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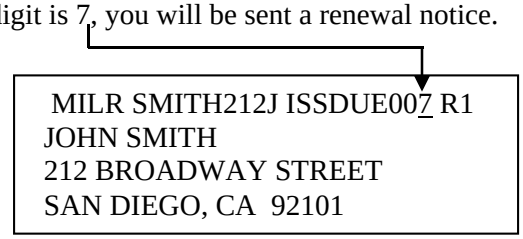

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MILITARY LAW REVIEW

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OUT OF FOCUS: EXPANDING THE DEFINITION OF CHILD PORNOGRAPHY IN THE MILITARY

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The sexual abuse and exploitation of children rob the victims of their childhood, irrevocably interfering with their emotional and psychological development. Ensuring that all children come of age without being disturbed by sexual trauma or exploitation is more than a criminal justice issue, it is a societal issue.[1]

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There can be no keener revelation of a society's soul than the way in which it treats its children.[2]

I. Introduction

You are the Special Victim Prosecutor (SVP) stationed at Fort Wherever. You receive a call from the Special Agent in Charge (SAC) at the local Criminal Investigation Command (CID)[3] office asking you to review images of suspected child pornography seized from a servicemember's laptop.

Dreading your task, you arrive at the CID office and are escorted to the computer forensic examination room where you are presented with a computer containing all of the seized images. You see there are hundreds of images seized from the servicemember's computer, all of which depict actual girls clearly under the age of eighteen. The images depict young girls in blatantly sexual poses, often lying atop a bed, straddling a chair or pushing up against the floor or wall. Many are topless, wearing a G–string, or are completely naked. A number of the images have also been edited to include offensive captions inviting the viewer to engage in sexual activity with the depicted child. However, none of the images show the genitalia or pubic area of any of the minor girls.[4]

After you have reviewed all of the images, the SAC requests that you authorize her to "title"[5] the servicemember with possession of child pornography. However, you must inform the SAC that none of the images technically meet the definition of child pornography, and are in fact what are generally referred to as

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[1] U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 1 (2010) [hereinafter National Strategy Report], http://www.justice.gov/psc/docs/natstrategyreport.pdf.

[2] *Id*. (quoting Nelson Mandela).

[3] The mission of Criminal Investigation Command (CID) is to conduct investigations of serious crimes, to include child pornography. *See* http://www.cid.army.mil/mission2.html.

[4] For a complete description of the images forming the basis for this hypothetical, *see* United States v. Warner, 73 M.J. 1, 5 (Court of Appeals for the Armed Forces [hereinafter C.A.A.F.] 2013) and United States v. Lang, No. 20140083, 2014 CCA LEXIS 844, at *4-6 (A. Ct. Crim. App. Oct 31, 2014) (mem. op.).

[5] For a detailed discussion of the "titling" process, *see* U.S. DEP'T OF ARMY REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES (9 JUNE 2014); U.S. DEP'T OF DEFENSE INSTR. 5505.7, TITLING AND INDEXING OF SUBJECTS OF CRIMINAL INVESTIGATIONS IN THE DEPARTMENT OF DEFENSE (27 January 2012); Major Patricia A. Ham, *The CID Titling Process—Founded or Unfounded?*, ARMY LAW., Aug. 1998. Generally, it is the determination that an individual should be made the subject of a criminal investigation because there is "credible information" that the individual "may have committed a criminal offense." Ham, *supra* note 5, at 1.

child erotica.[6] What is even more shocking to the SAC is, after she asks how to "title" the servicemember with possession of child erotica, you inform her that based on recent opinions from the Court of Appeals for the Armed Forces (CAAF) and the Military Service Courts of Criminal Appeals, you likely cannot prosecute the servicemember for the possession of these images.

To anyone not well versed in child pornography law, this would seem like an absurd conclusion. These are offensive images of minor girls in sexually provocative poses. They appear to serve no purpose other than to arouse the sexual interests of viewers. How can these not be considered child pornography and prohibited by law?

The problem, it can be argued, "is found in convoluted statutes and even more convoluted case law, which is missing the forest for the trees."[7] As this article will explain, child pornography is defined in an overly specific manner, requiring that any image of a minor, not engaged in some form of sexual act must depict the genitalia or pubic area.[8] Because none of the images described depict the genitalia or pubic area of the minor girls, they are not, as a matter of law, child pornography. More surprisingly, the CAAF has recently held that because these images do not meet the federal definition of child pornography, the First Amendment protects them.[9] Finally, any attempt to charge the possession of these images as something other than child pornography under Article 134, Uniform Code of Military Justice (UCMJ),[10] will likely be struck down under constitutional principles of fair notice.[11]

A change in the law is required to ensure that the creation, possession, or distribution of offensive images, including child erotica, is appropriately criminalized. However, any change in the law must still ensure that it is narrowly tailored to prevent the prohibition of otherwise innocent images of children. To that end, the military should amend its definition of child pornography to remove the requirement that images must depict the genitalia or pubic area, and instead require only that the image of a minor be lewd, under well–established legal

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[6] *See, e.g.*, United States v. Anderson, No. 20080669, 2010 CCA LEXIS 328, 2010 WL 3938363 (A. Ct. Crim. App. Sept. 10, 2010) (mem. op.).

[7] United States v. Blouin, 74 M.J. 247, 2015 CAAF LEXIS 584 *33-34 (C.A.A.F. 2015) (Baker, C.J., dissenting).

[8] *See, e.g.*, United States v. Anderson, No. 20080669, 2010 CCA LEXIS 328, 2010 WL 3938363 (A. Ct. Crim. App. Sept. 10, 2010) (mem. op.).

[9] U.S. CONST. amend I.

[10] Uniform Code of Military Justice (UCMJ) art. 134, otherwise known as the "General Article," allows for the prosecution of acts not otherwise criminalized under the law which are either prejudicial to good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces. *See generally,* Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974).

[11] *See* United States v. Warner, 73 M.J. 1 (C.A.A.F. 2013).

standards.[12] This will ensure that the greatest amount of harmful, offensive images of minors may be punishable for their possession, creation, or distribution, while also ensuring that servicemembers are not convicted for possessing innocent images of minors.

Having addressed the need for re–defining child protection statutes, the following section, Section II, discusses the history of child pornography and the policy and societal justifications for its prohibition. Section III presents the current military definition of child pornography with a discussion of recent case law. Section IV addresses the federal definition of child pornography, including its history and application, and the military's adoption of that standard. Section V discusses various state definitions of child pornography, and how those may differ from the military and federal definitions. Section VI addresses those images not encompassed under the definition of child pornography, such as child erotica. Finally, Section VII presents the proposed military definition of child pornography, along with legal arguments supporting its enactment.

II. An Overview of Child Pornography

Any review of the law relating to child pornography must first address the foundation and catalyst for such laws. This section begins by providing a history of child pornography leading to its prohibition, followed by a discussion relating to the policies underlying its prohibition.

A. A Brief History of Child Pornography

The foundations for child pornography and the sexual exploitation of children can be traced back to ancient times. "Almost since man discovered the ability to write or draw he has recorded the sexual abuse of children. Paintings of adult men having sexual intercourse with boys have been discovered in the remains of

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[12] *See, e.g.*, State v. Meyer, 120 Ore. App. 319, 325, 852 O.2d 879 (Ct. App. Or. 1993) (citing 53 CJS, "Lewdness," § 1; *Dictionary of Criminology* 127-28 (1965)); *see also* State v. Gates, 182 Ariz. 459, 462, 897 P.2d 1345 (Ariz. Ct. App. 1994) ("We believe a person of ordinary intelligence would understand the term 'lewd' to connote sexual suggestiveness.") (citations omitted); State v. Limpus, 128 Ariz. 371, 375-76, 625 P.2d 960 (Ariz. Ct. App. 1981). *See also* the discussion, i*nfra* at Sections IV.B and C, concerning the application of the term "lascivious," a synonym for "lewd. *See also* United States v. Gaskin, 12 U.S.C.M.A. 419, 421, 31 C.M.R. 5 (C.M.A. 1961) ("The term 'lascivious' is synonymous with 'lewd' . . . ."); United States v. Johnson, 4 M.J. 770, 771 (A.C.M.R. 1978) ("The terms 'indecent,' 'lewd,' and 'lascivious,' are synonymous and signify a form of immorality which has relation to sexual impurity.").

Ancient Greek civilisation."[13] In Ancient Greece, for example, before a young man in his mid-twenties married a girl of twelve to fourteen years, he would first engage in a relationship with a young boy of twelve years, until that boy reached the age of twenty, and the cycle began anew.[14] Similarly, in the Roman Empire it was common for girls to marry at age fourteen, and, it has been noted that ancient Chinese and Indian societies have "institutionalized sexual abuse of children."[15]

However, the true history of child pornography began with the invention of the camera. "Almost as soon as Louis Daguerre produced photographic plates in 1824, and particularly after the invention of the roll of negative film in 1839, pornographic photographs of children began to be circulated in London."[16] In fact, one of the most infamous early child pornographers was Lewis Carroll, who was an "avid collector of child pornography,"[17] and who potentially took thousands of pictures of girls as young as six years old.[18]

While the camera allowed for the easy creation of child pornography in the 19th century, it was the liberalization of obscenity laws in Denmark in the 1970s and apathy of other governments following the sexual revolution that allowed child pornography to become "an international commercial industry, leading to the relatively widespread availability of magazines, films, and photographs of children depicted in a sexual manner."[19] This allowed companies such as Rodox/Color Climax Corporation and individuals such as Willy Strauss to create and distribute massive quantities of magazines and movies worldwide depicting child pornography.[20] By 1977, approximately 250 child pornography magazines were circulating throughout the United States.[21] These magazines were

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[13] TIM TATE, CHILD PORNOGRAPHY: AN INVESTIGATION, 33-34 (1990); *see also* CHARLES PATRICK EWING, JUSTICE PERVERTED: SEX OFFENDER LAW, PSYCHOLOGY, AND PUBLIC POLICY 119 (2011).

[14] RICHARD WORTLEY & STEPHEN SMALLBONE, INTERNET CHILD PORNOGRAPHY: CAUSES, INVESTIGATION, AND PREVENTION 9 (2012).

[15] *Id.* at 9.

[16] Tate, *supra* note 13, at 34.

[17] *Id.* at 37.

[18] Wortley, *supra* note 14, at 11. Interestingly, the images that Mr. Carroll took would likely constitute child erotica by today's standards. *Id.*

[19] Ewing, *supra* note 13, at 119; *see also* Tate, *supra* note 13, at 40-41.

[20] Tate, *supra* note 13, at 45-51.

[21] Richard Wortley and Stephen Smallbone, *Child Pornography on the Internet Guide No. 41*, CENTER FOR PROBLEM ORIENTED POLICING 1 (2006), http://www.popcenter.org/problems/pdfs/ChildPorn.pdf. "By 1977, the existence of more than 260 child pornography magazines had been documented—publications said to 'depict children, some as young as three to five years of age [engaged] in activities [that] ranged from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sadomaschosim." Ewing, *supra* note 13, at 119 (citing *Sexual Exploitation of Children*: *Hearings before the Subcommittee on Select Education of the House Committee on Education and Labor*, 95th Cong. 1st Sess., 41-42 (1977)).

apparently "sold over the counter and in considerable quantities," such that they became "part of the commercial mainstream of pornography."[22]

While child pornography may have been prevalent for quite some time, at least in the United States, public awareness and condemnation did not begin until the late 1970s.[23] The first real mass public awareness of the issue was likely in September 1975, stemming from national media reports of New York City's *clean-up campaign* against a number of stores known to sell child pornography, in advance of the Democratic National Convention.[24] Then, in 1977, a psychiatrist and psychologist held a news conference in Chicago to attract attention to the issue of, and call for the criminalization of, child pornography.[25] "The response was immediate: newspapers across the country carried the story and began investigating the commercial production and sale of child pornography."[26] Stories highlighting the serious problem of child pornography ran in *Time Magazine* and the *Chicago Tribune* that year.[27]

According to one commentator discussing the issue, "[t]he year 1977 marked a turning point . . . . The media convergence catalyzed state and federal legislative action."[28] Congress held three committee hearings in May 1977, uncovering evidence that 264 child pornography magazines were published in the United States, and that one commercial producer made between 5-10 million dollars per year selling child pornography.[29] Congress subsequently concluded that "[c]hild pornography and prostitution have become highly organized, multi-million dollar industries that operate on a nationwide scale."[30] What followed, in 1978, was the beginning of federal and state laws criminalizing child pornography.[31]

Despite federal and state attempts to curtail child pornography through legislation, by 1990 the issue of child pornography had become a "national emergency."[32] This was only exacerbated by the creation and expansion of the Internet. "There is no doubt that the Internet has been instrumental in the exponential growth of the child pornography problem."[33] For example, in 1980

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[22] Tate, *supra* note 13, at 61 (citing U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT (1986)).
[23] Amy Adler, *The Perverse Law of Child Pornography*, 101 Colum. L. Rev. 209, 218 (2001).
[24] Tate, *supra* note 13, at 63.
[25] *Id.* at 64.
[26] *Id.*
[27] *Id.*
[28] Adler, *supra* note 23, at 230.
[29] Tate, *supra* note 13, at 65.
[30] *Id.* at 65 (citing S. Rep. No. 95-438, at 5 (1977)).
[31] Adler, *supra* note 23, at 230. *See* Section IV, *infra*, for a detailed discussion of the history of federal child pornography law following 1977.
[32] Amy Adler, *Inverting the First Amendment*, 149 U. Pa. L. Rev. 921, 933 (2001).
[33] Wortley, *supra* note 14, at 25.

the largest child pornography magazine in the United States sold only about 800 copies; in 2000, one Internet child pornography company had over a quarter of a million subscribers worldwide.[34]

The numbers related to the explosion of child pornography worldwide following the creation of the Internet are staggering. While it is impossible to determine precisely how much child pornography exists,[35] a number of sources have listed estimates. The global child pornography industry may earn anywhere between 1-20 billion dollars annually.[36] There may be more than one million images of child pornography available on the Internet at any one time, with the addition of an estimated 200 images daily or 20,000 images weekly.[37] The number of websites is likely growing as well, going from 261,653 to 480,000 between 2001 and 2004.[38]

History shows that child pornography has evolved from being a part of societal practice in ancient times, to gradually expanding the sexual exploitation of children as technology advances. Despite the change in attitudes towards child pornography by the general public in the 1970s, the Internet has exacerbated the problem into epidemic proportions.

B. Purpose Behind Prohibiting Child Pornography

Why the change in the 1970s by society to universally decry child pornography? What underlies the basis for prohibiting child pornography, and why is it something that society now has chosen to condemn? The Supreme Court has detailed six primary justifications for why child pornography, in the legal context, should be prohibited.

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[34] *Id.* (citations omitted).

[35] Ewing, *supra* note 13, at 142.

[36] M. Aiken, M. Moran, & M.J. Berry, *Child Abuse Material and the Internet: Cyber–Psychology of Online Child Related Sex Offending* 2 (2011) (paper presented at the twenty–ninth meeting of the INTERPOL Specialist Group on Crimes against Children, Lyons, France, Sept. 5-7, 2011), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.interpol.int%2FMedia%2FFiles%2FINTERPOL-Expertise%2FIGLC%2FChild-abuse-material-and-the-Internet&ei=AkD_VOC2H4qwyQTbk4LADQ&usg=AFQjCNFdSwlDutptLssRkI93tGnn0SjvnA&sig2=1nejnw2h24l_onQielyLMw&bvm=bv.87611401,d.aWw; Adler, *supra* note 23, at 231-32; National Strategy Report, *supra* note 1, at 15.

[37] National Strategy Report, *supra* note 1, at 15; Jason Scheff, *Disproving the "Just Pictures" Defense: Interrogative Use of the Polygraph to Investigate Contact Sexual Offenses Committed by Child Pornography Suspects*, 68 N.Y.U. Ann. Surv. Am. L. 603, 606-07 (2013); Ewing, *supra* note 13, at 142-43 (citations omitted).

[38] National Strategy Report, *supra* note 1, at 15.

First, the government has a compelling interest in "safeguarding the physical and psychological well-being of a minor."[39] Indeed, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."[40] "The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."[41]

Second,

> [t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.[42]

The possession of child pornography can likewise be prohibited as a means to decrease demand, particularly in light of difficulties associated with "attacking production and distribution."[43]

Third, "[t]he advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation."[44] Fourth, "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis."[45] Fifth, "[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions."[46] Sixth and finally, "encouraging destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity."[47]

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[39] New York v. Ferber, 458 U.S. 747, 756-57, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).
[40] *Id.* at 757.
[41] *Id.* at 758.
[42] *Id.* at 759.
[43] Osborne v. Ohio, 495 U.S. 103, 109-10, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990).
[44] *Ferber*, 458 U.S. at 761.
[45] *Id.* at 762.
[46] *Id.* at 763.
[47] *Osborne*, 495 U.S. at 111.

