCA 2006.[50] Afghan militia forces had captured Mr. Hamdan in November 2001 and turned him over to the U.S. military.[51] Unlike Mr. Jawad, Mr. Hamdan's crimes aligned with support-type activities, such as serving as a driver, a bodyguard, transporting weapons, and attending training.[52] Like the cases of *Plessy*[53] and *Brown*[54] in the field of Civil Rights, *Quirin* and *Hamdan* will go down in history as bookends of constitutional thought regarding military tribunal jurisdiction under the LOW.

The *Hamdan* Court found that the procedures adopted to try Mr. Hamdan violated CA3's "regularly constituted courts" requirement.[55] Article 36 gives the President statutory authority to convene commissions but requires that commission procedures be uniform with court-martial procedures in so far as practicable.[56] The Court based its finding in part on the President's failure to make a practicability determination for each procedure as required by Article 36, UCMJ. Because the President did not constitute the commissions pursuant to Article 36, UCMJ, the Court found the commissions not regularly constituted.[57] As the Court explained, "At a minimum, a military

---

[47] *See* APII, *supra* note 39, art. 6(2)(a–f).
[48] *Hamdan*, 548 U.S. at 566–67.
[49] Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).
[50] *See* MCA 2006, *supra* note 3.
[51] *Hamdan*, 548 U.S. at 566.
[52] *Id.* at 569–70.
[53] Plessy v. Ferguson, 163 U.S. 537 (1896).
[54] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).
[55] *See Hamdan*, 548 U.S. at 634. With the enactment of the MCA, the current military commissions likely meet the "regularly constituted" requirement, however, questions may still remain regarding the "all judicial guarantees" aspect. *See* MCA 2006, *supra* note 3. The Court also found that the pre-MCA tribunal did not provide "all the judicial guarantees" required by the Geneva Conventions. *See Hamdan*, 548 U.S. at 634; GCIII, *supra* note 18, art. 3(1)(d).
[56] UCMJ art. 36 (2008).
[57] *See Hamdan*, 548 U.S. at 623, 632–33.

commission can be 'regularly constituted' by the standards of our military justice system only if some practical need explains deviations from court-martial practice."[58] If the Court had followed a *Quirin*-type analysis, it never would have considered the regular constitution of the court.[59]

C. Courts-Martial as Regularly Constituted Courts

United States courts-martial meet both the regularly constituted and judicial guarantees requirements. As a general matter, the LOW appears to recognize that the term "regularly constituted court" includes "ordinary military courts," such as courts-martial,[60] which are established and organized in accordance with the laws and procedures already in force in a country.[61] Domestically, the Supreme Court raised in *dicta* the possibility of trying detainees by courts-martial[62] and seemingly approved of Hamdan's concession "that a court-martial constituted in accordance with the . . . (UCMJ) . . . would have authority to try him."[63]

Not only does a U.S. court-martial meet the regularly constituted requirement, but, as a result of a half-century of developments in the military justice system, it certainly meets the "judicial guarantees" requirement as well. American military justice has undergone a "revolution" in procedure over the last fifty years.[64] This revolution consisted of the passage of the UCMJ in 1950, the passage of the

---

[58] *Id.*

[59] *See supra* Part III.B.1.

[60] COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 340 (Jean S. Pictet et al. eds., Major Ronald Griffen & Mr. C. W. Dumbleton trans., 1958); *Hamdan*, 548 U.S. at 631–32.

[61] *See* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 355 (2005).

[62] *Hamdan*, 548 U.S. at 613 n.41 ("That conspiracy is not a violation of the law of war triable by military commission does not mean the Government may not, for example, prosecute by court-martial or in federal court those caught plotting terrorist atrocities like the bombing of the Khobar Towers.").

[63] *Id.* at 566. The petitioner in an earlier Supreme Court case had made the same concession with which the Court seemed to agree. In *Madsen v. Kinsella*, a case in which an accused dependent wife of a servicemember was convicted of murder by a military commission in occupied Germany, Mrs. Kinsetta argued that she should have been tried by court-martial and not by military commission, citing Article of War 12 (the language now found in Article 18, UCMJ). 343 U.S. 341, 345–52 (1950).

[64] *See* FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 2-23.00 (2d ed. 1999).

Military Justice Acts of 1968 and 1983, as well as the establishment of robust criminal defense organizations.[65] As a result, courts-martial now provide due process-oriented, individualized justice at a level likely unattainable in most countries' civilian courts.[66] To the extent that a consensus exists of what exactly the "judicial guarantees" consist of, American courts-martial meet the requirement.[67]

As shown, by both the standards of contemporary LOW and recognition by the U.S. Supreme Court, a modern court-martial fulfills the "regularly constituted" and "affording all the judicial guarantees" requirements. The proposed change thus complies with the LOW and simplifies the determination of whether *in personam* jurisdiction exists.

IV. Subject Matter Jurisdiction

A. The Current Framework's Reliance on the Law of War

Turning to subject-matter jurisdiction, the current framework's reliance on the LOW unnecessarily creates uncertainty in the charging process. In Justice Stevens's plurality opinion in *Hamdan*, the Court approved of Colonel William Winthrop's description of the historical jurisdictional limitations on military commissions.[68] These limits likewise apply to general courts-martial convened under Clause 2. According to Winthrop, "[i]ndividuals of the enemy's army who have

---

[65] Jack Goldsmith & Cass R. Sunstein, Comment, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 283–84 (2002).

[66] Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937 (2010).

[67] The following is a list of each of some of the guarantees and some of the corresponding provisions in the *MCM*:

> (a) Right to be present at trial;
> (b) Right against self-incrimination;
> (c) Right to be informed of the allegations;
> (d) Right to present a defense; and
> (e) Presumption of innocence.

See U.S. CONST. amend. V; MCM, *supra* note 6, R.C.M. 804(a); R.C.M. 308; 904; R.C.M. 913(c)(1)(B); R.C.M. 920(e)(5)(a); UCMJ, art. 31 (2008).