Of these rationales, perhaps the most compelling is the protection of children from the lasting and very real effects of being victims of child pornography. The Department of Justice has reported to Congress:

> Unlike children who suffer from abuse without the production of images of that abuse, these children struggle to find closure and may be more prone to feelings of helplessness and lack of control, given that the images cannot be retrieved and are available for others to see in perpetuity. They experience anxiety as a result of the perpetual fear of humiliation that they will be recognized from the images.[48]

In addition, Kenneth Lanning from the Federal Bureau of Investigation (FBI) notes that "[c]hildren used in pornography are desensitized and conditioned to respond as sexual objects. They are frequently ashamed of their portrayal in such material. They must live with the permanency, longevity, and circulation of such a record of their sexual victimization."[49] Studies show also that even years later the "feelings of shame and anxiety did not fade but intensified to feelings of deep despair, worthlessness, and hopelessness."[50]

Finally, tangentially related to the sixth rationale discussed by the Supreme Court is the concern that persons who possess or produce child pornography are likely to commit a contact–type sexual assault offense against children. The Department of Justice reported to Congress that "there is sufficient evidence of a relationship between possession of child pornography and the commission of contact offenses against children to make it a cause of acute concern."[51]

This conclusion is not without controversy, and is one of the more hotly debated issues surrounding child pornography.[52] Anecdotal conclusions strongly

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[48] National Strategy Report, *supra* note 1, at 9.

[49] Kenneth V. Lanning, *Child Molesters: A Behavioral Analysis* 84 (5th ed. 2010), http://www.missingkids.com/en_US/publications/NC70.pdf.

[50] Wortley, *supra* note 21, at 17-18.

[51] National Strategy Report, *supra* note 1, at 19.

[52] *See e.g.*, MAX TAYLOR AND ETHEL QUAYLE, CHILD PORNOGRAPHY: AN INTERNET CRIME 13 (2003) ("It must be noted that we have very little systematic evidence on the relationship between involvement with child pornography and sexual assaults on children.") "Sensational cases involving the sexual abuse, murder and the commensurate possession of child pornography, such as that of Danielle van Dam, create the perception in the minds of most people that there is arguably a nexus between these crimes." Debra D. Burke, *Thinking Outside the Box: Child Pornography, Obscenity and the Constitution*, 8 Va. J.L. & Tech. 11, 35 (2003) (citing *Neighbor Convicted in Killing of 7-Year-Old California Girl*, WASH. POST, Aug. 22, 2002, at A2. *See also Westerfield's Son Describes Finding Porn*, CNN.com (July 24, 2002), http://www.cnn.com/2002/LAW/07/24/westerfield.trial/ (recounting testimony of defendant's son to finding CD–ROMs in his father's home office that contained downloads from pornography site, including child pornography)).

support the connection.[53] Some statistics tend to support the correlation between child pornography and sexual contact offenses;[54] however, studies on the issue have produced widely divergent results.[55] One of the most famous studies, the Butner Study, which concluded that as many as 85 percent of child pornography offenders are also sexual contact offenders, has been widely discredited.[56]

As Mr. Lanning noted, "An offender's pornography and erotica collection is the single best indicator of what he wants to do. It is not necessarily the best indicator of what he did or will do. Not all collectors of child pornography physically molest children and not all molesters of children collect child pornography."[57] And "[t]he primary producers, distributors, and consumers of child pornography within the United States are child molesters, pedophiles, sexual deviants, and others with a sexual interest in children."[58] While research shows that a direct causal link between child pornography and sexual contact offenses may not be currently supported utilizing social sciences, there is clearly a link between child pornography and a sexual desire for children.

C. Summary

The sexual exploitation of children through child pornography has existed since ancient times; however, it is the relatively recent advent of the Internet that has allowed the proliferation of such abuse to spread to epidemic proportions. In

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[53] National Strategy Report, *supra* note 1, at 9 ("[L]aw enforcement officers and prosecutors interviewed for this Assessment universally report connections between child pornography offenses and sexual contact offenses against children."). *Id.*

[54] *See* Wortley, *supra* note 21, at 13; Eva J. Klain, Heather J. Davies, Molly A. Hicks, *Child Pornography: The Criminal–Justice–System Response* CENTER FOR PROBLEM ORIENTED POLICING 4 (Mar. 2001), http://www.popcenter.org/problems/child_pornography/PDFs/Klain_etal_2001.pdf ("[Thirty–five] percent of cases involving 595 individuals arrested since 1997 for using the mail to sexually exploit children were active abusers."); National Strategy Report, *supra* note 1, at 20 ("An analysis of 1663 federally prosecuted child pornography cases indicates contact offenses were discovered in approximately one–third of cases."); Tate, *supra* note 13, at 109 (1976 L.A. Police Department Sexually Exploited Children Unit interviewed 150 victims and suspected offenders of sexual abuse—all cases involved child pornography).

[55] *See* Scheff, *supra* note 37, at 651-53; Wortley, *supra* note 14, at 39-41; Lanning, *supra* note 49, at 79 ("This correlation between child pornography and pedophilia, which was recognized by law enforcement and documented in my presentations and publications for many years, has been corroborated by research conducted in Canada.") (citing Michael C. Seto, James M. Cantor, & Ray Blanchard, *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, Journal of Abnormal Psychology, 115(3): 610-615 (2006).

[56] *See* Scheff, *supra* note 37, at 651-52; United States v. Johnson, 588 F. Supp. 2d 997, 1005-07 (S.D. Iowa 2008).

[57] Lanning, *supra* note 49, at 107.

[58] *Id.* at 81.

light of this, and the contemporary recognition by society that child pornography is an evil that must be prevented in order to protect children, the law has attempted to respond accordingly.

III. The Current Status of the Definition of Child Pornography in the Military

Until recently, the military did not specifically prohibit or define child pornography within the UCMJ, but instead prosecuted servicemembers for its possession, distribution, or creation under the *general* article of Article 134, UCMJ.[59] Effective January 12, 2012, the President signed into law a newly listed offense under Article 134, UCMJ that specifically prohibited servicemembers from possessing, distributing or producing child pornography as well as additionally proscribing receiving and viewing.[60] The analysis to the rule recognizes that the new law "is generally based on 18 U.S.C. §2252A, as well as military custom and regulation," along with the historical practice of prosecuting servicemembers "under clause 1 or 2 of Article 134, or under clause 3 as an assimilated crime under 18 U.S.C. §2251."[61]

The President has defined "child pornography," in relevant part, as any "visual depiction of an actual minor engaging in sexually explicit conduct."[62] A "minor" is anyone under the age of eighteen.[63] "Sexually explicit conduct" is defined, in relevant part, as a "lascivious exhibition of the genitals or pubic area of any person."[64] Lascivious exhibition of the genitals is not further defined within the manual. However, as discussed in greater detail in Section IV, the military generally adheres to the federal interpretation of this term.[65]

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[59] UCMJ art. 134 (2012); *See* United States v. Finch, 73 M.J. 144, 152 (C.A.A.F. 2014) (Effron, S.J., dissenting) ("Although the Uniform Code of Military Justice does not contain an article that expressly addresses child pornography, such offenses are prosecuted in courts–martial under Article 134, UCMJ, 10 U.S.C. § 934 (2012), which prohibits conduct that is prejudicial to good order and discipline, conduct that is service discrediting, and conduct that violates federal criminal statutes.").

[60] MANUAL FOR COURTS–MARTIAL, UNITED STATES pt. IV, ¶ 68b (2012) [hereinafter MCM]; 2012 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,593, 76 Fed. Reg. 78451 (Dec. 13, 2011). The President is allowed to list examples of offenses under Article 134, UCMJ, which is considered "persuasive" to the courts. United States v. Jones, 68 M.J. 465, 471-72 (C.A.A.F. 2010).

[61] MCM, part IV, ¶ 68b analysis, at A23-22 (2012).

[62] MCM, part IV, ¶ 68b.c.(1). This is the second clause of the definition. The first clause defines "child pornography" as "material that contains . . . an obscene visual depiction of a minor engaging in sexually explicit conduct . . . ." *Id.* Because this alternate definition involves the obscenity standard, which is distinct from child pornography, it is not pertinent to this article. *See e.g.*, New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) (discussed in greater detail throughout this article in Section VII.A).

[63] MCM, part IV, ¶ 68b.c.(4).

[64] MCM, part IV, ¶ 68b.c.(7)(e).

[65] *See* United States v. Roderick, 62 M.J. 425, 429-30 (C.A.A.F. 2006).

A number of recent military cases discuss the meaning of "lascivious exhibition of the genitals or pubic area," and the legal effect of images not meeting that technical definition. One of the more comprehensive discussions of this term was in an unpublished case from the United States Army Court of Criminal Appeals (ACCA): *United States v. Anderson.*[66] In *Anderson*, Judge Ham explained how this term has been interpreted and applied in both federal and military law, but emphasized that the "prerequisite" for any image to be considered "child pornography" is that it actually depict the "genitals or pubic area."[67] Even when a servicemember is charged under clause 1 or 2 of Article 134, UCMJ, as opposed to the federal statute, the images must still depict the genitals or pubic area.[68]

The importance of *Anderson* is not necessarily its rather straightforward application of the statutory definition of child pornography, requiring a depiction of the genitalia or pubic area. Rather, its import stems from the foresight with which Judge Ham foreshadowed the issues that have since been addressed by the CAAF in recent years and which have inspired the proposal herein. Judge Ham noted that the federal definition of child pornography does "not address other lascivious images lacking an exhibition of the genitals or pubic area, such as so-called 'child erotica.'"[69] Because the question of whether those images could be prohibited under clause 1 or 2 of Article 134, UCMJ, was not as issue in the case,[70] the court took no position on the subject.[71] Judge Ham did, however, perfectly frame the issue: "[W]hat would constitute the offense and how would a service member be on notice of what conduct is prohibited? Extreme care should be taken in any decision to charge 'child erotica' in light of the potentially substantial constitutional and legal issues that could arise in such a case."[72]

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[66] United States v. Anderson, No. 20080669, 2010 CCA LEXIS 328, 2010 WL 3938363 (A. Ct. Crim. App. Sept. 10, 2010) (mem. op.).

[67] *Id.* at *25 ("In *Roderick*, in fact, the C.A.A.F. plainly recognized that a 'prerequisite for any analysis under *Dost* is that the image depict the genitals or pubic area, and that such a depiction is 'a requirement of [18 U.S.C.] § 2256(2).") (quoting *Roderick*, 62 M.J. at 430).

[68] *Id.* at *26 (citing United States v. Villard, 885 F.2d 117, 124 (3rd Cir. 1989)). Interestingly, a recent case from the ACCA calls into question the holding in *Anderson* that a depiction of the genitalia or pubic area is always required in the military. *See* United States v. Miedama, No. 20110496, 2013 CCA LEXIS 377, at *9, 2013 WL 1896280 (A. Ct. Crim. App. May 2, 2013). In *Miedama*, the ACCA held that in cases charged under clauses 1 or 2 of Article 134, UCMJ, an image need not actually depict the genitalia or pubic area to constitute child pornography. *Id.* It is unclear how this unpublished case will be applied, as the C.A.A.F. denied review. United States v. Miedama, No. 13-0609/AR, 2013 CAAF LEXIS 1144 (C.A.A.F. Sep. 25, 2013) (denying petition for review).

[69] *Anderson*, 2010 CCA LEXIS 328 at *24.

[70] *Id.* at *27.

[71] *Id.* at *29 n.11.

[72] *Id.*

The first significant case from the CAAF confronting the constitutionality of 'child erotica' was *United States v. Barberi*.[73] While that term was not actually at issue in the case, the CAAF considered the constitutional effect of an accused being convicted of possessing six images of child pornography, where four of those six images did not depict child pornography, because they lacked exhibition of genitalia or the pubic area of the minor child.[74]

Incredibly, the CAAF held that the four images that failed to meet the federal definition of child pornography were constitutionally protected speech. It recognized that the First Amendment protects speech that does not fall within certain categories, such as defamation, incitement, obscenity, and child pornography.[75] However, the court then summarily concluded that the four images that did not meet the federal definition of child pornography "constitute constitutionally protected speech, and '[t]he Government may not suppress lawful speech as the means to suppress unlawful speech.'"[76] In response to Chief Judge Baker's vigorous dissent concerning the "constitutionality" of these images,[77] the majority noted only that "[a]lthough these images are disturbing and distasteful, that alone does not place them into the category of unprotected speech in this case."[78]

The CAAF overruled *Barberi* three years later in the case of *United States v. Piolunek*.[79] However, it was overruled solely on the grounds that *Barberi* misapplied the general verdict doctrine.[80] The majority never discussed the question of whether images that do not meet the federal definition of child pornography are constitutionally protected, other than to recognize that "the Court in *Barberi* divided on whether there is an *additional* category of images that constitute child pornography."[81] To be sure, in his dissent in *Piolunek*, Judge Erdmann continued to rely heavily on that legal conclusion from *Barberi*.[82] Consequently, while *Barberi* may have been overruled on general verdict grounds, its conclusion that images which do not meet the federal definition of child pornography are constitutionally protected has not been overruled, and remains the current state of the law in the military.

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[73] United States v. Barberi, 71 M.J. 127 (C.A.A.F. 2012) (overruled by United States v. Piolunek, 74 M.J. 107 (C.A.A.F. 2015)).
[74] *Id.* at 129-30.
[75] *Id.* at 130-31.
[76] *Barberi*, 71 M.J. at 130-31 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)).
[77] *Id.* at 134-37 (Baker, C.J., dissenting).
[78] *Id.* at 131 n. 4. The legal efficacy of this case will be discussed in more detail *infra* Section VII.
[79] United States v. Piolunek, 74 M.J. 107 (C.A.A.F. 2015).
[80] *Id*. at 110-12.
[81] *Id*. at 111.
[82] *Id*. at 113-15 (Erdmann, J., dissenting).

In 2013, the CAAF directly addressed child erotica in *United States v. Warner*.[83] In that case, the accused appealed his conviction for possessing images that "depict minors as sexual objects or in a sexually suggestive way."[84] The government argued at trial that these images constituted "child erotica."[85] However, none of the images depicted actual nudity, a critical fact in the court's analysis.[86] The CAAF set aside the conviction because the accused was deprived of constitutional "fair notice" that he could be prosecuted under Article 134, UCMJ, for possessing images of minors "as sexual objects or in a sexually suggestive way."[87] The CAAF pointed out that none of the sources of "fair notice," which include "federal law, state law, military case law, military custom and usage, and military regulations," prohibited "possession of images of minors that are sexually suggestive but do not depict nudity or otherwise reach the federal definition of child pornography."[88] Consequently, the accused could not have been on notice that he could be punished for their possession.

The CAAF again addressed child erotica the next year. While the lack of nudity was central to the holding in *Warner*, the case of *United States v. Moon*[89] makes clear that even nudity itself is insufficient to uphold a conviction where the images do not meet the federal definition of child pornography. There, the accused was charged with possessing images of "nude minors and persons appearing to be nude minors."[90] The images at issue depicted "prepubescent and pubescent girls in a variety of poses and locations who are either completely naked or wearing only hats or jewelry."[91] The court sidestepped the notice concern in *Warner* by presuming the accused was on notice that he could be charged with possessing these images.[92] Nevertheless, the court set aside the conviction because the providence inquiry failed to establish why the images in question lost their constitutional protection.[93] Again, the court assumed, without discussion, that the images were constitutionally protected.

The impact of these recent decisions involving images that do not meet the federal definition of child pornography is twofold: (1) servicemembers lack sufficient notice that possessing those images may be criminalized, even under Article 134, UCMJ; and (2) those images are protected under the First

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[83] United States v. Warner, 73 M.J. 1 (C.A.A.F. 2013). This author was lead appellate government counsel in *Warner*.
[84] *Id.* at 2.
[85] *Id.* at 3.
[86] *Id.* at 3-4.
[87] *Id.*
[88] *Warner*, 73 M.J. at 3-4 (citing United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003)).
[89] United States v. Moon, 73 M.J. 382 (C.A.A.F. 2014).
[90] *Id.* at 383.
[91] *Id.* at 389 (Ohlson, J., dissenting).
[92] *Id.* at 383, 386.
[93] *Id.* at 389.

Amendment, significantly hindering the government's ability to prosecute servicemembers for possessing them.[94] To be sure, the Military Service Courts of Criminal Appeals have already followed suit, with both the Army and the Navy-Marine Corps Courts of Criminal Appeals recently dismissing charges in cases involving images that did not meet the federal definition of child pornography.[95]

As the law stands now, it is unlikely that servicemembers can be prosecuted for images depicting child erotica, such as those described in the introduction to this article; consequently, a change in the law is necessary to prohibit these images. Before deciding how best to amend the law, it is important to first discuss the origins of child pornography legislation, the purposes behind it, and examples of how child pornography is defined elsewhere.

IV. The Federal Definition of Child Pornography, Its Interpretation and Application

The federal government's prohibition of child pornography has evolved over the past four decades. However, it has consistently required that for an image to constitute child pornography it must contain a depiction of the "genitals or pubic area," and be either lewd or lascivious.[96] The meaning of the latter term occupies considerable case law in federal and military jurisprudence. This section discusses the legal history of child pornography under federal law, its application, and how federal and military courts have subsequently interpreted it.

A. History of Federal Child Pornography Law

Congress first directly addressed child pornography in 1978 through the Protection Against Sexual Exploitation Act.[97] This statute defined child pornography as, in part, a "lewd exhibition of the genitals or pubic area of any

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[94] *See* United States v. Wilcox, 66 M.J. 442 (C.A.A.F. 2008) (discussing the heightened evidentiary standard required in cases where servicemembers are charged with conduct or speech protected by the First Amendment).

[95] United States v. Rapp, No. 201200303, CCA LEXIS 355, 2013 WL 1829157 (N-M. Ct. Crim. App. Apr. 30, 2013); United States v. Lang, No. 20140083, 2014 CCA LEXIS 844 (A. Ct. Crim. App. Oct. 31, 2014).