[68] *See Hamdan*, 548 U.S. at 598 ("All parties agree that Colonel Winthrop's treatise accurately describes the common law government military commissions and that the jurisdictional limitations he identified were incorporated in Article of War 15 and, later, Article 21 of the UCMJ."); *see also* WINTHROP, *supra* note 24.

been guilty of illegitimate warfare or other offense in violation of the laws of war" may be tried by commission, and the military commission only has jurisdiction to try "violations of the laws and usages of war cognizable by military tribunals."[69] With two possible exceptions,[70] Clause 2 precludes charging under the punitive articles, which define offenses under domestic law, not the LOW.[71] Moreover, Congress cannot simply create new crimes or expand existing crimes under the LOW. Congress exercises its constitutional authority to "define and punish offenses against the law of nations"[72] by looking to "the rules and precepts of the law of nations, and more particularly the law of war," but it cannot just make up new LOW violations.[73]

B. The Military Commissions Experience: *Hamdan* and *Jawad*

1. Distinction Between Domestic Crimes and Law of War Violations

There exists a distinction between domestic crimes and violations of the LOW. Because of this distinction, an accused could claim that a charged offense does not constitute a LOW violation in order to escape Clause 2 subject-matter jurisdiction. Despite the fact that the charge alleges activity recognized as criminal, such as the unlawful killing of another person, subject-matter jurisdiction might not exist. In the *Jawad* case, the defense made this claim about the charge of attempted murder in violation of the law of war.[74] Similarly, the *Hamdan* defense argued to the Supreme Court that "conspiracy" did not constitute a violation of the LOW.[75] Four members of the *Hamdan* Court agreed:

---

[69] WINTHROP, *supra* note 24, at 836–38; *see also Hamdan*, 548 U.S. at 597–98.

[70] The two possible exceptions are article 104, "Aiding the Enemy" and article 106, "Spies." *See* UCMJ arts. 104, 106 (2008). The text of both of these articles begins with the phrase "Any person . . ." rather than "Any person subject to this chapter" as do the rest of the punitive articles. *Id.* United States Army Field Manual 27-10 also notes this distinction. FM 27-10, *supra* note 10, app. A-5, para. 13. The author lists these as "possible exceptions" because it would appear that these offenses must also constitute LOW violations for a court-martial to have subject matter jurisdiction under Clause 2.

[71] Interestingly enough, in *Quirin* under pre-UCMJ procedures, the Government charged the accused as having violated certain Articles of War. *See Ex parte* Quirin v. Cox, 371 U.S. 1, 22 (1942).

[72] *See* U.S. CONST. art. I, § 8, cl. 10; *see also* Brief of Petitioner at 38, United States v. Khalid Sheikh Mohammed, No. 09-1234 (D.C. Cir. Sept. 9, 2009).

[73] *Quirin*, 317 U.S. at 11.

[74] *See infra* Part IV.B.2.

[75] *See Hamdan*, 548 U.S. at 611–12 ("Because the charge does not support the commission's jurisdiction, the commission lacks authority to try Hamdan."). The

> At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war. That burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or Hague Conventions—the major treaties on the law of war.[76]

The shallow-rootedness of conspiracy under the LOW could preclude the use of Clause 2 courts-martial to try several of the detainees currently facing military commissions.[77] The Supreme Court's inability to reach a consensus on conspiracy as a law of war violation demonstrations the difficulty for the practitioner attempting to draft charges under Clause 2.

2. Unprivileged Belligerency and Law of War Violations

Notwithstanding contrary language from *Quirin*,[78] a mere lack of combatant immunity does not automatically render an accused's offense a violation of the law of war. The MCA 2006, like Clause 2, relied on the LOW for jurisdiction, again making the *Jawad* commission instructive for the present analysis.[79] The first commission charge

---

plurality was composed of Justice Stevens who authored the opinion of the Court, Justice Souter, Justice Ginsburg, and Justice Breyer. *See id.* at 566.

[76] *Id.* at 603–04. The Court went on to approvingly cite Winthrop: "[T]he jurisdiction of the military commission should be restricted to cases of offenses consisting in overt acts, i.e. in unlawful commissions or actual attempts to commit, and not in intentions merely" (emphasis in original). *Id.* at 604 (quoting WINTHROP, *supra* note 24, at 841).

[77] Most of the detainees with pending charges before the commissions face some sort of conspiracy charge. Of these, many are changed with additional offenses and certain "overt" acts which may themselves be independent violations of the law of war, such as "perfidy" or "attacking civilians." *See infra* notes 93, 94 (summarizing the pending charges).

[78] *See supra* note 32.

[79] The first point of comparison between military commission jurisdiction and Clause 2 jurisdiction comes from the MCA's statement of jurisdiction: "A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant. . . ." *See* MCA 2006, *supra* note 3, § 948d(a). A second point of comparison is that several offenses under the MCA require that the offenses be committed "in violation of the law of war." *See id.* § 948v(b)(13), (15), (16).

against Mr. Jawad alleged "Attempted Murder in Violation of the Law of War," and contained three specifications, each pertaining to a separate occupant of the vehicle.[80] The second charge alleged "Intentionally Causing Serious Bodily Injury."[81] Appendix A sets forth the specific language of these charges as well as their statutory definitions.

The *Jawad* defense moved to dismiss the charges for failure to state an offense and for lack of subject-matter jurisdiction. For purposes of the motion, the defense conceded Mr. Jawad's status as an unlawful combatant.[82] The Government took the position that Mr. Jawad's status as an unlawful combatant rendered his belligerent acts violations of the LOW.[83] The defense then argued that "the act of throwing a hand grenade at two U.S. servicemembers and their Afghan interpreter [did] not constitute a violation of the law of war."[84] The defense summed up its argument in the phrase, "[W]ar crimes are acts for which even lawful combatants would not receive combatant immunity."[85] In support of this proposition, the defense provided extensive legal authority and an affidavit from an expert in the LOW.[86] The defense correctly pointed out that the targets of the attack, two American servicemembers, were not protected persons under the Geneva Conventions and that the Afghan interpreter himself was alternatively not a protected person or proportionally acceptable collateral loss.[87] The defense further pointed out that a hand grenade is a lawful weapon.[88]