[96] Images that depict sexual activity also constitute child pornography. These include images that depict: (1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-genital, whether between persons of the same or opposite sex; (2) bestiality; (3) masturbation; or (4) sadistic or masochistic abuse. 18 U.S.C. §§ 2256(2)(A)(i)-(iv); MCM, part IV, ¶¶ 68b.c.(7)(a)-(d). However, because these images are readily identifiable as child pornography, they are outside the scope of this article.

[97] Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251-2253); Adler, *supra* note 23, at 236 n.154.

person."[98] Congress crafted this definition to conform to the requirements for obscenity under *Miller v. California*,[99] because it believed that it could not constitutionally do so otherwise.[100]

At the time, the Supreme Court had set forth that obscenity is not protected under the First Amendment;[101] however, jurisdictions could only limit their regulations to images "which depict or describe sexual conduct."[102] In doing so, the jurisdiction was required to "specifically" define such conduct, and limit its application to "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[103]

However, four years after Congress enacted its original definition of child pornography, the Supreme Court addressed a case in which a state adopted a definition that did not require the images to be obscene. In *New York v. Ferber*,[104] the Supreme Court held that jurisdictions are free to enact laws that ban "child pornography," and crafted a new exception to the protections of the First Amendment for such child pornography.[105] The Court specifically stated that the *Miller* standard for obscenity is not required when reviewing statutes prohibiting child pornography, because the government has a strong interest in the protection of children.[106]

In response to *Ferber*, Congress quickly acted to amend its definition of child pornography in the Child Protection Act of 1984.[107] It replaced the term "lewd" with the term "lascivious," thereby modifying the definition to a "lascivious exhibition of the genitals or pubic area of any person,"[108] which remains in place today.[109] "This was supposedly in order to emphasize the distinction between child pornography law and obscenity law, with which the term 'lewd' is often

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98 18 U.S.C. § 2253(2)(E) (1978).

99 Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

100 Adler, *supra* note 23 at 236 (citing Annemarie J. Mazzone, *United States v. Knox: Protecting Children from Sexual Exploitation Through the Federal Child Pornography Laws*, 5 Fordham Intell. Prop. Media & Ent. L.J. 167, 174-79 (1994)). *Miller*, in fact, actually used the term "lewd exhibition of the genitals" as a specific example of what would constitute obscene conduct. *Miller*, 413 U.S. at 25.

101 Roth v. United States, 354 U.S. 476, 485, 77 S. Ct. 1304, 1 L.Ed. 2d. 1498 (1957).

102 *Miller*, 413 U.S. at 24.

103 *Id.* at 24.

104 New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d. 1113 (1982). *Ferber* is addressed in more detail in Section VII.A.

105 *Ferber*, 458 U.S. at 756-64.

106 *Id.* at 764-65.

107 Pub. L. No. 98-292, 98 Stat. 204 (1984); 18 U.S.C. §§ 2251-2254, 2256, 2516; Adler, *supra*, note 23, at 237.

108 18 U.S.C. §2253(2)(E) (1984); 98 Stat. 204, 205 (1984).

109 18 U.S.C. § 2256(2)(A)(v) (2014).

associated."[110] The elimination of the obscenity standard within the definition had immediate impact on federal prosecutions: only twenty–three individuals had been convicted between 1977 and 1984; however, after the law was amended, "at least 214 defendants were convicted in the twenty–eight months following."[111]

Within the Child Protection Act of 1984, Congress made a number of findings explaining why it was expanding the definition of child pornography, including:

> (1) child pornography has developed into a highly organized, multi-million-dollar industry which operates on a nationwide scale;
> (2) thousands of children including large numbers of runaway and homeless youth are exploited in the production and distribution of pornographic materials; and
> (3) the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the individual child and to society.[112]

While the federal definition of child pornography has not changed since 1984, the manner in which the federal government regulates child pornography has greatly expanded through various legislative acts. The first was the Child Sexual Abuse and Pornography Act, which "banned the production and use of advertisements for child pornography."[113] Two years later, Congress began to modernize the statute by prohibiting the use of a "computer to transport, distribute, or receive child pornography," with the Child Protection and Obscenity Enforcement Act.[114]

Congress attempted to expand the definition of child pornography even further in 1996 by passing the Child Pornography Prevention Act (CPPA), which amended part of the definition to "include any visual depiction that 'is, *or appears*

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[110] Adler, *supra*, note 23, at 238, n.167 (citing United States v. Dost, 636 F. Supp. 828, 830-32 (S.D. Cal. 1986)). It appears that the distinction is one without a difference, however. The terms "lewd" and "lascivious" have been considered synonyms, and used interchangeably to define the same conduct. *See* United States v. Gaskin, 31 C.M.R. 5, 7, 12 U.S.C.M.A. 419 (1961); United States v. Johnson, 4 M.J. 770, 771 (A.C.M.R. 1978); United States v. Fabrizio, 459 F.3d 80, 84-85 (1st Cir. 2006) (collecting cases); Schmitt v. State, 590 So. 2d 404, 410 (Fla. 1991); Rhoden v. Morgan, 863 F. Supp 612, 618 (M.D. Tenn. 1994).

[111] Adler, *supra* note 23, at 237.

[112] Pub. L. No. 98-292, 98 Stat. 204 (1984).

[113] Pub. L. No. 99-628, § 2, 100 Stat. 3510 (1986) (codified as amended at 18 U.S.C. § 2251); Klain, *supra* note 54, at 13.

[114] Klain, *supra*, note 54, at 13; Pub. L. No. 100-690, § 7512, 102 Stat. 4181 (1988) (codified as amended at 18U.S.C. §§ 2251A-2252).

to be, of a minor engaging in sexually explicit conduct.'"[115] This was in response to the growth in computer technology "which makes it possible to create realistic images of children who do not exist,"[116] so–called "virtual child pornography."[117] However, the Supreme Court struck down this provision as overbroad and unconstitutional because images that do not depict actual minors do not meet the policies announced in *Ferber* that justify the constitutional exception for child pornography.[118]

In response, Congress enacted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act).[119] Congress amended the definition of child pornography from the overbroad "appears to be" to the term "indistinguishable from" in order to rebut defenses in court that the government failed to prove the images depicted an actual child.[120] In addition, the PROTECT Act enacted 18 U.S.C. § 1466A, which prohibits "virtual child pornography" as a type of obscenity.[121]

The current definition of child pornography is located at 18 U.S.C. § 2256(8). Based on all past legislation, this definition is sub–divided into three parts. The first involves images of actual children,[122] while the second and third encompass images that are "indistinguishable from" actual children or have been modified to appear to be actual children.[123] All three of these sub–parts require that the image depict the minor engaging in "sexually explicit conduct."[124] The definition of "sexually explicit conduct" depends on which sub–part is alleged as well. For the first and third sub–parts, "sexually explicit conduct" requires only that there be a "lascivious exhibition of the genitals or pubic area of any person."[125] For the second sub–part, which does not necessarily require actual children, the "lascivious exhibition of the genitals or pubic area of any person" must also be "graphic or simulated."[126] This article deals solely with images depicting actual children.

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[115] Klain, *supra*, note 54, at 14; Pub. L. No. 104-208, § 121,110 Stat. 3009, 3009-26 (1996); 18 U.S.C. § 2256(8)(B) (1999) (emphasis added).
[116] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 239-40, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).
[117] *Id.* at 242.
[118] *Id.* at 256.
[119] Pub. L. No. 108-21, 117 Stat 650 (2003).
[120] James N. Kornegay, *Protecting Our Children and the Constitution: An Analysis of the "Virtual" Child Pornography Provisions of the PROTECT Act of 2003*, 47 WM. & MARY L. REV. 2129, 2149 (2006).
[121] 18 U.S.C. § 1466A; *Kornegay*, *supra* note 120, at 2163.
[122] 18 U.S.C. § 2256(8)(A).
[123] 18 U.S.C. §§ 2256(8)(B)-(C).
[124] 18 U.S.C. §§ 2256(8)(A)-(C).
[125] 18 U.S.C. § 2256(2)(A)(v). The definition also includes sexual acts or acts of abuse; however, for purposes of this article, those definitions are not discussed.
[126] 18 U.S.C. § 2256(2)(B)(iii).

Through the various amendments and modifications to federal law, Congress has defined child pornography as a "lascivious exhibition of the genitals or pubic area of any person," where the image is either of an actual child, or indistinguishable from an actual child. The key legal question left to the courts was what constitutes a "lascivious exhibition"?

B. Lascivious Exhibition—Its Interpretation and Application by Federal Courts

The nearly universally accepted[127] test for determining whether a particular image is a "lascivious exhibition of the genitals or pubic area of any person" is derived from *United States v. Dost*.[128] Known as the *Dost* factors, these are:

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
> (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
> (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
> (4) whether the child is fully or partially clothed, or nude;
> (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or
> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.[129]

The court in *Dost* noted, however, that "a visual depiction need not involve all of these factors" and "[t]he determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor."[130] Indeed, other courts have recognized "other factors may be relevant, depending upon the particular circumstances involved,"[131] and those must be analyzed on a case–by–case basis.[132] Thus, while the *Dost* factors provide a useful guide for evaluating images of child pornography, they are not dispositive.

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[127] *See* United States v. Roderick, 62 M.J. 425, 429 (C.A.A.F. 2006) (noting that "[a]ll of the federal courts to address" the meaning of "lascivious exhibition" have relied on *Dost*).
[128] United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom.* United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987).
[129] *Id.*
[130] *Id.*
[131] United States v. Amirault, 173 F.3d 28, 31 (1st Cir. 1999); *see also* United States v. Campbell, 81 Fed. Appx. 532, 536 (6th Cir. 2003); United States v. Knox, 32 F.3d 733, 747 (3rd Cir. 1994).
[132] *Amirault*, 173 F.3d at 32.

The *Dost* factors have met some level of criticism.[133] In response, the Second Circuit has explained, "[T]he *Dost* factors impose useful discipline on the jury's deliberations. They may do so imperfectly, but they have not been much improved upon."[134]

Merely reciting the *Dost* factors does not end the inquiry. There have been a number of different areas of interpretation that have been addressed by the courts. First, "[i]n deciding if a picture contains a 'lascivious exhibition of the genitals,' a threshold question presents itself: does 'lascivious' describe the child depicted, the photographer, or the viewer?"[135] The federal circuit courts view this question of lasciviousness through different lenses.

For example, the First Circuit has explained, "[I]t is a mistake to look at the actual effect of the photograph on the viewer, rather than upon the intended effect."[136] "If [an accused's] subjective reaction were relevant, a sexual deviant's quirks could turn a Sears catalog into pornography."[137] The court also rejected the idea of looking at the issue through the lens of a "deviant photographer" because of the danger that "a deviant's subjective response could turn innocuous images into pornography."[138] The court concluded that "in determining whether there is an intent to elicit a sexual response, the focus should be on the objective criteria of the photograph's design."[139]

The Third Circuit agrees.

> Although it is tempting to judge the *actual* effect of the photographs on the viewer, we must focus instead on the *intended* effect on the viewer . . . . Child pornography is not created when the pedophile derives sexual enjoyment from an otherwise innocent photo. As the Ninth Circuit stated, "Private fantasies are not within the statute's ambit." When a picture does not constitute child pornography, even though it portrays nudity, it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it. [140]

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133 *See* Adler, *supra* note 32, at 953-57.
134 United States v. Rivera, 546 F.3d 245, 253 (2nd Cir. 2008).
135 Adler, *supra* note 32, at 954.
136 *Amirault*, 173 F.3d at 34 (citing United States v. Villard, 885 F.2d 117, 125 (3rd Cir. 1989)).
137 *Id.*
138 *Amirault*, 173 F.3d at 34.
139 *Id.* at 34-35.
140 *Villard*, 885 F.2d at 125.

Other circuits have taken a different approach. The Sixth Circuit found that "it is appropriate to apply a 'limited context' test that permits consideration of the context in which the images were taken, but limits the consideration of contextual evidence to the circumstances directly related to the taking of the images."[141] The court considers: "(1) where, when, and under what circumstances the photographs were taken, (2) the presence of any other images of the same victim(s) taken at or around the same time, and (3) any statements a defendant made about the images."[142] Similarly, the Second Circuit agrees that the context of the image may "reinforce[] the lascivious impression."[143]

When viewing the context of the photograph, is the intent of the child relevant? Regardless of whether one looks to the image itself or the intended effect of the image, "lasciviousness is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or likeminded pedophiles."[144] "This is because '[c]hildren do not characteristically have countenances involving sexual activity,' but 'an innocent child can be coaxed to assume poses or expressions that bespeak sexual availability when viewed by certain adults.'"[145] The intent of the child in the photograph is wholly irrelevant to the analysis.[146]

Must nudity be depicted for an image to be "lascivious"? The landmark case considering this question comes from the Third Circuit in *United States v. Knox*. The court determined that nudity is not actually required under the federal statute, and the definition "encompasses visual depictions of a child's genitals or pubic area even when these areas are covered by an article of clothing and are not discernible." [147] The court considered the plain meaning of the term "exhibition,"[148] as well as the purpose of the images in the following:

> [I]t is not true that by scantily and barely covering the genitals of young girls that the display of the young girls in seductive poses destroys the value of the poses to the viewer of child pornography. Although the genitals are covered, the display and focus on the young girls' genitals or pubic area apparently still provides considerable interest and excitement for the

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141 United States v. Brown, 579 F.3d 672, 683 (6th Cir. 2009).
142 *Id.* at 683-84.
143 *Rivera*, 546 F.3d at 250.
144 United States v. Wiegand, 812 F.2d 1239, 1244 (9th Cir. 1987).
145 United States v. Overton, 573 F.3d 679, 689 (9th Cir. 2009) (internal citations omitted).
146 United States v. Knox, 32 F.3d 733, 747 (3rd Cir. 1994).
147 *Id.* at 754.
148 *Id.* at 744.

> pedophile observer, or else there would not be a market for the tapes in question in this case.[149]

In sum, the *Dost* factors provide the most universally accepted and easily applied method to determine whether a particular image constitutes a "lascivious exhibition of the genitals or pubic area." While courts may disagree as to which lens to view the image through in every case, it is clear that the intent of the child is not relevant, and the focus should appropriately be on how the image would appear to the pedophile viewer. Whether that is through looking at the image alone or at external factors is left up to debate.

C. The Military's Interpretation of "Lascivious Exhibition"

The military, in large part, follows mainstream federal law concerning the application of the term "lascivious exhibition of the genitals or pubic area." It adopted the *Dost* factors for evaluating the lasciviousness of particular images of suspected child pornography.[150] In addition, the military chose to follow other circuits that evaluate images "with an overall consideration of the totality of the circumstances."[151]

The ACCA recognizes that the CAAF "has not specifically decided whether the 'totality of the circumstances' 'limits the consideration of contextual evidence to the circumstances directly related to the taking of the images.'"[152] The scope of the type of contextual evidence and how it would apply in any given case remains debatable.

Most recently, the ACCA adopted the holding in *Knox* and found that "nudity is not required to meet the definition of child pornography as it relates to the lascivious exhibition of the genitals or pubic area."[153] Both the Navy–Marine Corps Court of Criminal Appeals and Air Force Court of Criminal Appeals have cited that decision favorably.[154] However, in a less than clear opinion, the CAAF has recently overruled the ACCA.[155] The CAAF considered the application of *Knox*, decided in 1994, to the current definition of federal child pornography, amended in 2003.[156] Because Congress in 2003 added the requirement that a

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[149] *Id.* at 745.
[150] United States v. Roderick, 62 M.J. 425, 429-30 (C.A.A.F. 2006).
[151] *Id.* at 430.
[152] United States v. Anderson, No. 20080669, 2010 CCA LEXIS 328, at *24, 2010 WL 3938363 (A. Ct. Crim. App. Sept. 10, 2010) (mem. op.).
[153] United States v. Blouin, 73 M.J. 694, 696 (A. Ct. Crim. App. 2014).
[154] United States v. Morris, No. 201300348, 2014 CCA LEXIS 645 at *6 (N–M Ct. Crim. App. Aug. 28, 2014) (unpublished); United States v. Puckett, 60 M.J. 960, 963 (A.F. Ct. Crim. App. 2005).
[155] United States v. Blouin, 74 M.J. 247, 2015 CAAF LEXIS 584 (C.A.A.F. 2015).
[156] *Id.* at *10-11.

"lascivious exhibition of the genitals or pubic area" be "graphic" when dealing with digital images under 18 U.S.C. § 2256(8)(B), the CAAF found that *Knox* is inapplicable to the current statute.[157]

However, as Chief Judge Baker pointed out in his dissent to *Blouin*, "the majority does not elaborate on why *Knox II* is inapplicable to subsection 8(A), which contains identical language to the pre-2003 version of the CPPA the *Knox II* court interpreted," and does not require that the images also be "graphic."[158] So while the CAAF has held that the reliance on *Knox* by the ACCA was based on "an erroneous view of the law," in fact it appears that the CAAF itself has relied on "an erroneous view of the law" to wholesale declare *Knox* invalid.[159] Consequently, whether a lascivious exhibition of the genitals or pubic area under 18 U.S.C. § 2256(8)(A) must depict nudity remains an unclear issue in the military. It is also an important issue, as the current military definition is identical to that particular federal definition.

In short, the military applies the term "lascivious exhibition of the genitals or pubic area" in similar fashion to federal courts, though the outer limits of what context may be considered under the totality of the circumstances is yet to be fully developed. It is clear, however, that when employing the statutory definition, either the genitalia or pubic region must be displayed in some fashion.