---

[80] *See* DoD Military Commissions Website, *supra* note 2 ("Charge Sheet").
[81] *See id.*
[82] *See* Defense Motion to Dismiss for Failure to State and Offense and Lack of Subject Matter Jurisdiction under R.C.M. 907, United States v. Jawad, at 3 (May 28, 2008), *available at* http://www.defenselink.mil/news/d20080528Defense%20Motion%20To%20Dismiss%20for%20Failure%20to%20State%20an%20Offense%20-%20Lack%20of%20Subject%20Matter%20Jurisdiction%20D-007.pdf [hereinafter Defense Motion to Dismiss].
[83] *See id.*
[84] *Id.*
[85] *See id.* at 5.
[86] The defense included an affidavit from Ms. Madeline Morris of Duke Law School in which she agreed that "Engaging in combat (including killing)—as a lawful or an unlawful combatant—does not constitute a violation of the law of war unless the combat activity is conducted through an unlawful method or against an unlawful target." *See id.* attachment 1. Under the principle of "distinction," one common characteristic cited for deeming someone an "unlawful combatant" is the failure to wear a uniform or carry arms openly.
[87] *See id.* at 7.
[88] *See id.*

The military judge[89] partially agreed with the defense and found that in order to prove the charged offenses, the Government had to prove both that Mr. Jawad was an unlawful combatant and that the "method, manner, or circumstances used violated the law of war."[90] In other words, the unlawful belligerency itself only negated combatant immunity but did not constitute a standalone violation of the LOW. The military judge specifically found that the phrase "murder in violation of the law of war" was not satisfied by Mr. Jawad's status, if so proved, as an unlawful combatant.[91] Most instructive for purposes of Clause 2 subject-matter jurisdiction, the military judge found that:

> The government has not cited any persuasive authority for the proposition that acting as an unlawful enemy combatant, by itself, is a violation of the laws of war in the context of non-international armed conflict. In other words, that the Accused might fail to qualify as a lawful combatant does not automatically lead to the conclusion

---

[89] Colonel Stephen Henley, U.S. Army, is the current Chief Judge of the U.S. Army Trial Judiciary and was the military judge assigned to the *Jawad* commission. In an apparent attempt to avoid tainting courts-martial, Congress expressly precluded the consideration of military commissions decisions at courts-martial. MCA 2009, *supra* note 3, § 1803(a)(2). Although decisions of the military commissions do not constitute *stare decisis* for purposes of future Clause 2 litigation, the fact that the same military judges and court-martial personnel involved in the commissions decisions may one day serve in positions to interpret Clause 2 adds to the commissions' value as precedent of persuasion. One doubts as well that this congressional restriction could preclude the defense in any Clause 2 court-martial from citing to precedent interpreting the LOW, whether or not it stems from military commissions. *See* U.S. CONST. amend V.

[90] *See* Ruling on Defense Motion to Dismiss—Lack of Subject Matter Jurisdiction at 1, No. D-007, United States v. Mohammed Jawad, *available at* http://www.defenselink.mil /news/commissionsJawad.html.

[91] *See id.* In dicta, the military judge also stated in his ruling:

> If Congress intended to make any murder committed by an unlawful enemy combatant a law of war violation they could have said so. They did not and for this Military Commission to do so now would contradict the canons of statutory construction which dictate that a court must construe the language of a statute so as to avoid rendering any words superfluous.

Id. at 3. In so stating, the military judge indicated his belief that Congress could have given the military commissions' jurisdiction over common law (not LOW) murder. As a matter of domestic positive law, this may be the case. Under Article 18 as currently drafted, however, it would appear that any murder charged at a Clause 2 court-martial would have to be alleged to be in violation of the law of war, thus requiring the "method, manner, or circumstances used violated the law of war." *Id.* at 2.

> that his conduct violated the law of war and the propriety of the charges in this case must be based on the nature of the act, not simply on the status of the Accused.[92]

Thus, while "murder" constitutes a crime under domestic law for which an unlawful combatant may not have combatant immunity, it does not *ipso facto* make the crime a violation of the LOW. In such a case, a court-martial would lack subject-matter jurisdiction under Clause 2. The MCA 2006 arguably could have defined murder without the LOW element. Once the MCA included the LOW element, however, the prosecution had to prove that the alleged murder actually violated the LOW. The military judge did not indicate that the Government could not prove this element, only that unprivileged belligerency alone would not satisfy it. Thus while *Hamdan* raises questions regarding the viability of "conspiracy" as a violation of the LOW, *Jawad* casts serious doubt over whether an accused's unlawful belligerency could render criminal activity a violation of the LOW.

C. Challenges in Defining Offenses Under the Law of War

Hamdan and *Jawad* demonstrate the difficulty of discerning what offenses to charge under Clause 2. Neither the *MCM* nor the MCA provides a reliable list of offenses and elements for purposes of LOW subject-matter jurisdiction. Noteworthy for comparison with trial by courts-martial, the most common charges before the commissions are conspiracy and material support to terrorism.[93] Almost all of the alleged

---

[92] *See id.* at 3.

[93] According to the charge sheets posted on the DoD Military Commissions website, the following detainees have been charged with the following offenses: Ibrahim Ahmed Mamoud Al Oosi (conspiracy and material support); Omar Ahmed Khadr (murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, material support, spying); Ali Hamza Ahmad Suliman al Bahlul (conspiracy, solicitation [to commit war crimes], material support); Almed Mohammed Ahmed Haza al Darbi (conspiracy, material support); Mohammed Kamin (material support); Ahmed Khalfan Ghailani (conspiracy, murder in violation of the law of war, material support, attacking protected persons, attacking protected places, terrorism); Mohammed Hashim (material support, spying); Abdal-Rahim Hussein Muhammed Abdu Al-Nashiri (conspiracy, murder in violation of the law of war, perfidy, destruction of property in violation of the law of war, intentionally causing serious bodily injury in violation of the law of war, terrorism, material support, attempted murder in violation of the law of war); Obaiduullah (conspiracy, material support); Fouad Mahmoud Hasan Al Rabia (material support, conspiracy); Faiz Mohammed Ahmed Al Kandari (material support, conspiracy); Tarek Mahmoud El Sawah (conspiracy, material support); Noor Uthman Muhammed (material

"911 Conspirators" are charged with some form of inchoate crime which may have dubious standing before a court-martial convened under Clause 2.[94] This article does not suggest the impossibility of discerning crimes under the LOW, just the difficulty and sometimes ambiguity of doing so. Appendix B sets forth several sources from which to distill substantive offenses against the LOW as well as hypothetical LOW charges in the *Jawad* case that may have withstood legal scrutiny under the current Clause 2 framework.