V. State Definitions of Child Pornography

In addition to the military and the federal government, all 50 states prohibit the possession, distribution, or production of child pornography, or some combination of the three. Each state has adopted its own definition and interpretation of the term child pornography. State definitions can be broken into two different groups: those that define child pornography either the same as or more narrowly than the federal government does, and those that define child pornography more broadly. A consideration of these diverging definitions is important to determine the outer bounds of what an offensive image of a minor must actually depict in order to survive constitutional scrutiny.[160]

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[157] *Id*. at *11.
[158] *Id.* at *16 (Baker, C.J., dissenting).
[159] *Id.* at *11.
[160] The international community also generally has laws regulating child pornography, in various forms. For an in–depth discussion of international laws and treaties related to the sexual exploitation of children in the international community, *see* Klain, *supra* note 54, at 34-38; YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES (2008).

A. States That Follow or Restrict the Federal Definition of Child Pornography

Within this first group, there are two separate sub–categories. The first is states that follow the federal definition, either exactly or with minor changes. The second includes states that only prohibit images that meet the more stringent constitutional obscenity standard. Only one–third of all states fall within this group.

1. States that Apply the Federal Definition

Thirteen states define child pornography in line with the federal government. These are: Alaska, Connecticut, Florida, Hawaii, Indiana, Minnesota, Mississippi, Missouri, Nevada, New York, North Carolina, Rhode Island, and Wyoming.[161] However, there are a number of differences between specific definitions. For example, Alaska, Florida, Minnesota, Nevada, and New York use the term "lewd" instead of "lascivious," and do not include the "pubic area."[162] However, there is legally no difference because the term "lewd" is generally considered to be synonymous with "lascivious."[163] Rhode Island utilizes "lascivious," but adds the term "graphic" as an alternative qualifier.[164]

Indiana's unique definition uses neither the term "lewd" nor "lascivious," but rather defines child pornography as the "exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person."[165] Indiana courts have upheld this definition, however, because they have found that this modifier "is essentially the definition of 'lewd' conduct, which the [Supreme] Court discussed at length in *Ferber* and found no constitutional infirmity."[166]

In addition, while Connecticut and North Carolina define child pornography in line with the federal government, they also penalize images that depict a broader array of nudity, but only where those images also meet the obscenity standard. For example, Connecticut prohibits the "showing of the human male or

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[161] ALASKA STAT. § 11.41.455(a)(6); CONN. GEN. STAT. §§ 53a-193(13)-(14); FLA. STAT. § 827.071(1)(h); HAWAII REV. STAT. § 707-750(2); IND. CODE § 35-42-4-4(a)(4); MINN. STAT. § 617.246(e)(4); MISS. CODE ANN. § 97-5-31(b)(v); MO. REV. STAT. § 573.010(21)(e); NEV. REV. STAT. § 200.700(3); N.Y. PENAL LAW § 263.00(3); N.C. GEN. STAT. § 14-190.13(5)(g); R.I. GEN. LAWS § 11-9-1.3(c)(6)(5); WYO. STAT. ANN. § 6-4-303(a)(iii).

[162] ALASKA STAT. § 11.41.455(a)(6); FLA. STAT. § 827.071(1)(h); MINN. STAT. § 617.246(e)(4); NEV. REV. STAT. § 200.700(3); N.Y. PENAL LAW § 263.00(3).

[163] *See* Schmitt v. State, 590 So. 2d 404, 410 (Fla. 1991); Rhoden v. Morgan, 863 F. Supp 612, 618 (M.D. Tenn. 1994).

[164] R.I. GEN. LAWS § 11-9-1.3(c)(6)(5).

[165] IND. CODE § 35-42-4-4(a)(4).

[166] Logan v. State, 836 N.E.2d 467, 473 (Ind. Ct. App. 2005) (citing New York v. Ferber, 458 U.S. 747, 765, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)).

female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering . . . ," where such showing would be obscene.[167] North Carolina similarly prohibits the obscene showing of "uncovered, or less than opaquely covered, human genitals, pubic area, or buttocks, or the nipple or any portion of the areola of the human female breast."[168]

The question of whether nudity is required has led to different results. For example, Florida specifically disagrees with the federal and military interpretation in *Knox* that nudity is not required for a "lascivious exhibition."[169]

2. States That Apply the Obscenity Standard

Despite the clear holding in *Ferber* that child pornography need not meet the requirements of obscenity to be properly prohibited by a jurisdiction, four states continue to employ the obscenity standard when defining child pornography. Those are Alabama, Georgia, New Mexico, and South Carolina.[170] It is unclear why they apply the obscenity standard, particularly because their definitions otherwise appear similar to the federal definition.[171] While there are interesting aspects to each of the state's definitions, because their interpretations apply the higher obscenity standard, and do not interpret the concept of child pornography under *Ferber*, they are not helpful to this discussion.

B. States That Define Child Pornography More Broadly Than the Federal Government

The remaining two–thirds of the states define child pornography more broadly than does the federal government. While they mirror the federal definition by utilizing some form of qualifier, such as lewd or lascivious, their definitions are broader because they allow for the depiction of body parts other than the genitalia and pubic area, such as the female breast. These can be broken down to five separate categories: (1) Breast; (2) Buttocks, Rectal Area, or Anus; (3) Buttocks and Breast; (4) 'Intimate Parts'; and (5) Nudity.

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167 CONN. GEN. STAT. § 53a-193(4).
168 N.C. GEN. STAT. § 14-190.13(6).
169 Breeze v. State, 634 So. 2d 689, 690-91 (Fla. Dist. Ct. App. 1st Dist. 1994).
170 ALA. CODE. §§ 13A-12-190(10)-(11); GA. CODE ANN. § 16-12-102(7); N.M. STAT. ANN. § 30-gA-2(A)(5); S.C. CODE ANN. § 16-15-375(6).
171 *Id*.

1. States that Include Images of the Breast

Five states fall within this first category: Arkansas, Colorado, Idaho, Maryland, and Nebraska.[172] A number of these states include additional limiting language beyond mere lasciviousness to ensure that the statutes pass constitutional muster. For instance, Colorado requires that the depiction be "for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved."[173] This limitation ensures that "the statute does not reach constitutionally protected materials depicting nude children for family, educational, medical, artistic, or other legitimate purposes."[174] Further, it "provides citizens with a specific warning of what conduct is prohibited and ensures protection from arbitrary or discriminatory enforcement of the statute."[175] Idaho has identical language, and its statute was found to be constitutional.[176]

Each of these states also has a unique requirement for how the breast must be depicted. For example, Maryland requires that the "human female breasts" be in a "state of sexual stimulation."[177] Colorado, Idaho, and Nebraska all define it as including the "undeveloped" or "developing" female breast, while Arkansas refers to it simply as the female breast.[178] Importantly, the depiction of a female breast by itself, so long as it meets the lewd/lascivious standard, is sufficient on its own to constitute child pornography in these states.[179]

2. States That Include Images of the Buttocks, Rectal Areas, or Anus

The following eight states include within their definition of child pornography, a depiction of either the buttocks, rectal area, or anus of the minor: Arizona, California, Louisiana, Maine, Michigan, New Hampshire, Vermont, and West Virginia.[180] While not directly confronted with the question of whether a

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[172] ARK. CODE ANN. § 5-27-601(15)(F); COLO. REV. STAT. § 18-6-403(2)(d); IDAHO CODE ANN. § 18-1507(1)(d); MD. CODE ANN. CRIM. LAW § 11-101(e); NEB. REV. STAT. § 28-1463.02(3).

[173] COLO. REV. STAT. § 18-6-403(2)(d).

[174] People v. Batchelor, 800 P.2d 599, 602 (Colo. 1990).

[175] *Id.* at 603.

[176] State v. Morton, 140 Idaho 235, 238, 91 P.3d 1139, 1142 (Idaho 2004).

[177] MD. CODE ANN. CRIM. LAW § 11-101(e)(2). There is no additional description for what this term means.

[178] ARK. CODE ANN. § 5-27-601(15)(F); COLO. REV. STAT. § 18-6-403(2)(d); IDAHO CODE ANN. § 18-1507(1)(d); NEB. REV. STAT. § 28-1463.02(3).

[179] *See* Cummings v. State, 353 Ark. 618, 630, 110 S.W.3d 272, 279 (Ark. 2003) (conviction upheld for image depicting only the female breast).

[180] ARIZ. REV. STAT. § 13-3551(5) (rectal area); CAL. PENAL CODE § 311.4(d)(1) (rectal area), LA. REV. STAT. ANN. § 14:81.1(10) (anus); ME. REV. STAT. tit. 17-A, § 281(4)(E) (anus); MICH. COMP. LAWS § 750.145c(h) (rectal area); N.H. LAWS § 649-A:2(III)

depiction of the buttocks, anus, or rectal area by itself can satisfy the constitutional concept of child pornography, a number of these statutes have been explicitly upheld as constitutional.[181]

The most interesting jurisdiction out of this group is West Virginia. In addition to expanding the federal definition to include the rectal area, West Virginia also apparently prohibits the possession of child erotica.[182] It defines child erotica as "visual portrayals of minors who are partially clothed, where the visual portrayals are: (1) unrelated to the sale of a commercially available legal product; and (2) used for purely prurient purposes."[183] While there are no cases directly interpreting this language, it is possible that the inclusion of the term "prurient" might require an obscenity analysis. In addition, there is currently draft legislation in West Virginia that would redefine child erotica as:

> Any material relating to minors that serves a sexual purpose for a given individual, to include nonnude or seminude photographs and videos of minors in sexually suggestive poses modeling a variety of clothing types such as dresses, bikinis, nightgowns or undergarments. Child erotica may also include, in addition to images, other materials that may cause sexual arousal, such as children's diaries, drawings, underwear, letters and other similar items.[184]

The law has not yet been enacted, and thus it is premature to analyze the effect that law may have on child pornography jurisprudence.

3. States that Include the Breast and Buttocks

Combining the requirements of the previous two sections, eleven states include images that depict either the female breast or the buttocks: Illinois, Kentucky, Massachusetts, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, and Washington.[185]

(buttocks); VT. STAT. ANN. tit. 13, § 2827(a) (anus); W. VA. CODE § 61-8C-1(c)(10) (rectal area).

[181] *See* State v. Limpus, 128 Ariz. 371, 625 P.2d 960 (Ariz. 1981); State v. Hazlett, 205 Ariz. 523, 73 P.3d 1258 (Ariz. 2003); People v. Riggs, 237 Mich. App. 584, 604 N.W.2d 68 (Mich. Ct. App. 1999).

[182] W. VA. CODE § 61-8C-3a (entitled Prohibiting child erotica; penalties).

[183] *Id.*

[184] H.B. 2195, 81ST LEG. 1ST SESS. (W. Va. 2013).

[185] 720 ILL. COMP. STAT. 5/11-20.1(a)(1)(vii); KY. REV. STAT. ANN. § 531.300(4)(d), MASS. GEN. LAWS ch. 272, § 29C(vii); N.D. CENT. CODE § 12.1-27.2-01(4); OKL. STAT. tit. 21, § 1024.1(A); S.D. CODIFIED LAWS § 22-24A-2(16); TENN. CODE ANN. § 39-17-1002(8)(G); TEX. PENAL CODE ANN. § 43.25(a)(2); UTAH CODE ANN. § 76-5b-103(10)(e); VA. CODE ANN. § 18.2-390(2); WASH. REV. CODE § 9.68A.011(4)(f).

Utah has chosen to define child pornography in two nearly identical manners. First, it defines it as a "lascivious exhibition of the genitals, pubic region, buttocks, or female breast of any person."[186] Second, it defines it as "the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person."[187] However, nudity is defined as "any state of undress in which the human genitals, pubic region, buttocks, or the female breast, at a point below the top of the areola, is less than completely and opaquely covered."[188] The similarity between the definitions makes the practical difference unclear. Arguably, the former is an objective standard based solely on the image itself, while the latter is a subjective standard based on the intended effect on either the viewer, producer, or victim.

4. States That Include "Intimate Parts"

The following three states define child pornography even more broadly, utilizing the generic phrase 'intimate parts' to define what body parts must be depicted within the image: Montana, Oregon, and Wisconsin.[189] Wisconsin defines child pornography exclusively as a "[l]ewd exhibition of intimate parts," while Oregon utilizes "[l]ewd exhibition of sexual or other intimate parts," and Montana merely adds the term to a list including the "lewd exhibition of the genitals, breasts, pubic or rectal area, or other intimate parts of any person."[190]

In Wisconsin, the term "intimate parts" is statutorily defined as: "the breast, buttock, anus, groin, scrotum, penis, vagina, or pubic mound of a human being."[191] Oregon has similarly limited the reach of what it might encompass with the following language:

> The phrase "sexual or other intimate parts" is not defined in statute, and this court has stated that the phrase includes genitals and breasts, as well as parts that are "subjectively intimate to the person touched, and either known by the accused to be so or to be an area of the anatomy that would be objectively known to be intimate by any reasonable person."[192]

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[186] UTAH CODE ANN. § 76-5b-103(10)(e).
[187] UTAH CODE ANN. § 76-5b-103(10)(f).
[188] UTAH CODE ANN. § 76-5b-103(8).
[189] MONT. CODE. ANN. § 45-5-625(5)(b)(i)(G); OR. REV. STAT. § 163.665(3)(f); WIS. STAT. § 948.01(7)(e).
[190] *Id*.
[191] WIS. STAT. § 939.22(19).
[192] State v. Rodriguez, 347 Ore. 46, 69 n. 12, 217 P.3d 659 (Or. 2009) (citing State v. Woodley, 306 Ore. 458, 463, 760 P.2d 884 (1998).

While Montana does not provide as detailed a definition as Oregon, its supreme court noted that the term "intimate parts" can include "the buttocks, the hips, and the prepubescent chest of a seven year old girl."[193]

5. States That Define Child Pornography as Nudity

The final category includes the following six states that define child pornography using the broad term "nudity": Delaware, Iowa, Kansas, New Jersey, Ohio, and Pennsylvania.[194] Nonetheless, all but one of these states statutorily require that the nudity be "for the purpose of sexual stimulation or gratification of any person," or other similar language.[195]

Ohio does not statutorily limit the definition of nudity; however, the interpretation and application of that term led to one of the most critical Supreme Court cases involving child pornography, *Osborne v. Ohio*.[196] In upholding the constitutionality of Ohio's prohibition of "nude" images of minors, the Supreme Court adopted the Ohio Supreme Court's interpretation and narrowing of that statutory term with the following definition:

> [T]he possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged.[197]

The Supreme Court noted that "[b]y limiting the statute's operation in this manner, the Ohio Supreme Court avoided penalizing persons for viewing or

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[193] State v. Weese, 189 Mont. 464, 468, 616 P.2d 371 (Mont. 1980).

[194] DEL. CODE ANN. tit. 11, § 1100(7)(i); IOWA CODE § 728.1 (7)(g) (2013); KAN. STAT. ANN. § 21-5510 (2013); N.J. STAT. ANN. § 2C:24-4(b)(1); OHIO REV. CODE ANN. § 2907.323;18 PA. CONS. STAT. § 6312(g).

[195] DEL. CODE ANN. tit. 11, § 1100(7)(i) ("Nudity, if such nudity is to be depicted for the purpose of the sexual stimulation or the sexual gratification of any individual who may view such depiction."); IOWA CODE § 728.1 (7)(g) ("Nudity of a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction of the nude minor."); KAN. STAT. ANN. § 21-5510(a)(2) (requiring that the image depict "sexually explicit conduct" (which includes nudity) "with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender or any other person."); N.J. STAT. ANN. § 2C:24-4(b)(1) ("Nudity, if depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction."); 18 PA. CONS. STAT. § 6312(g) ("[N]udity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction.").

[196] Osborne v. Ohio, 495 U.S. 103 (1990). The decision in *Osborne* is addressed in more depth in Section VII.

[197] *Osborne*, 495 U.S. at 112-13 (quoting State v. Young, 37 Ohio St. 3d 249, 252, 525 N.E.2d 1363 (Ohio 1988)).

possessing innocuous photographs of naked children."[198] In essence, as interpreted, the Ohio definition effectively mirrored the federal definition.

One intriguing aspect of *Osborne* is the Supreme Court's apparent misinterpretation of the Ohio Supreme Court's elucidation that the "lewd exhibition" actually depicts the genitalia.[199] However, later case law interpreting the Ohio Supreme Court's reading have held that the disjunctive "or" between a "lewd exhibition" and a "graphic focus on the genitals" was intentional, and therefore a "lewd exhibition" of nudity need not focus on or depict the genitalia.[200] Even with this disjunctive reading, Ohio courts have continuously held that both terms are neither constitutionally vague nor overbroad.[201]

Beyond Ohio, other states have consistently upheld statutes that define child pornography merely as nudity. The Supreme Court of Iowa rejected a vagueness challenge of its statute in *State v. Hunter*.[202] It noted that "[t]he common meaning of the word 'nudity' includes exposure of the breasts, buttocks or genitalia."[203] It also found that the limiting phrase "for the purpose of sexual stimulation of the viewer" would "allow[] for the general public and those enforcing the statute to distinguish between prohibited conduct and protected expression."[204]

Kansas focuses on the means of taking an image, as opposed to what it depicts, to define nudity. The Kansas Supreme Court noted that "[i]t is clearly necessary that the child must have some understanding or at least be of an age where there could be some knowledge that they are exhibiting their nude bodies in a sexually explicit manner."[205] In upholding the constitutionality of the statute, the court provided this required interpretation:

> We construe the language to apply only to those situations when a child has been employed, used, persuaded, induced, enticed, or coerced into the nude display of the statutorily defined areas while engaging in sexually explicit conduct, also as statutorily defined, for purposes of appealing to the sexual desires or the

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198 *Id.* at 113-14.