V. Defining "Unlawful Combatant" Under the Proposed Framework

A. The Proposed Definition

The proposed definition of unlawful combatant must act as a failsafe to ensure that neither the LOW nor domestic law violations occur in charging individuals before courts-martial. The definition itself must encompass both U.S. constitutional restrictions and considerations under the LOW. For reasons of policy and law explained below, this article recommends a very narrow definition of unlawful combatant. Under this

---

support, conspiracy); Jabran Said Bin Al Qahtani **(**conspiracy, material support); Sufyian Barhoumi (conspiracy, material support); Ghassan Abdullah al Sharbi (conspiracy, material support). Further, Salim Ahmed Hamdan (convicted of conspiracy and material support); David M. Hicks (convicted of material support and attempted murder in violation of the law of war). *See* DoD Military Commissions Website, *supra* note 2, Charge Sheets.

[94] According to the DoD Commissions website, the alleged "Sept 11 Co-Conspirators" are Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarek Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. They are all accused of the following offenses, all of which except conspiracy involve some form of accomplice liability: conspiracy, attacking civilians, attacking civilian objects, intentionally causing serious bodily harm, murder in violation of the law of war, material support, hijacking or hazarding a vessel, terrorism. *See* DoD Military Commissions Website, *supra* note 2, "Charge Sheets." It appears that the "Sept 11 Co-Conspirators" are now to be tried in federal district court. *See Obama Administration Transfers 12 Detainees to Yemen, Afghanistan, Somaliland*, ABC NEWS, Dec. 20, 2009,http://blogs.abcnews.com/politicalpunch/2009/12/obama-administration-transfers-12-detainees-to-yemen-afghanistan-somaliland.html. This article does not suggest that the proposed framework would make courts-martial an appropriate forum for those charged with inchoate crimes. In fact, the proposed framework's focus on direct participation would likely preclude courts-martial for such persons. As a policy matter, the author does not object to this result. Courts-martial should remain limited to military matters, not general matters of national security. Thus, the nexus to the battlefield is appropriate.

definition, court-martial jurisdiction over unlawful combatants would not extend beyond those directly involved in hostilities against U.S. and coalition forces. To this end, this article proposes the following definition of unlawful combatant: "'Unlawful combatant' means any person excluding any citizen of the United States who, while not falling into any other category described under Article 2, nevertheless, directly participates in hostilities against U.S. armed forces or coalition partners."

B. Narrowing the Definition

1. Constitutional Background and Changes in the UCMJ

The Supreme Court has viewed with suspicion attempts to extend court-martial jurisdiction beyond members of the United States armed forces.[95] Typically, the narrow category of civilians subject to the UCMJ consists of persons closely (and mostly voluntarily) associated with military missions. For instance, Article 2 includes persons in the custody of the armed forces serving a sentence imposed by a court-martial,[96] members of certain federal agencies when serving with the armed forces during time of war or contingency operation,[97] and persons serving with or accompanying an armed force in the field.[98] The recent addition to Article 2 of "lawful combatants" likewise encompasses anyone entitled to prisoner of war status.[99] In the 1955 case of *Ex rel. Toth v. Quarles*, the Supreme Court ruled that court-martial jurisdiction should extend only to "the least possible power adequate to the end proposed."[100] There, the Supreme Court invalidated the conviction of a former servicemember who was court-martialed only after final discharge from the service.[101] The Supreme Court has also held that subjecting civilians to court-martial during peacetime violates the Constitution.[102] While the

---

[95] *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957).
[96] UCMJ art. 2(a)(7) (2008).
[97] *Id.* art. 2(a)(10). Congress added the "or contingency operation" language in 2008, presumably to address the Court of Military Appeals' ruling in *United States v. Averette* that jurisdiction required a declared war. 41 C.M.R. 363 (C.M.A. 1970).
[98] UCMJ art. 2(a)(1). Courts-martial may also have jurisdiction over certain persons in certain territories via treaty. *Id.* art. 2(a)(11)–(12).
[99] *See supra* note 18.
[100] 350 U.S. 11, 23 (1955).
[101] *See id.*
[102] *See* Reid v. Covert, 354 U.S. 1, 64–65 (1957); *see also* United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970); GILLIGAN & LEDERER, *supra* note 64, § 2-23.00.

recent court-martial of a civilian contractor in Iraq may challenge these limits, wisdom still counsels to respect this guidance.[103]

2. Excluding U.S. Citizens from the Proposed Definition

The *MCM* definition of unlawful combatant should exclude U.S. citizens. For purposes of access to U.S. courts, it seems that the distinction between U.S. citizens and non-U.S. citizens may make little difference.[104] In cases in which the Supreme Court has struck down court-martial jurisdiction over civilians, however, those civilians have universally been U.S. citizens.[105] Even in *Quirin*, the Court distinguished the putative citizen as perhaps having voluntarily relinquished his citizenship by his association with the German Reich.[106] In the remaining instances under Article 2 in which the UCMJ purports to authorize jurisdiction over civilians, the persons (such as contractors, former members of the Armed Forces serving courts-martial sentences, and members of federal agencies) have voluntarily subjected themselves to military jurisdiction by their very close association with the armed forces. Ultimately, in order to ensure the constitutionality of a UCMJ definition of unlawful combatant and to disinvite Supreme Court scrutiny, the definition should exclude U.S. citizens.

---

[103] Alexandra Zavis, *Army Interpreter Sentenced at Court-Martial; An Iraqi Canadian Involved in a Stabbing Is the First Civilian Contractor Tried by the U.S. Military*, L.A. TIMES, June 24, 2008, at A3.

[104] For example, non-citizen detainees under the military commissions system have had success challenging the notion that their status as foreigners outside the territory of the United States precludes access to U.S. civilian courts. *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229 (2008).

[105] With few exceptions, the U.S. Supreme Court has looked unfavorably upon courts-martial trying U.S. citizens, except where those citizens were on active duty in the military both at the time of the offense and at the time of trial. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957); *Ex rel.* Toth v. Quarles, 350 U.S. 11 (1955). *But see Civilian Contractor Convicted at a Court-Martial (Baghdad)*, RELEASE No. 20080623-01, Operation Iraqi Freedom, Official Website of Multi-National Forces-Iraq, June 23, 2008, http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=20671&Itemid=128 (describing the "first case" of a contractor, Alaa "Alex" Mohammad Ali, convicted at a court-martial).