199 *See id.* at 129 n.4 (Brennan, J., dissenting).

200 *See* State v. McDonald, No. CA2008-05-045, 2009 Ohio App. LEXIS 1019 at *17-19 (Ohio Ct. App., Clermont County Mar. 16, 2009) (including citations to cases where convictions for images which did not depict the genitalia were affirmed); United States v. McGrattan, 504 F.3d 608, 613-15 (6th Cir. 2007) (confirming interpretation that nudity must be either by a "lewd exhibition" or a "graphic focus on the genitals").

201 State v. Gann, 154 Ohio App. 3d 170, 176, 796 N.E.2d 942 (Ohio Ct. App. 2003).

202 State v. Hunter, 550 N.W.2d 460, 467 (Iowa 1996), *overruled on other grounds by* State v. Robinson, 618 N.W.2d 306 (Iowa 2000).

203 *Hunter*, 550 N.W.2d at 465 (citing Wright v. Town of Huxley, 249 N.W.2d 672, 678 (Iowa 1977), State v. Salata, 859 S.W.2d 728, 733-36 (Mo. App. 1993)).

204 *Id.* at 465.

205 State v. Zabrinas, 271 Kan. 422, 431, 24 P.3d 77 (Kan. 2001).

> prurient interest of the offender, the child, or another. The statute prohibits anyone from possessing a visual depiction of a child engaged in this type of conduct. The phrase "exhibition in the nude" does not make the statute unconstitutionally overbroad.[206]

The Court's finding in *State v. Liebau*[207] emphasizes the strictness of the requirement. "Clearly, a sixteen–year–old girl, unaware that she is being videotaped in the nude while using the bathroom, cannot be said to be engaging in sexually explicit conduct or an exhibition of nudity."[208]

C. Summary

Two–thirds of all states (thirty–three) utilize a definition of child pornography that is broader than the federal limitation on the "genitalia or pubic area." These range from the inclusion of a single body part or multiple additional body parts (i.e., breast, buttocks, etc.), to the generic "intimate parts," to merely requiring "nudity" so long as it meets a required limiting definition. Importantly, none of these state statutes has been declared unconstitutional for including parts of the body not within the federal definition.

VI. The Concern with Child Erotica

The issue posed at the beginning of this article concerned the inability to prosecute servicemembers who possessed images of minors that do not meet the federal definition of child pornography. Having established now what constitutes child pornography under military, federal, and state law, and why it is prohibited, two important questions remain: (1) how to define those images that do not meet the military's definition of child pornography yet should still be prohibited; and (2) why should those images be prohibited?

A. Defining Child Erotica

The colloquial term for offensive images of minors that are not technically child pornography is "child erotica." However, the term itself is not overly precise. To begin with, there is no legal definition of "child erotica." For instance, the Third Circuit defined "child erotica" as "material that depicts 'young girls as sexual objects or in a sexually suggestive way,' but is not 'sufficiently lascivious to meet the legal definition of sexually explicit conduct' under 18 U.S.C. §

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[206] *Zabrinas*, 271 Kan. at 432.
[207] State v. Liebau, 31 Kan. App. 2d 501, 67 P.3d 156 (Kan. Ct. App. 2003).
[208] *Id.* at 505.

2256."[209] The Ninth Circuit referred to a definition from an FBI affidavit that defined child erotica as "images that are not themselves child pornography but still fuel their sexual fantasies involving children."[210]

Mr. Kenneth Lanning, a retired FBI agent who "has been involved in the professional study of the criminal aspects of deviant sexual behavior since 1973,"[211] originally defined "child erotica" as "any material, relating to children, that serves a sexual purpose for a given individual."[212] He included "things such as fantasy writings, letters, diaries, books, sexual aids, souvenirs, toys, costumes, drawings, and nonsexually explicit images."[213] Mr. Lanning recognizes, however, that "[m]any investigators eventually began using the term child erotica to refer only to visual images of naked children that were not legally considered child pornography."[214] Mr. Lanning disagrees with this limited use of the term because his "definition includes many materials that are not images at all."[215] However, whether other items of a sexual nature involving children, such as fantasy writings or sexual aids, may appropriately be prohibited, is outside the scope of this article.

A useful tool for categorizing and defining child erotica images that should be prohibited similar to child pornography comes from the Combating Paedophile Information Networks in Europe (COPINE) Project.[216] This Project created a ten

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[209] United States v. Vosburgh, 602 F.3d 512, 520 n.7 (3rd Cir. 2010).
[210] United States v. Gourde, 440 F.3d 1065, 1068 (9th Cir. 2006).
[211] Lanning, *supra* note 49, at v.
[212] *Id.* at 85 (citing Kenneth V. Lanning, *Child Molesters: A Behavioral Analysis*, 84 (1st ed. 1986)).
[213] *Id.* at 85.
[214] *Id.* at 85; *see also* Mary G. Leary, *Death to Child Erotica: How Mislabeling the Evidence can Risk Inaccuracy in the Courtroom*, 16 Cardozo J.L. & Gender 1, 1 (2009) ("Child Erotica is a term currently used to describe images and materials which can sexually exploit children, but do not fit the legal definition of 'child pornography' or 'child abuse images.'").
[215] Lanning, *supra*, note 49, at 85.
[216] "The Combating Paedophile Information Networks in Europe (COPINE) Project was founded in 1997, and is based in the Department of Applied Psychology, University College Cork, Ireland. The Project emerged out of the Child Studies Unit (CSU), which was created to explore and contribute to the development of facilities for street children and other disadvantaged children[]," http://web.archive.org/web/20071129133102/http://copine.ie/background.php (accessed through wikipedia.org). "The COPINE Project is a unique academic initiative, applying Forensic and Clinical Psychology to the analysis of vulnerabilities for children related to the Internet. The initial focus of the Project related to sexual exploitation of children through the Internet, which finds expression in child pornography." *Id*.

–level scale to classify images of children, with one being the most innocent and ten being the most extreme.[217]

Reviewing the COPINE scale at Appendix C, we find that level six correlates to images that depict a "lascivious exhibition of the genitals or pubic area of any person" similar to the terms used under current military and federal law.[218] Levels seven through ten would each likely fit within the remaining definitions of child pornography under military and federal law as well.[219] Levels one through five describe images that under current military law would likely be considered child erotica, and would not likely be prohibited under military or federal law because they do not require the depiction of the genitalia or an actual sexual act. While the law does not currently criminalize all of the images described in levels one through five, a percentage would fit the concept of child erotica that should be banned.

Initially, it must be recalled that for images to survive constitutional challenge as child pornography they must be either lewd or lascivious, evaluated by utilizing the *Dost* factors under the totality of the circumstances. Levels one and two would clearly fail to meet the *Dost* standard, and are in fact generally used as examples of what types of images are protected by the Constitution.[220] Level three images pose a particular problem, in that they likely do not meet the requirements for lewdness since they "may be indistinguishable from legitimate family photographs"; however, "they can be argued to represent a very serious example of sexual victimization through photography . . . because they sexualize situations that should be safe and secure environments in which children can play."[221] These images would be lewd not based on the image itself, but based solely on the intent of the photographer, which is a contentious legal issue.[222]

The clearest example of images that should be prohibited are levels four and five. While they do not depict the genitalia or pubic region, the requirement that there be a sexual component to the posed image takes them out of the category of innocuous images or mere nudity. More than likely, the images catalogued in these levels would most closely conform to those described by Mr. Lanning and the limited case law interpreting child erotica.

By combining the various definitions and descriptors of child erotica that have been used, a single encompassing definition emerges: images of minors in

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[217] Taylor, *supra* note 52, at 32; Wortley, *supra* note 14, at 8; Akdeniz, *supra* note 160, at 69. This scale has been adopted in most respects by courts throughout Europe. Akdeniz, *supra* note 160, at 71. The scale is reproduced *infra* at Appendix C.

[218] MCM, pt. IV, ¶ 68b.c.(7)(e).

[219] MCM, pt. IV, ¶ 68b.c.(7)(a)-(d).

[220] Massachusetts v. Oakes, 491 U.S. 576, 588-90, 109 S. Ct. 2633, 105 L. Ed. 2d 493 (1989) (Scalia, J., concurring in the judgment in part and dissenting in part).

[221] Taylor, *supra* note 52, at 35.

[222] *See supra*, Section IV.B.

various stages of undress which depict them as sexual objects in sexualized or provocative poses, or which suggest a sexual interest, that serve a sexual purpose or fuel a sexual fantasy for a given individual, but do not meet the technical definition of child pornography.

B. The Purpose of Prohibiting Child Erotica

The military should expand its definition of child pornography to encompass images of child erotica for two reasons: (1) child erotica is prevalent throughout society and is commonly located within child pornography collections; and (2) the policies that underlie the prohibition of child pornography apply equally to child erotica.

It is undeniable that child erotica exists and is a problem. Recently, a teacher at a Florida church school was forced to retire after over forty years of teaching when it was discovered he used a school computer to view images of "young girls posing provocatively in underwear and bathing suits."[223] No charges were filed because police determined that he merely viewed "child erotica," not child pornography.[224]

Studies directly cataloging the prevalence of child erotica in child pornography collections are lacking. This is likely because "[w]hen the significance of a photograph is determined by legal definitions, necessarily photographs that fall outside that definition tend either to be ignored or not evaluated because they may be seen as secondary or incidental to the main focus of prosecution."[225] However, there is information that tends to support the position that images of child erotica are more than a *de minimus* problem.

One study has shown that, in the years 2000 and 2006, 79% and 82%, respectively, of child pornography collections that had been seized and surveyed included images of "nudity or seminudity, but not graphic," which arguably refer to child erotica.[226] Another study had similar numbers, showing that 73%of people arrested for producing child pornography possessed "nude or seminude,

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[223] Adam Sacasa & Brett Clarkson, *Teacher Escapes Prosecution After Viewing Child Erotica*, Sun Sentinel (Mar. 19, 2013), http://articles.sun-sentinel.com/2013-03-19/news/fl-delray-child-erotica-20130319_1_school-computer-child-abuse-unit-riggs.

[224] *Id*.

[225] Max Taylor, Gemma Holland & Ethel Quayle, *Typology of Paedophile Picture Collections*, 74 Police J. 97, 99 (2001), http://www.popcenter.org/problems/child_pornography/pdfs/taylor_etal_2001.pdf.

[226] Janis Wolak, David Finkelhor, & Kimberly Mitchell, *Child Pornography Possessors: Trends in Offender and Case Characteristics*, 23 Sexual Abuse: A Journal of Research and Treatment 22, 31 (2011).

not graphic images," and 79% of people arrested for possession had "nude or seminude, not graphic images."[227]

Surveys of the COPINE collection establish that while most images fall within level six (the analogous definition to a "lascivious exhibition of the genitals or pubic area"), a good portion of the images would fall within levels four and five.[228] Further, the rationale of various U.S. Attorneys declining to prosecute referred child pornography cases between 1992 and 2000 was that in 280 cases, which represented 11.5% of the cases not prosecuted, there was "no federal offense evident."[229] This rationale suggests that the images in question in at least some of those cases did not meet the federal definition of child pornography.

Beyond statistics and studies, recent military case law highlights the likely prevalence of child erotica in the military. In several cases, the evidence made clear that accused servicemembers possessed a large number of images of child erotica, either alone or in conjunction with actual child pornography.[230] It is therefore highly likely that any military justice practitioner dealing with an accused possessing a child pornography collection will be confronted with images of child erotica, or may even confront persons possessing only child erotica.

The policies supporting the prohibition of child pornography have already been discussed in depth. The key justification is the protection of children from sexual exploitation. To say that child erotica does not involve these same interests is to say that harm only flows from the depiction of the genitalia or pubic area. If the underlying concept behind the prohibition of child pornography is truly the protection of children, why would the genitalia or pubic area be the *sine quo non* of injury?

Imagine, for example, a pedophile forces a minor girl to pose naked for him while he takes pictures of her. He forces her to portray herself in various poses,

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[227] Wortley, *supra* note 14, at 32 (citing Janis Wolak, David Finkelhor, & Kimberley J. Mitchell, *The Varieties of Child Pornography Production*, *in* MAX TAYLOR & ETHEL QUAYLE, VIEWING CHILD PORNOGRAPHY ON THE INTERNET: UNDERSTANDING THE OFFENCE, MANAGING THE OFFENDER, HELPING THE VICTIMS 31-48 (2005); Janis Wolak, David Finkelhor, & Kimberley J. Mitchell, *Child Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimisation Study*, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN (2005), http://www.missingkids.com/en_US/publications/NC144.pdf).

[228] Taylor, *supra* note 52, at 36.

[229] Akdeniz, *supra* note 160, at 135.

[230] United States v. Barberi, 71 M.J. 127, 129 (C.A.A.F. 2012) (four of six images did not meet the federal definition); United States v. Warner, 73 M.J. 1 (C.A.A.F. 2013) (twenty images); United States v. Moon, 73 M.J. 382 (C.A.A.F. 2014); United States v. Lang, No. 20140083, 2014 CCA Lexis 844 (A. Ct. Crim. App. Oct. 31, 2014) (unpublished); United States v. Rapp, No. 201200303, 2013 CCA Lexis 355 (N.M. Ct. Crim. App. Apr. 30, 2013) (six of sixteen images did not depict child pornography).

for a number of hours. He takes a total of 100 images of her, and uploads them all to a peer–to–peer network utilized by scores of additional pedophiles, all of whom take those 100 images and spread them further throughout the Internet. However, none of the first ninety–nine photos taken depict or focus on the genitalia or pubic area—it is not until the final, 100th photo that the pedophile includes her genitalia in the image. Where the purpose behind criminalizing child pornography is based almost exclusively on the protection of the minor victim, can it truly be said that the first ninety–nine photos circulating throughout the internet do not harm the minor girl? Is it really only the single image that has harmed her?

C. Summary

The term child erotica encompasses generally those sexualized images of minors that do not meet the technical definition of child pornography. These types of images are prevalent throughout society, and are routinely discovered in the child pornography collections seized in criminal investigations. These images harm children in the same manner that "technical" child pornography would. Just as it is imperative for the military to prohibit child pornography, it is equally imperative that it prohibit child erotica as defined herein.

VII. The Military Should Amend Its Definition of Child Pornography to Include Depictions of Child Erotica

As previously discussed,[231] the military defines child pornography under Article 134, Uniform Code of Military Justice,[232] in part, as "material that contains . . . a visual depiction of an actual minor engaging in sexually explicit conduct."[233] "Sexually explicit conduct" is further defined, in relevant part, to include a "lascivious exhibition of the genitals or pubic area of any person."[234] In order to ensure that servicemembers may appropriately be charged with possessing images of child erotica, this portion of the definition of child pornography should be amended to remove the requirement that the images depict the genitals or pubic area.

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[231] *See supra*, Section III.

[232] UCMJ, art. 134.

[233] MCM, pt. IV, ¶ 68b.c.(1) (2012).

[234] MCM, pt. IV, ¶ 68b.c.(7)(e). "Sexually explicit conduct" also includes images which depict "actual or simulated . . . sexual intercourse or sodomy[,] . . . bestiality[,] . . . masturbation[,] . . . [or] sadistic or masochistic abuse . . . ." *Id.* at ¶¶ 68b.c(7)(a)–(d). Because these definitions encompass depictions of actual sexual acts, as opposed to posed pictures, they are not relevant to the subject of this paper.

Rather than listing specific body parts that must be depicted, subsection (e) of the definition of sexually explicit conduct should be amended to read "lewd visual depiction of a minor."[235] The term lewd should be further defined within the offense as follows:

> "Lewd Depiction." Whether a particular image constitutes a lewd visual depiction of a minor is based on a consideration of the totality of the circumstances. Non-dispositive factors to be considered include, but are not limited to:
>
> (a) whether the focal point of the visual depiction is on the child's intimate parts;
> (b) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
> (c) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
> (d) whether the child is fully or partially clothed, or nude;
> (e) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or
> (f) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

By defining sexually explicit conduct utilizing only the term lewd, as opposed to requiring an actual depiction of the genitalia or pubic region, child pornography will encompass a broader set of offensive images of minors. In actuality, the proposed definition would be interpreted no differently than the current definition; the only change is that the requirement for the genitalia or pubic area has been removed. The newly defined term, lewd, incorporates the six factors announced in *United States v. Dost* to define "lascivious exhibition of the genitals,"[236] and further includes the military's consideration of the "totality of the circumstances" to determine whether an image depicts a lascivious exhibition.[237]

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[235] *See Infra* Appendix A for the draft text.

[236] United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), *aff'd sub nom*. United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987). Every federal court to consider the issue has universally adopted these factors. United States v. Roderick, 62 M.J. 425, 429 (C.A.A.F. 2006).

[237] *Roderick*, 62 M.J. at 430. As the court in *Roderick* noted, "several of the federal circuit courts have recognized that 'although *Dost* provides some specific, workable criteria, there may be other factors that are equally if not more important in determining whether a photograph contains a lascivious exhibition.'" *Id*. at 429-30 (quoting United States v. Amirault, 173 F.3d 28, 32 (1st Cir. 1999); *see also* United States v. Campbell, 81 F. App. 532, 536 (6th Cir. 2003); United States v. Knox, 32 F.3d 733, 747 (3d Cir. 1994)).

While these factors have been used to define the term lascivious, courts have routinely found that the term lascivious is a synonym for lewd.[238] The term lewd, rather than lascivious, is used in the amended definition to avoid confusion regarding whether the genitalia or pubic region is a required component.[239]

Utilizing only the term lewd, as opposed to merely expanding the body parts listed beyond the genitalia or pubic area (as many states do),[240] ensures that images which could potentially be considered lewd, but do not necessarily focus on any particular body part, could still be prohibited. Inevitably, if the military were to adopt a definition merely expanding the list of body parts, future cases will focus on what constitutes the "buttocks," or "bare female breast." Is a complete depiction of the buttocks or breast required? If a partial depiction is acceptable, what percentage must be depicted? Invariably, by defining child pornography utilizing too strict of a requirement, the military will inadvertently exclude images that rightfully should be prohibited. This is what it has already been done by limiting depictions to those displaying the genitalia or pubic area; it should not be repeated.

Additionally, the proposed definition amends the *Dost* factors by broadening the second factor to include intimate parts, as a number of states do. Because intimate parts would generally be associated with the sexual organs and private parts of an individual, the depiction of those areas would tend to have a sexual component and likely victimize the minor portrayed. By choosing not to limit the consideration to specifically listed body parts, courts will be free to evaluate images based on the totality of the circumstances, rather than with anatomical precision.

Furthermore, addressing the issues of *Blouin* and *Knox*, nudity is explicitly not required under the definition, but is merely one of the factors to consider in determining whether the image is lewd. Nudity is obviously an important factor, however, as it is less likely that an image would be lewd if it did not include nudity. In all likelihood, in cases that do not involve nudity, the type of clothing worn is going to be the key determinant. For example, an image of a seventeen year–old girl posed seductively in jeans and a tank top is far different from an image of a nine year–old girl in a G–string and bra.

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[238] United States v. Gaskin, 12 U.S.C.M.A. 419, 421, 31 C.M.R. 5 (C.M.A. 1961) ("The term 'lascivious' is synonymous with 'lewd' . . . ."); United States v. Johnson, 4 M.J. 770, 771 (A.C.M.R. 1978) ("The terms 'indecent,' 'lewd,' and 'lascivious' are synonymous and signify a form of immorality which has relation to sexual impurity.").

[239] Because the term "lascivious exhibition" has for so long included the requirement of the genitalia or pubic area, it is conceivable that courts would read the former requirement in to the new definition by mistake, thus defeating the purpose of amending the definition.

[240] *See* discussion, *supra* at Section V.

The exclusion of the term child erotica is intentional. As discussed, the term has varying meanings and has been interpreted in different ways by courts and commentators. One commentator has noted three concerns with utilizing the term: (1) it "incorrectly suggests an artistic reference"; (2) it "suggests an artistic or social *value* to the material which is not present"; and (3) it has been used too broadly by courts, referring to a "very diverse collection of materials and objects."[241] While the proposed definition is intended to, and does, encompass images of child erotica, the terminology utilized is intended to more closely align with the former definition for ease of judicial interpretation. Arguably, all previous case law interpreting lascivious exhibition will remain good law, except insofar as such law requires a depiction of the genitalia or pubic area.

This broader definition of child pornography accomplishes a number of things. It eliminates the requirement that an image depict the actual genitalia or pubic region, ensuring that possession of images that depict the breast of a female minor or the buttocks of a male minor could rightfully be prosecuted, assuming that the image meets the standards articulated for lewdness. This definition provides the greatest flexibility to trial counsel in determining what charges to file, and leaves to the sound discretion of the courts and finders of fact the interpretation and application of the rule to specific images in question.

There are three primary constitutional arguments that could be made against the recommended definition: (1) The images at issue are constitutionally protected; thus, the definition violates the First Amendment; (2) The definition is overbroad; and (3) The definition is void–for–vagueness. Each of these arguments will be addressed in turn.

A. The Term "Lewd Visual Depiction of a Minor" Does Not Violate the First Amendment's Protection of Freedom of Speech.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[242] This generally means that "the First Amendment bars the government from dictating what we see or read or speak or hear."[243] However, "[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children."[244] The question, however, is what

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[241] Leary, *supra* note 214, at 2.

[242] U.S. CONST. amend. I.

[243] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245, 122 S. Ct. 1389, 1399, 152 L. Ed. 2d 403, 418 (2002).

[244] *Ashcroft*, 535 U.S. at 245-46 (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127, 116 L. Ed. 2d 476, 112 S. Ct. 501 (1991) (Kennedy, J., concurring)).

encompasses "pornography produced with real children" for constitutional purposes?

In *United States v. Barberi*,[245] the CAAF addressed that particular question. In that case, the accused was charged, in part, with possession of child pornography in violation of Article 134, UCMJ.[246] The charges stemmed from an investigation into allegations that the accused had abused his minor stepdaughter. Seized electronic media possessed by the accused contained images of his stepdaughter in "various stages of undress."[247] The accused had apparently taken the pictures himself.[248] At trial, the government admitted six separate pictures of the stepdaughter as evidence of his possession of child pornography; however, four of the six images did not contain a depiction of her genitalia or pubic area.[249] On appeal to the CAAF, the accused argued that the four images that did not depict the genitalia or pubic area were constitutionally protected speech.[250]

The CAAF began its analysis by agreeing with the ACCA that "[w]ithout an exhibition of the genitals or pubic area, the four images at issue do not fall within the definition of sexually explicit conduct and therefore do not constitute child pornography as defined by the CPPA and as instructed by the military judge in this case."[251] It then began its constitutional analysis by quoting the general language from the Supreme Court concerning the categories of speech that fall outside of the protections of the First Amendment.[252] The court noted that "speech that falls outside of these categories retains First Amendment protection."[253]

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[245] United States v. Barberi, 71 M.J. 127 (C.A.A.F. 2012).

[246] *Barberi*, 71 M.J. at 128. While the accused was charged under Article 134, UCMJ, the definition for child pornography utilized by the military judge was derived from the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. §§ 2252A-2260 (1996). *Barberi*, 71 M.J. at 129-30. Relevant to the case, the definition was limited to a "lascivious exhibit of the genitals or pubic area." *Barberi*, 71 M.J. at 130; *cf.* 18 U.S.C. §2256(2)(A).

[247] *Barberi*, 71 M.J. at 129.

[248] *Id*.

[249] *Id*.

[250] *Id*. The constitutionality of the four images was critical to the accused's argument to the CAAF that the general verdict rule did not apply to his conviction because the court would be unable to determine whether he had been convicted based on constitutionally protected speech. *Barberi*, 71 M.J. at 129-32; *compare with* Stromberg v. California, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117 (1931), United States v. Rodriguez, 66 M.J. 201 (C.A.A.F. 2008). Because the CAAF did find that the four images were constitutionally protected, the exception to the general verdict rule did apply, resulting in the dismissal of the findings as to the charge of possession of child pornography. *Barberi*, 71 M.J. at 132-33.

[251] *Barberi*, 71 M.J. at 130.

[252] *Id*.

[253] *Id*. at 130 (citing *Ashcroft*, 535 U.S. at 245-46; *New York v. Ferber*, 458 U.S. 747, 765, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)).

Based solely on this conclusory statement, the CAAF held that "[a]ccordingly, [the four images] constitute constitutionally protected speech, and '[t]he Government may not suppress lawful speech as the means to suppress unlawful speech.'"[254] Based on this holding, any image of a minor, in various stages of undress, that does not meet the federal definition of child pornography (i.e., fails to depict the genitals or pubic area), is per se constitutionally protected speech.[255]

As previously discussed,[256] despite *Piolunek* recently overruling *Barberi*, its holding concerning the constitutionality of images that do not meet the federal definition of child pornography survives. Therefore, the CAAF's holding in *Barberi* would seem to render impossible any expansion of the definition of child pornography to eliminate the requirement that the genitalia or pubic area be a focal point. However, the CAAF's conclusion in *Barberi* improperly conflates the federal definition of child pornography (which is identical to the military definition) with the constitutional definition of child pornography. This is its fundamental flaw, and is in direct contradiction to Supreme Court precedent.

The seminal case concerning the lack of constitutional protection for child pornography is *New York v. Ferber*.[257] At issue in that case was the constitutionality under the First Amendment of Article 263 of New York's Penal Law,[258] which "prohibit[ed] the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene."[259] That statute, upheld as constitutional by the Supreme Court, defined child pornography as a "lewd exhibition of the genitals."[260]

The Supreme Court began by analyzing the CAAF's finding that the obscenity standard created in *Miller v. California*[261] was "the appropriate line

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[254] *Barberi*, 71 M.J. at 130-31 (quoting *Ashcroft*, 535 U.S. at 255).

[255] At least two members of the CAAF agree that the decision in *Barberi* "presents us with a binary choice: either a given image depicts a 'lascivious exhibition of the genitals or pubic area' and is therefore child pornography, or that image is constitutionally protected under the First Amendment." *See* United States v. Moon, 73 M.J. 382, 392 (C.A.A.F. 2014) (Ohlson, J. dissenting). As Chief Judge Baker noted in *Barberi* itself, the per se holding has eliminated any "middle ground." *Barberi*, 71 M.J. at 135 (Baker, C.J., dissenting).

[256] Tate, *Supra* note 13, at 34.

[257] New York v. Ferber, 458 U.S. 747, 765, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).

[258] N.Y. PENAL LAW, § 263 (McKinney 1980).

[259] *Ferber*, 458 U.S. at 749.

[260] *Id*. at 751 (citing N.Y. PENAL LAW, §263.00(3)).

[261] Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). The *Miller* standard has set forth the following definitive definition of constitutionally proscribed obscenity, "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24.

dividing protected from unprotected expression by which to measure a regulation directed at child pornography."[262] The Court noted that this case "constitutes our first examination of a statute directed at and limited to depictions of sexual activity involving children."[263]

The *Miller* standard was intended to strike the appropriate balance between the state's interest in protecting individuals from exposure to unwanted pornographic material, and "the dangers of censorship inherent in unabashedly content-based laws."[264] The Court recognized that child pornography laws could likewise "run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy."[265] However, the Court ultimately concluded that states should be afforded "greater leeway" in the proscription of child pornography in order to protect children.[266]

While the Court did not actually provide a definition of what constitutes child pornography for the loss of constitutional protections, it required that "the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed."[267] It did find that the New York statute was defined "with sufficient precision," and in particular noted that "[t]he term 'lewd exhibition of the genitals' is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation."[268] The Court's one limitation was reinforcing the principle that "nudity, without more, is protected expression."[269]

Ferber therefore stands for the proposition that child pornography is a specific class of speech that does not receive First Amendment protection not because of the nature of what it depicts, but based on the harm that it has been shown to cause to children. While the Court did not present a comprehensive definition of child pornography, it concluded that a lewd or lascivious exhibition of the genitals or pubic area was sufficiently precise. But could a broader definition pass constitutional muster? That question was arguably answered eight years later.

In *Osborne v. Ohio*,[270] the Supreme Court at least implicitly found that a definition broader than one limited to a depiction of the genitalia and pubic region

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[262] *Ferber*, 458 U.S. at 753.
[263] *Id*.
[264] *Id.* at 756.
[265] *Id*.
[266] *Id*.
[267] *Id*. at 764.
[268] *Id*. at 765 (citing Miller v. California, 413 U.S. 15, 25, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973)).
[269] *Ferber*, 458 U.S. at 765 n.18 (citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 213, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975)).
[270] Osborne v. Ohio, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1980).

is constitutionally permissible. In that case, the Court was confronted with an Ohio statute which, "on its face, purports to prohibit the possession of 'nude' photographs of minors."[271] While noting that mere nudity is generally insufficient to survive constitutional challenge, the Court found there was no overbreadth concern due to the Ohio State Supreme Court's interpretation of the statute to prohibit only "the possession or viewing of material or performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals . . . ."[272]

While this case again appears to turn on the presence of the genitalia in any depiction, the majority notes that "[they] do not agree that this distinction between body areas and specific body parts is constitutionally significant: The crucial question is whether the depiction is lewd, not whether the depiction happens to focus on the genitals or the buttocks."[273]

While not the holding in the case, the majority dicta supports the proposition that for constitutional purposes, child pornography is not limited solely to images that depict the genitals or pubic areas of a minor. At least two current judges on the CAAF agree with this interpretation. In *United States v. Moon*,[274] Judge Ohlson, joined by Chief Judge Baker in dissent, went through this same analysis of *Ferber* and *Osborne*, noting that "a plain reading of the Supreme Court's decision in Osborne demonstrates that there are constitutionally acceptable definitions of child pornography that are broader than the definition used in the CPPA,"[275] and that "the Supreme Court has not stated that the CPPA or the

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[271] *Id*. at 112.

[272] *Id*. at 113-14 (quoting State v. Young, 37 Ohio St. 3d 249, 252, 525 N.E.2d 1363, 1368 (1988)).

[273] *Osborne*, 495 U.S. at 114 n.11. The discussion was brought about by the dissent's recognition that the Ohio State Supreme Court's interpretation of the statute was written in the disjunctive, meaning that it could prohibit either a "graphic focus on the genitals" or a "lewd exhibition," rather than a "lewd exhibition of the genitals." *Osborne*, 495 U.S. at 129 (Brennan, J. dissenting). While noting that the genitalia is an irrelevant constitutional consideration, the majority nevertheless dismissed the dissent's concern by interpreting the Ohio State Supreme Court's decision as requiring a "lewd exhibition of the genitals." *Osborne*, 495 U.S. at 114 n.11 (citing *State v. Young*, 37 Ohio St. 3d 249, 258, 525 N.E.2d 1363, 1373 (1988)). Interestingly, Ohio courts have actually interpreted the Ohio Supreme Court's language in *State v. Young* to include either a "lewd exhibition" or a "graphic focus on the genitals," not a "lewd exhibition of the genitals," as the majority found. *See* State v. McDonald, No. CA2008-05-045, 2009 Ohio App. LEXIS 1019, at *17 (Ohio Ct. App. Mar. 16, 2009) ("[a] close reading of the decision in *Young* demonstrates that the nudity need only constitute a lewd exhibition *or* involve graphic focus on the genitals.") (emphasis added); State v. Graves, 184 Ohio App. 3d 39, 42, 919 N.E. 2d 753, 755 (2009); State v. Gann, 154 Ohio App. 3d 170, 176, 796 N.E. 2d 942, 947 (2003).

[274] United States v. Moon, 73 M.J. 382 (C.A.A.F. 2014).

[275] *Id*. at 391 (Ohlson, dissenting).

CPPA's statutory definitions cover the entire field of images that may be criminalized as 'child pornography.'"[276]

Consequently, the summary conclusion[277] in *Barberi* that images that do not meet the federal definition of child pornography are constitutionally protected is itself constitutionally infirm and should be explicitly overturned. To be sure, that decision conflicts with the definition of child pornography in two–thirds of the states.[278]

B. The Proposed Definition is Not Unconstitutionally Overbroad

The purpose of the overbreadth doctrine is to ensure that statutes, particularly criminal ones, do not overly infringe upon or "chill" constitutionally protected speech.[279] "[W]here a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'"[280] "Even when a statute at its margins infringes on protected expression, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .'"[281] In general, the overbreadth doctrine is considered "strong medicine" that is invoked by courts "sparingly and only as a last resort."[282]

Every overbreadth challenge brought against state statutes that apply a broader definition of child pornography than does the military have uniformly been rejected by the courts.[283] The crux of an overbreadth challenge would be

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[276] *Id*. at 392.

[277] The only legal source relied upon by the majority in *Barberi* to conclude that any image that does not meet the federal definition of child pornography is constitutionally protected is *Ashcroft*. *Barberi*, 71 M.J. at 130-31. However, the ruling in *Ashcroft* is based solely on the conclusion that because real children are not utilized in the creation of virtual child pornography, the constitutional exception under *Ferber* does not apply. Child erotica involves actual children. Consequently, *Ashcroft* is inapposite to the rule announced in *Barberi*.

[278] The interesting dilemma that has been created by *Barberi* is what would happen if the government attempted to incorporate through Article 134, UCMJ, a charge based on a state definition of child pornography utilizing UCMJ, art. 134(3) (crimes and offenses not capital). Would the CAAF hold the state definition unconstitutional? It seems incongruous that an image would be constitutionally protected on a military base, but not outside its gates.

[279] Virginia v. Hicks, 539 U.S. 113, 119,123 S. Ct. 2191, 156 L.Ed. 2d 148 (2003).

[280] Osborne v. Ohio, 495 U.S. 103, 112, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1980) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)).

[281] *Osborne*, 495 U.S. at 112 (citing *Ferber*, 458 U.S. at 770 n. 25).

[282] *Broadrick*, 413 U.S. at 613.

[283] *See* State v. Hazlett, 205 Ariz. 523, 73 P.3d 1258 (Ariz. Ct. App. 2003); People v. Batchelor, 800 P.2d 599 (Colo. 1990); State v. Morton, 140 Idaho 235, 91 P.3d 1139

that the lack of genitals or pubic area in an image would impermissibly encompass benign images. However, by retaining the requirement analogous to federal law that the images be lewd, the definition would not extend to those innocent photographs of infants in the bath, or innocuous family photographs.[284] Every case that has dealt with an overbreadth challenge focuses on the requirement that the image be lewd or lascivious, not that any particular body part was depicted. The only way an overbreadth challenge would succeed is for a court to arrive at the unreasonable conclusion that only the genitalia or pubic area can render an image lewd.