[106] *Ex parte* Quirin v. Cox, 371 U.S. 1, 21 (1942).

3. Eliminating Distinctions Based on the Type of Conflict

The *MCM* definition of unlawful combatant should not distinguish between IAC and NIAC. As previously established, under the LOW, both IAC and NIAC require trials by regularly constituted courts.[107] Since the LOW does not require that domestic law distinguish between IAC and NIAC in permitting trial by courts-martial, the definition should jettison the distinction entirely.[108] Eliminating the IAC/NIAC distinction and making unlawful combatants subject to domestic law also makes irrelevant certain questions remaining as to what LOW offenses exist within a NIAC.[109] For instance, one could make the argument that the perfidy charge described in Appendix B exists only in time of an IAC.[110]

C. Incorporating "Direct Participation" into the Definition

1. Overview

This section justifies restricting the definition of unlawful combatant to those who directly participate in hostilities (DPH). Under the LOW, the DPH test allows lethal targeting of civilians who directly participate in hostilities for such time that they participate in hostilities.[111] This

---

[107] *See supra* Part III.B.2.

[108] Professor Goodman points out that if the LOW permits a particular practice under IAC, it also permits it under NIAC, although the converse does not necessarily hold true:

> [International Humanitarian Law] is uniformly less restrictive in internal armed conflicts than in international armed conflicts. Accordingly, if states have authority to engage in particular practices in an international armed conflict (e.g., targeting direct participants in hostilities), they a fortiori possess authority to undertake those practices in noninternational conflict. Simply put, whatever is permitted in international armed conflict is permitted in noninternational armed conflict.

Goodman, *supra* note 5, at 50.

[109] *See, e.g.*, Derek Jinks, *September 11 and the Laws of War*, 20 YALE J. INT'L L. 1, 2 (2003) ("It is clear that humanitarian law governs the conduct of hostilities in non-international conflicts—even when confined to the territory of one state. The central difficulty is how best to define the scope and content of international humanitarian rules applicable in non-international armed conflict.").

[110] For a contrary view, see John C. Dehn, *Permissible Perfidy? Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World's Reaction*, 6 J. INT'L CRIM. JUST. 627 (2008).

[111] *See, e.g.*, API, *supra* note 41, art. 51(4).

article's restrictive notion of DPH purposely conforms closely with the recently published (and some might say controversial) ICRC Interpretive Guidance.[112] Contrasted with the U.S. view, the ICRC view of DPH comprises a much narrower range of activities.[113] According to the ICRC Interpretive Guidance, in order for an act to constitute an act of direct participation, a specific act must meet the following criteria:

> 1. [T]he act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
> 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); [and]
> 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[114]

Incorporating a narrow interpretation of DPH into the proposed definition of unlawful combatant serves two purposes. First, the test has well-recognized roots in the contemporary LOW and will provide a rational justification for why some detainees (i.e., those detained in or around the battlefield) face trial by courts-martial while others (those whose actions are entirely more remote from battlefield) do not. Second, the test will limit the class of persons subject to courts-martial to those whose acts revolve around battlefield-type actions thereby allaying potential constitutional concerns over expansive prescriptive jurisdiction.

---

[112] *See* International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2006), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-872-p991/$File/irrc-872-reports-documents.pdf (last visited Mar. 22, 2010) [hereinafter *ICRC Interpretive Guidance*].

[113] "Not only does [the United States] take the position that tasks such as serving as lookouts or guards is direct participation, but the Navy and Air Force seem to disagree with the ICRC Commentary as they have asserted that being an intelligence agent may constitute direct participation." Major Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon*, 51 A.F. L. REV. 111, 117 (2001).

[114] *ICRC Interpretive Guidance*, *supra* note 112, at 1016.

The justifications for the DPH test rest on both legal, as explained below, and policy grounds. As for policy, the author suggests that the United States should limit use of the courts-martial to this narrow category of unlawful combatants in order to preserve the status of courts-martial as uniquely military courts. Without a DPH test, courts-martial jurisdiction risks expansion to include financiers and others thought to materially support terrorism. As such, courts-martial could become general national-security courts. This would simply go too far beyond the traditional purpose of a court-martial.

2. The Direct Participation Test under the Law of War

Under the LOW, the DPH requirement appears, among other places, in CA3: "Persons taking no active part in hostilities . . ." receive the protection detailed under CA3.[115] The test also appears in Additional Protocol I: "Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."[116] Additional Protocol II further states that "[a]ll persons who do not take a direct part . . . in hostilities. . ." must receive humane treatment.[117] By

[115] GCIII, *supra* note 18, art. 3(1).
[116] API, *supra* note 41, art. 51(4).
[117] APII, *supra* note 39, art. 4(1). "Loss of protection against attack is clear and uncontested, as evidence by several military manuals, when a civilian uses weapons or other measures to commit acts of violence against human or material enemy forces." I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 61, at 22 (2005). Unfortunately, "a precise definition of the term 'direct participation in hostilities' does not exist." *Id.* Generally, under the LOW, "combatants" are defined as members of a country's armed forces. *See* 2 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 78–99 (2005). Support exists for the proposition that unlawful combatants are civilians. In a 2005 case, the Supreme Court of Israel had the opportunity to consider what is a "civilian" for purposes of the LOW. *See* HCJ 769/02 The Public Committee Against Torture in Israel v. The Government of Israel [2005] IsrSC, *available at* https://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/HCJ+judgment+on+preventative+strikes+against+terrorists+11-Dec-2005.htm?DisplayMode=print (last visited Mar. 22, 2010). In that decision, the Israeli Supreme Court stated, "A civilian who violates the law and commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy—during that time—the protection granted to a civilian. . . . True, his status is that of a civilian, and he does not lose that status while he is directly participating in hostilities. However, he is a civilian performing the function of a combatant." *Id.* para. 6.C.31. Furthermore,

> Civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities

limiting the definition to strict "direct participation," only "unprivileged belligerents" would be subject to trial by courts-martial as unlawful combatants.[118] Limiting "unlawful combatant," a term nowhere defined in the 1949 Geneva Conventions,[119] to the notion of unprivileged belligerency also comports well with current international law understandings of "unlawful combatant."[120]

While the United States remains free to define terms domestically in a way inconsistent with the LOW, this approach creates confusion. For instance, the MCA 2006's definition of "unlawful enemy combatant," to include someone "who has purposefully and materially supported hostilities against the United States or its co-belligerents," went beyond the LOW's notion of DPH.[121] The proposed definition encompasses

---

> cannot on these grounds alone be considered combatants. This is because indirect participation . . . does not involve acts of violence which pose an immediate threat of actual harm to the adverse party.