Finally, even assuming that the definition could be read in some way to encompass those traditionally cited innocent pictures of children, such a reading would not render the definition *substantially* overbroad, and judicial review would prevent overreaching by the government.[285]

C. The Proposed Definition Is Not Unconstitutionally Vague

"As generally stated, the void–for–vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[286] The primary purpose is to ensure that "a legislature establish minimum guidelines to govern law enforcement."[287] As it applies to servicemembers who may be subject to prosecution for the violation of particular statutes, the constitutional requirement is that they have "'fair notice' that an act is forbidden and subject to criminal

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(2004); People v. Gezelman, 202 Mich. App. 172, 507 N.W.2d 744 (Mich. Ct. App. 1993); Commonwealth v. Davidson, 595 Pa. 1, 938 A.2d 198 (2007).

[284] Professor Amy Adler would argue that the terms "lewd" or "lascivious" themselves are so "capacious" that they "seem[] to threaten all pictures of unclothed children, whether lewd or not, and even pictures of clothed children, if they meet the hazy definition of 'lascivious' or 'lewd.'" Amy Adler, *The Perverse Law of Child Pornography*, 101 Colum. L. Rev. 209, 240 (2001); Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 941 (2001). However, every court in the country that has addressed the constitutionality of the terms "lewd" and "lascivious" have found them to not be overly broad.

[285] *See* Massachusetts v. Oakes, 491 U.S. 576, 589, 109 S. Ct. 2633, 105 L. Ed. 2d 493 (1989)(Scalia, J., concurring in part and dissenting in part) ("Assuming that it is unconstitutional (as opposed to merely foolish) to prohibit such photography, I do not think it so common as to make the statute *substantially* overbroad. We can deal with such a situation in the unlikely event some prosecutor brings an indictment."); New York v. Ferber, 458 U.S. 747, 773-74, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) ("[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.") (citing *Broadrick*, 413 U.S. at 615-16).

[286] Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

[287] *Id*. at 358.

sanction."[288] "Potential sources of fair notice may include federal law, state law, military case law, military custom and usage, and military regulations."[289]

By utilizing the term lewd to define the images that will be subject to prohibition, the proposed definition ensures that it is not void-for-vagueness and provides sufficient notice to an accused as to what images are proscribed. Courts routinely recognize that the term lewd "is a commonly used word that 'has an unmistakable meaning which is very well and generally understood.'"[290] Further, the near universally accepted *Dost* factors, which are included within the text of the definition, provide further definiteness as to what expressive conduct is actually prohibited.

VIII. Conclusion.

> While the Supreme Court was worried about works of art and *Romeo and Juliet* . . .lower appellate courts have been grappling with cases seeking to distinguish between what some judges view as supposedly lawful child erotica—photographs depicting young children dressed as prostitutes in G-strings in coy and provocative positions—and criminal child pornography—photographs depicting young children dressed as prostitutes in G–strings in coy and provocative positions that also show some sliver of the pubic area. . . . I am skeptical, if a majority of my colleagues are not, that the Congress, the Supreme Court, or, most importantly, the Constitution, intended such a nuanced result when it comes to the difference between criminal and constitutionally protected images of real children depicted in a pornographic manner for the purpose of sexual gratification.[291]

Whether a servicemember can be prosecuted for possessing or distributing offensive images of minors turns primarily on whether the image depicts the genitalia or pubic area. This arbitrary requirement, which flies in the face of the definition of child pornography in almost two-thirds of the States (many of which

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[288] United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003) (citing United States v. Bivins, 49 M.J. 328, 330 (C.A.A.F. 1998)).

[289] United States v. Warner, 73 M.J. 1, 3 (C.A.A.F. 2013) (citing *Vaughan*, 58 M.J. at 31).

[290] State v. Meyer, 120 Ore. App. 319, 325, 852 O.2d 879 (Ct. App. Or. 1993) (citing 53 CJS, "Lewdness," § 1; *Dictionary of Criminology* 127-28 (1965)); *see also* State v. Gates, 182 Ariz. 459, 462, 897 P.2d 1345 (Ariz. Ct. App. 1994) ("We believe a person of ordinary intelligence would understand the term 'lewd' to connote sexual suggestiveness.") (citations omitted); State v. Limpus, 128 Ariz. 371, 375-76, 625 P.2d 960 (Ariz. Ct. App. 1981).

[291] *Blouin*, 2015 CAAF LEXIS 584 at *34-35 (Baker, C.J., dissenting).

house military posts), excludes countless images that run afoul of the primary purpose for prohibiting child pornography: the protection of children.

The fact that a child's genitalia are not depicted in a particular image does not render it any less harmful to that child. By expanding the definition of child pornography to remove the requirement that the genitalia or pubic area be depicted, and instead require only that the image be lewd under well-established legal principles, the military will be in a much better position to prevent the proliferation of these offensive and harmful images within its ranks. To continue to exclude a wide range of offensive images of children from the category of what constitutes child pornography serves only to condone their continued presence within the military.

Appendix

Recommended Changes to Current Definition

Manual for Courts-Martial United States (2012)
Part IV. Punitive Articles
68b. Article 134--(Child pornography) 2012

c. Explanation

(1) "Child Pornography" means material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct.

(2) An accused may not be convicted of possessing, receiving, viewing, distributing, or producing child pornography if he was not aware that the images were of minors, or what appeared to be minors, engaged in sexually explicit conduct. Awareness may be inferred from circumstantial evidence such as the name of a computer file or folder, the name of the host website from which a visual depiction was viewed or received, search terms used, and the number of images possessed.

(3) "Distributing" means delivering to the actual or constructive possession of another.

(4) "Minor" means any person under the age of 18 years.

(5) "Possessing" means exercising control of something. Possession may be direct physical custody like holding an item in one's hand, or it may be constructive, as in the case of a person who hides something in a locker or a car to which that person may return to retrieve it. Possession must be knowing and conscious. Possession inherently includes the power or authority to preclude control by others. It is possible for more than one person to possess an item simultaneously, as when several people share control over an item.

(6) "Producing" means creating or manufacturing. As used in this paragraph, it refers to making child pornography that did not previously exist. It does not include reproducing or copying.

(7) "Sexually explicit conduct" means actual or simulated:

> (a) sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or

opposite sex;

(b) bestiality;

(c) masturbation;

(d) sadistic or masochistic abuse; or

(e) ~~lascivious exhibition of the genitals or pubic area of any person~~ lewd visual depiction of a minor.

(8) "Visual depiction" includes any developed or undeveloped photograph, picture, film or video; any digital or computer image, picture, film, or video made by any means, including those transmitted by any means including streaming media, even if not stored in a permanent format; or any digital or electronic data capable of conversion into a visual image.

(9) "Wrongfulness." Any facts or circumstances that show that a visual depiction of child pornography was unintentionally or inadvertently acquired are relevant to wrongfulness, including, but not limited to, the method by which the visual depiction was acquired, the length of time the visual depiction was maintained, and whether the visual depiction was promptly, and in good faith, destroyed or reported to law enforcement.

(10) "Lewd Visual Depiction." Whether a particular image constitutes a lewd visual depiction of a minor is based on a consideration of the totality of the circumstances. Non-dispositive factors to be considered include, but are not limited to:

(a) whether the focal point of the visual depiction is on the child's intimate parts;

(b) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

(c) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

(d) whether the child is fully or partially clothed, or nude;

(e) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; or

(f) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

(1~~0~~1) On motion of the government, in any prosecution under this paragraph, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography or visual depiction or copy thereof shall not be admissible and may be redacted from any otherwise admissible evidence, and the panel shall be instructed, upon request of the Government, that it can draw no inference from the absence of such evidence.

MCM, Pt IV, ¶ 68b.c
State Definitions of Child Pornography

1. Alabama
    a. Any person who shall knowingly disseminate or display publicly any obscene matter containing a visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct shall be guilty of a Class B felony." ALA. CODE. § 13A-12-191.
    b. "Breast nudity. The lewd showing of the post-pubertal human female breasts below a point immediately above the top of the areola." ALA. CODE. § 13A-12-190.
2. Alaska
    a. "the lewd exhibition of the child's genitals." ALASKA STAT. § 11.41.455.
3. Arizona
    a. "Exploitive exhibition" means the actual or simulated exhibition of the genitals or pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer." ARIZ. REV. STAT. § 13-3551.
4. Arkansas
    a. "Sexually explicit conduct" means actual or simulated . . . Lewd exhibition of the: (i) Genitals or pubic area of any person; or (ii) Breast of a female." ARK. CODE ANN. § 5-27-601.
5. California
    a. "exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer." CAL. PENAL CODE § 311.4.
6. Colorado
    a. "'Erotic nudity' means the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human breasts, or the undeveloped or developing breast area of the human child, for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved." COLO. REV. STAT. § 18-6-403.

7. Connecticut
    a. "lascivious exhibition of the genitals or pubic area of any person." CONN. GEN. STAT. § 53a-193.
8. Delaware
    a. "Prohibited sexual act" shall include . . . (9) Nudity, if such nudity is to be depicted for the purpose of the sexual stimulation or the sexual gratification of any individual who may view such depiction . . . (11) Lascivious exhibition of the genitals or pubic area of any child." DEL. CODE ANN. tit. 11, § 1100.
9. Florida
    a. "actual lewd exhibition of the genitals." FLA. STAT. § 827.071.
10. Georgia
    a. "'Sexually explicit nudity' means a state of undress so as to expose the human male or female genitals, pubic area, or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state." GA. CODE ANN. § 16-12-102.
11. Hawaii
    a. "'Sexual conduct' means acts of masturbation, homosexuality, lesbianism, bestiality, sexual penetration, deviate sexual intercourse, sadomasochistic abuse, or lascivious exhibition of the genital or pubic area of a minor." HAWAII REV. STAT. § 707-750.
12. Idaho
    a. "'Erotic nudity' means the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human female breasts, or the undeveloped or developing breast area of the human female child, for the purpose of real or simulated overt sexual gratification or stimulation of one (1) or more of the persons involved." IDAHO CODE ANN. § 18-1507.
13. Illinois
    a. "depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed or transparently clothed genitals, pubic area, buttocks, or, if such person is female, a fully or partially developed breast of the child or other person." 720 ILL. COMP. STAT. 5/11-20.1.
14. Indiana
    a. "'Sexual Conduct' means: . . . exhibition of the: . . . (i) uncovered genitals; or (ii) female breast with less than a fully opaque covering of any part of the nipple; intended to satisfy or arouse the sexual desires of any person." IND. CODE § 35-42-4-4.

15. Iowa
    a. "Nudity of a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction of the nude minor." IOWA CODE § 728.1.
16. Kansas
    a. "engaging in sexually explicit conduct with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender or any other person;" KAN. STAT. ANN. § 21-5510.
    b. "Sexually explicit conduct" means actual or simulated: Exhibition in the nude; . . . or lewd exhibition of the genitals, female breasts or pubic area of any person;" KAN. STAT. ANN. § 21-5510.
17. Kentucky
    a. "'Obscene' means the predominate appeal of the matter taken as a whole is to a prurient interest in sexual conduct involving minors." KY. REV. STAT. ANN. § 531.300.
    b. "The exposure, in an obscene manner, of the unclothed or apparently unclothed human male or female genitals, pubic area or buttocks, or the female breast, whether or not subsequently obscured by a mark placed thereon, or otherwise altered, in any resulting motion picture, photograph or other visual representation, exclusive of exposure portrayed in matter of a private, family nature not intended for distribution outside the family;" KY. REV. STAT. ANN. § 531.300.
18. Louisiana
    a. "lewd exhibition of the genitals or anus." LA. REV. STAT. ANN. § 14:81.1.
19. Maine
    a. "'Sexually explicit conduct' means any of the following acts . . . [l]ewd exhibition of the genitals, anus or pubic area of a person. An exhibition is considered lewd if the exhibition is designed for the purpose of eliciting or attempting to elicit a sexual response in the intended viewer;" ME. REV. STAT. tit. 17-A, § 281.
20. Maryland
    a. "'Sexual conduct' means whether alone or with another individual or animal, any touching of or contact with: (i) the genitals, buttocks, or pubic areas of an individual; or (ii) breasts of a female individual." MD. CODE ANN. CRIM. LAW § 11-101.
    b. "'Sexual excitement' means: (1) the condition of the human genitals when in a state of sexual stimulation; (2) the condition of the human female breasts when in a state of sexual stimulation." MD. CODE ANN. CRIM. LAW § 11-101.
21. Massachusetts
    a. "depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks

or, if such person is female, a fully or partially developed breast of the child." MASS. GEN. LAWS ch. 272, § 29C.

22. Michigan
    a. "'Erotic nudity' means the lascivious exhibition of the genital, pubic, or rectal area of any person. As used in this subdivision, 'lascivious' means wanton, lewd, and lustful and tending to produce voluptuous or lewd emotions." MICH. COMP. LAWS § 750.145c.
23. Minnesota
    a. "lewd exhibitions of the genitals." MINN. STAT. § 617.246.
24. Mississippi
    a. "Lascivious exhibition of the genitals or pubic area of any person." MISS. CODE ANN. § 97-5-31.
25. Missouri
    a. "Lascivious exhibition of the genitals or pubic area of any person." MO. REV. STAT. § 573.010.
26. Montana
    a. "lewd exhibition of the genitals, breasts, pubic or rectal area, or other intimate parts of any person." MONT. CODE. ANN. § 45-5-625.
27. Nebraska
    a. "Erotic nudity means the display of the human male or female genitals or pubic area, the human female breasts, or the developing breast area of the human female child, for the purpose of real or simulated overt sexual gratification or sexual stimulation of one or more of the persons involved." NEB. REV. STAT. § 28-1463.02.
28. Nevada
    a. "lewd exhibition of the genitals." NEV. REV. STAT. § 200.700.
29. New Hampshire
    a. "any lewd exhibitions of the buttocks, genitals, flagellation, bondage, or torture." N.H. LAWS § 649-A:2.
30. New Jersey
    a. "Nudity, if depicted for the purpose of sexual stimulation or gratification of any person who may view such depiction." N.J. STAT. ANN. § 2C:24-4.
31. New Mexico
    a. "lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation." N.M. STAT. ANN. § 30-6A-2.
32. New York
    a. "lewd exhibition of the genitals." N.Y. PENAL LAW § 263.00.
33. North Carolina
    a. "The lascivious exhibition of the genitals or pubic area of any person." N.C. GEN. STAT. § 14-190.13.

34. North Dakota
    a. "'Sexual conduct' means actual or simulated sexual intercourse, sodomy, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the buttocks, breasts, or genitals . . . ." N.D. CENT. CODE § 12.1-27.2-01.
35. Ohio
    a. "state of nudity." OHIO REV. CODE ANN. § 2907.323 (*but see* Osborne v. Ohio, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990))
36. Oklahoma
    a. "where the lewd exhibition of the uncovered genitals, buttocks or, if such minor is a female, the breast, has the purpose of sexual stimulation of the viewer." OKL. STAT. tit. 21, § 1024.1.
37. Oregon
    a. "'Sexually explicit conduct' means actual or simulated . . . [l]ewd exhibition of sexual or other intimate parts." OR. REV. STAT. § 163.665.
38. Pennsylvania
    a. "Prohibited sexual act: Sexual intercourse as defined in section 3101 (relating to definitions), masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction." 18 PA. CONS. STAT. § 6312.
39. Rhode Island
    a. "'Sexually explicit conduct' means actual . . . [g]raphic or lascivious exhibition of the genitals or pubic area of any person." R.I. GEN. LAWS § 11-9-1.3.
40. South Carolina
    a. "'Sexually explicit nudity' means the showing of: (a) uncovered, or less than opaquely covered human genitals, pubic area, or buttocks, or the nipple or any portion of the areola of the human female breast; or (b) covered human male genitals in a discernibly turgid state." S.C. CODE ANN. § 16-15-375.
41. South Dakota
    a. "'Prohibited sexual act,' actual or simulated sexual intercourse, sadism, masochism, sexual bestiality, incest, masturbation, or sadomasochistic abuse; actual or simulated exhibition of the genitals, the pubic or rectal area, or the bare feminine breasts, in a lewd or lascivious manner[.]" S.D. CODIFIED LAWS § 22-24A-2.
42. Tennessee
    a. "'Sexual activity' means any of the following acts[:] . . . [l]ascivious exhibition of the female breast or the genitals, buttocks, anus or pubic or rectal area of any person." TENN. CODE ANN. § 39-17-1002.