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, THIRD REPORT ON HUMAN RIGHTS SITUATION IN COLUMBIA § 811 (Feb. 26, 1999).

[118] Recall that Article 2 already subjects privileged belligerents to trial by court-martial, both for acts committed before and after their capture. *See* UCMJ arts. 2(9) & (13) (2008).

[119] *See, e.g.*, GCIII, *supra* note 18, art. 3(1).

[120] "Combatants" are defined as:

> [M]embers of the armed forces. The main feature of their status in international armed conflicts is that they have a right to directly participate in hostilities. . . . Combatants have an obligation to respect [the LOW], which includes distinguishing themselves from the civilian population. If they violate the LOW they must be punished, but they do not lose combatant status and retain, if captured by the enemy, prisoner-of-war status, except if they violated their obligation to distinguish themselves.

MARCO SASSOLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW 121 (1999). "If civilians directly engage in hostilities, they are considered 'unlawful' or 'unprivileged' combatants or belligerents (the treaties of humanitarian law do not expressly contain these terms). They may be prosecuted under the domestic law of the detaining state for such action." Official Statement**,** International Committee of the Red Cross (ICRC), The Relevance of IHL in the Context of Terrorism, July 21, 2005, http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705 (last visited May 20, 2009).

[121] An "unlawful enemy combatant" was defined by the MCA 2006 as follows:

> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its

Jawad but excludes persons who merely "provided material support" to terrorism[122] without any physical involvement or geographic proximity to hostilities (e.g., *Hamdan*). This falls well within a conservative interpretation of the LOW.

3. An Appropriate Limitation on Court-Martial Prescriptive Jurisdiction

The DPH test provides an appropriate limitation on prescriptive jurisdiction. While not overly restrictive, the U.S. Constitution and international law put some limits on the United States' exercise of its prescriptive jurisdiction[123] beyond its own territory and citizens.[124] A

> co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
> (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

MCA 2006, *supra* note 3, § 948a. The President's Executive Order establishing military tribunals purported to extend jurisdiction over roughly the same category of persons. *See* Military Order of November 13, 2001, *supra* note 49. The Obama Administration subsequently abandoned the term "enemy combatant." *See* Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re* Guantanamo Bay Detainee Litigation, Nos. 05-0763, 05-1646 (D. D.C. Mar. 13, 2009). According to Professor Goodman, speaking in the detention context, "[P]olicymakers and advocates of U.S. practices improperly conflated two classes of individuals subject to detention: civilians who participate in hostilities ['unlawful combatants'] and civilians who have not directly participated but nevertheless pose a security threat." *See* Goodman, *supra* note 5, at 48 (bracketed language inserted by author).

[122] The MCA 2006 defined "providing material support for terrorism" as "[providing] material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism . . . or who intentionally provides material support or resources [to a terrorist organization with knowledge]." MCA 2006, *supra* note 3, § 950v(b)(25).

[123] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401(a) (1987).

[124]

> [W]hile the present constitutional landscape prescribes certain structural and due process limits on the United States' ability to project and apply extraterritorially its anti-terrorism laws, doctrines of international law intersect with the Constitution to avoid these limits, leaving the United States virtually unconstrained to extend the core panoply of its anti-terrorism laws to foreigners abroad.

number of federal statutes have extraterritorial application to foreigners under certain conditions.[125] The punitive articles of the UCMJ likewise apply extraterritorially.[126] From a domestic law standpoint, congressional intent drives whether a criminal statute applies extraterritorially.[127] Several well-established theories of international law also appear to support extraterritorial application of criminal laws to unlawful combatants.[128] Generally, "a territorial or national link, or 'nexus'" to the "conduct itself, its perpetrators, or its victims" justifies national prescriptive jurisdiction.[129] Requiring DPH against U.S. forces or coalition partners ensures this nexus and thus serves as another means of justifying the proposed prescriptive jurisdiction. This restriction would also take into account the Supreme Court's guidance to limit court-martial jurisdiction to the "least possible power adequate to the end proposed."[130]

There is a policy reason why a strict DPH test appropriately serves the ends of a court-martial. A court-martial by its very nature is a military court. It is not a court of general national security. A court-

---

Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 122 (2009).

[125] *See, e.g.*, 18 U.S.C.A. § 2340 (Westlaw 2010) (criminalizing the use of torture even committed by a foreign national); *id.* § 1203 (criminalizing hostage taking); *id.* § 2332 (criminalizing the murder or assault of a U.S. national outside the United States).

[126] *See, e.g.*, Stevens v. Warden, 536 F.2d 1334 (10th Cir. 1976); Hemphill v. Moseley, 443 F.2d 322 (10th Cir. 1971). As for other federal crimes under Article 134, just as at a court-martial of servicepersons, each case will have to individually resolve whether Congress intended a particular criminal statute to have extraterritorial application.

[127] *See, e.g.*, Small v. United States, 544 U.S. 385 (2005).

[128] Three principles of international law appear to readily support extraterritorial application of federal law under the circumstances contemplated in this article. First, the "territorial principle" confers jurisdiction in situations where the "alleged act has actual or intended consequences in the United States." Brian L. Porto, *Extraterritorial Criminal Jurisdiction of Federal Courts*, 1 ALR Fed. 2d 415 (2005). Second, the "protective principle . . . confers jurisdiction based on a nation's need to protect its security and the integrity of its governmental functions." *Id.* Third, under the "passive personality principle," courts in the United States have jurisdiction "when the victim of the offenses(s) charged is an American citizen." *Id.*

[129] Colangelo, *supra* note 124, at 129. Colangelo goes on to note that in *Johnson v. Eisentrager*, the Supreme Court held that "the Constitution does not confer a [Fifth Amendment] right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in hostile service of a government at war with the United States." *Id*. (citing Johnson v. Eisentrager, 339 U.S. 763, 785 (1949)).

[130] *Ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955).

martial, except for the rare instances of serving as courts of occupation[131] (not at issue in this article), exists to serve purposes of good order and discipline in a military force.[132] If jurisdiction is going to encompass persons other than members of the armed forces, that jurisdiction should remain strictly tied to the concept of actual military operations, not to broader notions of intelligence or national security. By requiring DPH, the proposed framework would simply put the unlawful combatant on the same footing with the lawful combatant/prisoner of war. Now, both could be tried by court-martial without any substantial difficulty or parsing of Article 18 and international law. Such a "hostilities connection" test analogizes logically to the now-defunct "service connection" test, which briefly controlled subject-matter jurisdiction over offenses committed by servicemembers.[133] The proposed restriction would limit jurisdiction to offenders whose alleged offenses occurred, for the most part, in or around the operational environment of a contingency operation.

VI. Conclusion

This article focused on a narrow subset of potential detainees who may face trial in the course of contemporary contingency operations. It argued for adding a new category to Article 2, unlawful combatants, to facilitate the exercise of jurisdiction already available under Article 18, while leaving Article 18 itself intact for whatever residual jurisdiction may remain under Clause 2. In particular, it focused on people like Mr. Jawad, detained for directly participating in hostilities against U.S. and coalition forces. This article referred to this class of persons as unlawful combatants. Under the current Clause 2 framework for court-martial jurisdiction over unlawful combatants, a practitioner must satisfy two LOW requirements to achieve *in personam* and subject matter jurisdiction. The LOW no longer requires the *in personam* requirement

---

[131] *See supra* note 24.

[132] *See generally* Lieutenant W.G. "Scotch" Perdue, *Weighing the Scales of Discipline: A Perspective on the Naval Officer's Prosecutorial Discretion*, 46 NAVAL L. REV. 69 (1999) (describing various ways in which command discretion in the military owes itself to the primary objective of supporting good order and discipline).

[133] *United States v. O'Callahan*, the 1969 Supreme Court case which added a "service-connection" requirement for court-martial of servicemembers, represents the high water mark in the restriction of court-martial jurisdiction. 395 U.S. 258 (1969). In *United States v. Solorio*, the Court overruled *O'Callahan* and did away with the "service-connection" test. *See* United States v. Solorio, 483 U.S. 43 (1987).

because a modern court-martial is a regularly constituted court providing necessary judicial guarantees. Requiring that substantive offenses independently exist under the LOW creates uncertainty due to a lack of consensus over what offenses actually exist under the LOW. Unlawful belligerency alone does not necessarily convert a criminal offense into a violation of the LOW. *Hamdan* and *Jawad* demonstrate that some offenses currently charged at the commissions may not actually constitute LOW violations. Making unlawful combatants subject to the UCMJ and defining unlawful combatants for *MCM* purposes as non-U.S. citizens who directly participate in hostilities facilitates prosecuting someone like Mr. Jawad at court-martial. It would also eliminate the jurisdictional anomaly between lawful combatants who violate the LOW, already subject to the UCMJ, and those unprivileged belligerents who commit the same crimes. As demonstrated by the recent addition of lawful combatants to Article 2, the proposed change is simple. Under the proposed framework, practitioners in the field as well as military trial and appellate judges will stand on familiar ground in charging, presiding over, and reviewing courts-martial involving unlawful combatants.

Appendix A

Charges at the *Jawad* Commission

Each charge listed below contained three specifications, identical in all respects except for the name of the vehicle occupant. The MCA 2006 defined the offenses.[134]

CHARGE I, Violation of 10 U.S.C. §§ 9501, 950v(b)(l5), Attempted Murder in Violation of the Law of War.

Specification 1:

In that Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, attempt to commit murder in violation of the law of war, by throwing a hand grenade into the

---

[134] MCA 2006, *supra* note 3, § 950v(b)(13), (l5). Those offenses are defined as follows:

> (13) Intentionally causing serious bodily injury.
>
> (A) Offense. Any person subject to this chapter who intentionally causes serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.
>
> (B) Serious bodily injury defined. In this paragraph, the term "serious bodily injury" means bodily injury which involves—
>
> (i) a substantial risk of death;
>
> (ii) extreme physical pain;
>
> (iii) protracted and obvious disfigurement; or
>
> (iv) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.
>
> . . . .
>
> (15) Murder in violation of the law of war. Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct.

passenger compartment of a vehicle transporting U.S. or Coalition Forces, to wit, [name of occupant], [U.S. Army], with the intent to kill said [name of occupant].

CHARGE II: Violation of 10 U.S.C. § 950v(b)(13), Intentionally Causing Serious Bodily Injury.

Specification 1:

In that Mohammed Jawad, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, intentionally cause serious bodily injury in violation of the law of war, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces, to wit, [name of occupant], [U.S. Army].

Appendix B

Potential Court-Martial Charges under the Current Framework

Sources for defining crimes under the LOW for Clause 2 purposes consist of LOW treaties, such as the Geneva and Hague Conventions and customary international law.[135] One potential source of crimes for purposes of charging under Clause 2 jurisdiction is the recent Study on Customary International Humanitarian Law by the International Committee of the Red Cross (ICRC Study).[136] The ICRC Study defines categories of crimes based on widely accepted principles: the principle of distinction, specially protected persons and objects, specific methods of warfare, weapons, treatment of civilians and persons hors de combat.[137] "Serious violations" of these LOW principles constitute war crimes.[138] The Rome Statute[139] and the statutes of *ad hoc* international war crimes tribunals also provide sources for ascertaining and charging violations of the laws of war.[140]

Considering the sources discussed above, the crime of "perfidy" might have provided subject-matter jurisdiction if the government had sought to try Mr. Jawad by court-martial under the current Clause 2. The

---

[135] It is widely agreed that the existence of a rule of customary international law requires the presence of two elements, names State practice (*usus*) and a belief that such a practice is required, prohibited, or allowed, depending on the nature of the rule, as a matter of law . . . ." Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. OF THE RED CROSS 175, 178 (2005).

[136] I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 1, *supra* note 61.

[137] *See id.* at 198–211.

[138] *See, e.g.*, Statute of the International Tribunal, *Report of the Secretary-General Pursuant to Paragraph 2 of U.N. Security Council Resolution 808*, U.N. GAOR, 48th Sess., 3175th mtg., arts. 2–5, U.N. Doc. S/2-5704 (1993), *reprinted in* 32 I.L.M. 1159, 1192–93 (1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955, art. 1 (1994).

[139] For instance, Article 8 of the International Criminal Court Treaty ("the Rome Statute") lists "willful killing," but only in conjunction with "grave breaches of the Geneva Conventions" and only against protected persons. Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (1998) [hereinafter ICC Statute]. Although the United States has not ratified the ICC Statute, the United States actively participated in the negotiations and would agree that many elements expressed in the Treaty constitute customary international law. *See* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999).

[140] *See, e.g.*, ICTY Statute, *supra* note 138.

ICRC Study lists "killing, injuring or capturing an adversary by resort to perfidy" as a prohibition.[141] Additional Protocol I prohibits perfidy and defines it as "acts inviting the confidence of an adversary to lead him to believe that he is entitled to . . . protection under the rules of international law . . . with intent to betray that confidence."[142] "Injuring" would subsume the intent behind the *Jawad* Commission charge of intentionally causing serious bodily injury" in violation of the laws of war. Additional Protocol I provides the following example of perfidy: "the feigning of civilian, non-combatant status."[143] Perfidy contains an element of intent: in this case, the accused must have worn civilian clothes with the intent to betray a confidence invited by the very wearing of civilian clothes. In the hypothetical *Jawad* Clause 2 court-martial, circumstantial evidence alone may be enough to demonstrate that he intentionally used his blending in with the civilian population to get close enough to the vehicle to throw the hand grenade. In another case, though, such as a pitched battle, where U.S. forces attack a given site, knowing that the persons there are combatants, and the combatants openly respond as combatants, it would be difficult to argue perfidy despite the lack of belligerent immunity.[144] Thus, the mere fact that unlawful combatants fail to wear uniforms does not convert each instance in which they engage in hostilities into perfidy.[145]

The Rules for Courts-Martial set forth no specific distinction for charging "law of war violations" under Clause 2.[146] Only in the discussion to RCM 307(c)(2) is any distinction made for Clause 2 charging, and that consists merely of advising that the specification should be delineated as "Violation of the Law of War" on the charge sheet.[147] On a standard DD Form 458, the "perfidy" charge could take the following form:

---

[141] *See* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 1, *supra* note 61, R. 65.
[142] API, *supra* note 41, art. 37.
[143] *Id.* art. 37(1)(c).
[144] These facts may be closer to those of another military commissions case, *United States v. Omar Ahmed Khadr*. *See* DoD Military Commissions Website, *supra* note 2, Charge Sheet.
[145] *See* W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L 494 (2003). Mr. Parks, a renowned expert on the LOW, states in his article, "The law of war prohibits 'killing or wounding treacherously individuals belonging to the hostile nation or army,' commonly known as *perfidy*. . . . However, it is not a war crime for military personnel to wear or fight in civilian clothing unless it is done for the purpose of and with the result of killing treacherously." *Id.* at 521–22.
[146] *See* MCM, *supra* note 6, R.C.M. 307.
[147] *See id.* R.C.M. 307(c)(2) discussion.

CHARGE I: Violation of the Law of War: Attempting to Treacherously Murder.

Specification 1:

In that Mohammed Jawad, an unlawful combatant subject to trial by military tribunal by the law of war, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, attempt to treacherously[148] commit murder, while feigning civilian, non-combatant status in order to effectuate said attempt, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces [name of occupant of vehicle] with the intent to kill said [name occupant of vehicle].

. . .

CHARGE II: Violation of the Law of War: Treacherously Wounding.

Specification 1:

In that Mohammed Jawad, an unlawful combatant subject to trial by military tribunal by the law of war, did, in and around Kabul, Afghanistan, on or about December 17, 2002, while in the context of, and associated with, an armed conflict, treacherously wound [name of occupant of vehicle], while feigning civilian, non-combatant status, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces [name of first occupant of vehicle].

---

[148] *See* ICC Statute, *supra* note 139, art 8(b)(xi). Article 8 of the ICC Statute declares as war crimes "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law." Article 8(b)(xi) lists "killing or wounding treacherously individuals belonging to the hostile nation or army." "Treacherously" is synonymous with "perfidiously." *See* Parks, *supra* note 145, at 521 ("The law of war prohibits 'killing or wounding treacherously individuals belonging to the hostile nation or army,' commonly known as *perfidy*.").

Appendix C

Amending Language and Potential Charge

The author proposes the italicized language as amendments to the Manual for Courts-Martial.

Proposed Amendment to the Uniform Code of Military Justice:

§ 802. Art. 2. Persons subject to this chapter

(a) The following persons are subject to this chapter:

. . .

(14) Unlawful Combatants who have directly participated in hostilities against the United States or its coalition partners in time of declared war or contingency operation for acts committed during direct participation in hostilities and for acts related to such acts committed during direct participation in hostilities.

Proposed Amendment to the Rules for Courts-Martial:

Rule 103. Definitions and rules of construction.

The following definitions and rules of construction apply throughout this Manual, unless otherwise expressly provided.

. . .

(21) For purposes of Article 2(a)(14), "Unlawful combatant" means any person excluding any citizen of the United States who, while not falling into any other category described under Article 2, nevertheless, directly participates[149] *in hostilities against U.S. armed forces or coalition partners.*

[149] The *MCM* would have to also provide guidance on the meaning of "direct participation," restricting the term for purposes of the UCMJ as suggested in this article. *See supra* Part V.C.

Example of a Specification:

If Mr. Jawad were tried by court-martial under the proposed framework, the attempt charge would look very similar to a common attempt model specification:

> The CHARGE, Violation of Article 80, UCMJ, Attempted Murder.
>
> The Specification:
>
> In that Mohammed Jawad, an unlawful combatant, did, in and around Kabul, Afghanistan, on or about 17 December 2002, during a contingency operation, attempt to murder [name of vehicle occupant], a U.S. servicemember, by throwing a hand grenade into the passenger compartment of the vehicle in which [name of occupant] was then a passenger, with the intent to kill the occupants of said vehicle.