43. Texas
    a. "'Sexual conduct' means sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola." TEX. PENAL CODE ANN. § 43.25.
44. Utah
    a. "'Sexually explicit conduct' means actual or simulated . . . (e) lascivious exhibition of the genitals, pubic region, buttocks, or female breast of any person; (f) the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person." UTAH CODE ANN. § 76-5b-103.
45. Vermont
    a. "sexual conduct by a child or of a clearly lewd exhibition of a child's genitals or anus." VT. STAT. ANN. tit. 13, § 2827.
46. Virginia
    a. "'sexually explicit visual material' means . . . [a] lewd exhibition of nudity." VA. CODE ANN. § 18.2-374.1.
    b. "'Nudity' means a state of undress so as to expose the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered or uncovered male genitals in a discernibly turgid state." VA. CODE ANN. § 18.2-390.
47. Washington
    a. "Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer." WASH. REV. CODE § 9.68A.011.
48. West Virginia
    a. "'Sexually explicit conduct' includes any of the following, whether actually performed or simulated[:] . . . [e]xhibition of the genitals, pubic or rectal areas of any person in a sexual context." W. VA. CODE § 61-8C-1.
49. Wisconsin
    a. "'Sexually explicit conduct' means actual or simulated: . . . (e) Lewd exhibition of intimate parts." WIS. STAT. § 948.01.
50. Wyoming
    a. "'Explicit sexual conduct' means actual or simulated sexual intercourse, including genital–genital, oral–genital, anal–genital or oral–anal, between persons of the same or opposite sex, bestiality, masturbation, sadistic or masochistic abuse or lascivious exhibition of the genitals or pubic area of any person." WYO. STAT. ANN. § 6-4-303

COPINE SCALE

1. Indicative	Non-erotic and non-sexualised pictures showing children in their underwear, swimming costumes, etc. from either commercial sources or family albums; pictures of children playing in normal settings, in which the context or organization of pictures by the collector indicates inappropriateness.
2. Nudist	Pictures of naked or semi-naked children in appropriate nudist settings, and from legitimate sources.
3. Erotica	Surreptitiously taken photographs of children in play areas or other safe environments showing either underwear or varying degrees of nakedness.
4. Posing	Deliberately posed pictures of children fully, partially clothed or naked (where the amount, context and organization suggests sexual interest).
5. Erotic Posing	Deliberately posed pictures of fully, partially clothed or naked children in sexualized or provocative poses.
6. Explicit Erotic Posing	Emphasizing genital areas where the child is either naked, partially or fully clothed.
7. Explicit sexual activity	Involves touching, mutual and self-masturbation, oral sex and intercourse by child, not involving an adult.
8. Assault	Pictures of children being subject to a sexual assault, involving digital touching, involving an adult.
9. Gross Assault	Grossly obscene pictures of sexual assault, involving penetrative sex, masturbation, or oral sex involving an adult.

10. Sadistic/Bestiality	a. Pictures showing a child being tied, bound, beaten, whipped or otherwise subject to something that implies pain. b. Pictures where an animal is involved in some form of sexual behavior with a child.

THE SEARCH FOR STATUS: CHARTING THE CONTOURS OF COMBATANT STATUS IN THE AGE OF ISIS

LIEUTENANT COLONEL R. AUBREY DAVIS III*

> *[T]he lawyer must do his duty regardless of dialectical doubts-though with a feeling of humility springing from the knowledge that if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law. He must continue to expound and to elucidate the various aspects of the law of war for the use of armed forces, of governments, and of others.*[1]

I. Introduction

The means of warfare have changed. What were large contests between states have now devolved into several nation–states engaged in enduring conflicts with agile international terrorist organizations. The problem does not end there. Emerging organizations like the Islamic State of Iraq and ash–Sham (ISIS)[2] believe that the flags of modern states "have fallen, and their borders have been destroyed."[3] The intent of ISIS reaches far beyond the desire for territory in

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[1] Hersch Lauterpact, *The Problem of the Revision of the Law of War*, 29 BRITISH YEARBOOK OF INTERNATIONAL LAW 360, 381-82 (1952).

[2] Literally translated from Arabic as *ad-Dawlah al-Islāmīyah fī al-'Irāq wash-Shām* (الدولة الإسلامية في العراق والشام).

[3] Yosef Jabareen, *The Emerging Islamic State: Terror, Territoriality, and the Agenda of Social Transformation,* 58 GEOFORUM 51, 53 (2015) (*citing The Declaration of the Islamic State*, at https://botshikan.wordpress.com/2014/06/30/).

Kurdistan[4] and defeating the Kurdish Peshmerga.[5] Rather, ISIS intends to establish a global caliphate and set the conditions for Armageddon.[6] More specifically, "the state has an obligation to terrorize its enemies—a holy order to scare . . . them with beheadings and crucifixions and enslavement of women and children, because doing so hastens victory and avoids prolonged conflict."[7]

Hersch Lauterpacht foresaw this trend when he made these comments above regarding the then-recently signed 1949 Geneva Conventions.[8] He called the Conventions a revision of a "substantial part of the law of war."[9] Lauterpacht argued that the law must and will change with the currents of political will and the means of warfare.[10]

Today, the currents of political will and the means of warfare have transformed into what has been appropriately termed "transnational armed conflict."[11] However, the law has lagged behind in providing an adequate framework to address the realities of transnational conflict.[12] Most importantly, the law does not have a status to assign actors who are participants in such transnational armed conflicts.[13]

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[4] *Id.* at 52.

[5] The word "Peshmerga" is the Kurdish term used to describe Kurd irregular fighters and literally means "those who face death." *See* Heevie Kurdish Development Organization Information Page, at http://heevie.org/aboutkurdistan.

[6] Graeme Wood, *What ISIS Really Wants and How to Stop It,* THE ATLANTIC (Mar. 2015), http://www.theatlantic.com/features/archive/2015/02/what-isis-really-wants/384980/.

[7] *Id.*

[8] Lauterpacht, *supra* note 1, at 360.

[9] *Id*.

[10] *Id.* at 365-66 (observing that, for example, in relation to the repeal of the intentional practice of targeting civilians in aerial bombardment as "there is no rule firmly grounded in the past on which we can place reliance–for aerial bombardment is a new weapon which raises new problems.").

[11] Geoffrey Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter–Terror Combat Operations,* 42 ISR. L. REV. 46, 50 (2009). The author notes in the introduction that "[t]ransnational armed conflicts have become a reality. The increasing sophistication of terrorist organizations, their increasingly transnational nature, and their development of military strike capabilities, push and will continue to push States to resort to combat power as a means to defend against this threat." *Id*.

[12] *See generally* BEN SAUL, TERRORISM (Hart Publishing Oxford 2012); Tim Krieger & Daniel Meierrieks, *How to Deal with International Terrorism,* 3 UNIVERSITÄT FREIBURG DISCUSSION PAPER SERIES 1 (2014), http://www.wguth.uni-freiburg.de/forschung/data/data/wgsp_dp_2014_03.pdf.

[13] *Id.*

The current international humanitarian legal framework essentially categorizes people involved in armed conflicts as either combatants or civilians.[14] However, transnational terrorist actors attack civilians as a means of belligerency thereby forcing international terrorists into one of two ill-matched categories.[15] As an author from the University of Freiburg stated, "[w]hat is new in the 21st century is the indiscriminate use of terrorist tactics against innocent civilians on a huge scale."[16] Thus, if transnational terrorists attack civilians, then how can they be legally characterized as civilians? This article argues that terrorists are neither combatants nor civilians, suggesting that a new independent category has emerged. To correctly characterize the ever-evolving global insurgent, the international community must adopt the term "transnational belligerent."

This thesis will be presented in four parts. Part one will define the problem of ISIS and focus on how terrorism has been addressed from a Non-International Armed Conflict (NIAC) perspective. Part two will discuss how current international law inadequately addresses the realities of transnational belligerents and how concepts like complementarity are expressions of how the law does not properly address this international threat. Part three will survey international approaches to defining terrorism and the historical underpinnings of belligerency. Part four will analyze the state of the law, propose "transnational belligerency" as a necessary third category under the law, provide a model to analyze transnational belligerents, and finally propose a means to codify the law internationally.

II. Background: ISIS and The Law of Armed Conflict

A. ISIS: Origins and the Global Caliphate

Defining the problem of ISIS is fairly straightforward. As one author noted in March 2014 regarding the rise of ISIS,

> [Islamic State of Iraq and ash–Sham's] portrayal of its own goals in Syria–Iraq indicate that it seeks to establish an Islamic state that can become the core of a new Caliphate that will eventually strive to dominate the rest of the world. Despite their ongoing disagreement with Zawahiri, ISIS abides by Osama bin

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[14] *See generally* ANICÉE VAN ENGELAND, CIVILIAN OR COMBATANT?: A CHALLENGE FOR THE 21ST CENTURY (Oxford Univ. Press 2011) (positing that international humanitarian law was not drafted to rule on war, but rather to protect victims of war—civilians in particular). *Id*. It is important to note that Geneva Convention III identifies "retained personnel" (doctors, clergy, etc.) as a legal status for individuals captured in war.

[15] *See* Jan–Erik Lane, *The New Patterns of Warfare: Terrorism Against Innocent Civilians,* 3 SUVREMENE TEME 6 (2010).

[16] *Id.* at 10.

> Laden's dictum that there are only three choices in Islam: conversion, subjugation, or death.[17]

The issues of internal politics and the disassociation of ISIS from al–Qaeda notwithstanding, ISIS finds its origins in Afghanistan circa 1999.[18] At that time, Abu Mus'ab al–Zarqawi had moved to Afghanistan where he met both Osama bin Ladin and Ayman al–Zawahiri.[19] Though Al Qa'ida had considered itself "jihadis without borders," al–Zarqawi, the man who would eventually establish what is presently ISIS, had a more focused goal of building an establishment.[20]

Al–Zarqawi's caliphate vision (and presently al–Baghdadi's—the current leader of ISIS) is clearly seen in the writings from Osama bin Ladin seized during the Abbattabad raid.[21] Bin Ladin wrote "[W]e are an international organization fighting for the liberation of Palestine and all of the Muslim countries to erect an Islamic caliphate that would rule according to the Shari'ah of Allah."[22] He continues by writing, "It is our desire, and the desire of the brothers in Yemen, to establish the religion and restore the caliphate, to include all the countries of the Islamic world."[23] What is most striking is that historically Al Qa'ida would brutally attack civilians to accomplish this end.[24] ISIS is much the same, but with much greater focus on attacking civilians.

1. Attacking Civilians as a Means of Achieving a Caliphate

In data collated by the Global Terrorism Database, ISIS is credited with 1636 total incidents dating back to 2012 in which they targeted and killed over 334 private citizens equating to nearly 48% of their entire operation.[25] Al Qa'ida is

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[17] Aymenn Jawad al-Tamimi, *The Dawn of the Islamic State of Iraq and Ash-Sham,* 16 CURRENT TRENDS IN ISLAMIST IDEOLOGY 5 (2014).

[18] MUHAMMAD AL–'UBAYDI ET AL., REPORT: THE GROUP THAT CALLS ITSELF A STATE: UNDERSTANDING THE EVOLUTION AND CHALLENGES OF THE ISLAMIC STATE 10 (W. Point Publ'g 2014), https://www.ctc.usma.edu/v2/wp-content/uploads/2014/12/CTC-The-Group-That-Calls-Itself-A-State-December20141.pdf.

[19] *Id.*

[20] *Id.* at 3.

[21] *US Declassifies Osama Bin Laden compound documents,* THE GUARDIAN, http://www.telegraph.co.uk/news/worldnews/al-qaeda/11618234/US-declassifies-Osama-Bin-Laden-compound-documents-live.html (last visited 6 Oct. 2015).

[22] Undated Letter Purportedly Between Osama Bin Ladin to Shaykh Mahmud 13, SOCOM-2012-0000019-HT, https://www.ctc.usma.edu/posts/letters-from-abbottabadbin-ladin-sidelined.

[23] *Id.* at 21.

[24] *See* V. G. JULIE RAJAN, AL QAEDA'S GLOBAL CRISIS: THE ISLAMIC STATE, TAKFIR, AND THE GENOCIDE OF MUSLIMS 57 (Routeledge 2015).

[25] National Consortium for the Study of Terrorism and Responses to Terrorism (START) (2014). Global Terrorism Database Islamic State of Iraq and the Levant, http://www.start.umd.edu/gtd.

credited with eighty incidents, twenty–two of them were civilian targets[26] Al Qa'ida Iraq, purportedly ISIS's predecessor, is credited with 636 incidents, 285 of which are private citizen targets.[27] The targeting of civilians is a consistent practice among transnational belligerent organizations especially among those seeking to establish a caliphate.

Al Shabaab, an organization mainly associated with operations in Somalia, is one such organization seeking to establish a caliphate by primarily targeting civilians.[28] Al–Shabaab is credited with 1739 incidents, 456 of which were attacks against private citizens.[29] Boko Haram also seeks to establish a caliphate in Northern Africa.[30] Boko Haram is credited with 1304 incidents since 2008 with 549 of those attacks aimed at private citizens.[31]

2. ISIS as Global Public Enemy

Transnational belligerents like ISIS, simply by the nature of their stated organizational intentions, should be considered "global public enemies." "Global public enemies" is a concept that has been around for centuries even in the earliest conceptions of global unity.[32] For example, Francisco de Vittoria—regarded by many as the father of international law and founder of just war theory—stated that "[w]hat natural reason has established among all nations is called the *jus gentium*."[33] *Jus gentium* origins were an all–encompassing means of imposing order for the common good of the world. In Vittoria's words, "Since one nation is a part of the whole world . . . if any war should be advantageous to one province

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[26] Global Terrorism Al Qa'ida, http://www.start.umd.edu/gtd.
[27] Global Terrorism Al Qa'ida Iraq Database, http://www.start.umd.edu/gtd.
[28] George Kegoro, *The Object of Al Shabaab Terror: To Set Up a Caliphate in Kenya,* THE WORLD POST, Dec. 16, 2014, http://www.huffingtonpost.com/george-kegoro/al-shabaab-caliphate-kenya_b_6304950.html.
[29] National Consortium for the Study of Terrorism and Responses to Terrorism (START) (2013). Global Terrorism Database Al Shabaab, http://www.start.umd.edu/gtd.
[30] Monica Mark, *Boko Haram's Five–year Battle to Impose Caliphate Kills Thousands,* THE GUARDIAN, May 10, 2014, http://www.theguardian.com/world/2014/may/10/boko-haram-battle-caliphate-kills-thousands.
[31] National Consortium for the Study of Terrorism and Responses to Terrorism (START) (2013). Global Terrorism Database Boko Haram, http://www.start.umd.edu/gtd.
[32] ANTONIO TRUYOL SERRA, THE PRINCIPLES OF POLITICAL AND INTERNATIONAL LAW IN THE WORK OF FRANCISCO DE VITORIA 53 (Ediciones Cultura Hispanica Madrid 1946) (citing *De Indis* 2 (1532)).
[33] *Id.* (explaining that "Vittoria gives the *jus gentium* the character of a *jus inter gentes*, a juridical order binding human groups which are independent as such; he creates, in short, the modern concept of international law").

or nation but injurious to the world . . . it is my belief that, for this very reason, that war is unjust."[34]

Vittoria wrote years later that the "deliberate slaughter of the innocent is never lawful in itself"[35] and, "doubt may arise whether the killing of guiltless persons is lawful when they may be expected to cause danger in the future."[36] Vittoria posited that "evil is not to be done even in order to avoid greater evil" because there are "other available measures of precaution against their future conduct, namely, captivity, exile, etc…"[37] Thus, even in the time of Vittoria, the prospect of those who would inevitably cause harm were considered outlaws and, perhaps more importantly, were severable from the population at large.[38]

The concept of *jus gentium* has grown considerably to include crimes *ergo omnes*—against all—and since World War II (WWII) has grown to further include crimes of "universal jurisdiction."[39] Crimes of universal jurisdiction currently recognized in international law "are slavery, piracy, violations of the law of war, genocide, and torture."[40] Authors argue that "to incorporate acts of terror into the law *jus gentium* would only require the recognition that any incident that is part of a 'widespread or systematic' pattern of violence against civilians is an offense against the law of nations."[41] They continue by arguing that given *sine leges, nullem crimen*—ex post facto—"the prosecution would need to be able to say to an alleged terrorist 'you should have known the rules because the law of terrorism is customary international law.'"[42]

However, an ex post facto approach to prosecution is unrealistic given the status of the law. As is shown below, the international community is far from reaching a consensus on the definition of the term terrorist. Furthermore, the parties to the International Criminal Court (ICC) negotiations intentionally kept

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[34] *Id.* at 56 (citing *De potestate civili* 13 (1528)) (summarizing Vittoria's comments by stating that the words "expressed in this text is [sic] nothing but the application to the world, conceived as a moral unity, of the principle of common good . . .").

[35] *Id*. at 88 (citing *De Jure belli* 35 (1532)). Arguably, this had direct import to terrorists and terrorist acts from a modern point of view. *Id.*

[36] *Id.* at 89 (citing *De Jure belli* 38 (1532)). Interestingly, Serra cites "the children of the enemies, or the adult male civilians who may be mobilized" as examples of those who might cause danger in the future. *Id.*

[37] *Id.*

[38] *See* Santiago Peña, *De La Suprématie Des Institutions Gouvernementales Sur Le Jus Gentium,* 18 REVUE GENERALE DE DROIT 925 (1987) (providing an in–depth discussion of *jus gentium* in the context of the Nov. 6, 1985 police seizure of the Columbian Supreme Court from M–19 guerillas).

[39] THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 308 (Erik Luna & Marianne L. Wade eds., Oxford Univ. Press 2012).

[40] *Id.*

[41] *Id.* at 308-09 (referring to the Rome Statute of the International Criminal Court, at art 7., July 17, 1998, 2187 U.N.T.S.90 [hereinafter Rome Statute]).

[42] *Id.*

the term terrorist out of the Rome Statute altogether.[43] Thus, efforts to now somehow include terrorism as incorporated into the ICC prosecutorial scheme would not stand to reason and merely underscores the need to address the greater problem of transnational belligerents. There is a worldwide consensus that intentional transnational belligerent attacks against civilians are reprehensible.[44] This is why protection of civilians has received considerable attention as the Law of Armed Conflict has developed.

B. The Law of Armed Conflict

1. Common Article 2 and International Armed Conflict

Since WWII, the contours of global conflict are interpreted in two basic ways: international armed conflict (IAC) and non–international armed conflict (NIAC). The 1949 Geneva Conventions require that in order to have an IAC, the conflict

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[43] Rome Statute, *supra* note 41.

[44] A recent example of global commitment to the protection of civilians is the Responsibility to Protect (RtoP) Civilians, which states "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity." United Nations, *UN General Assembly Resolution 2005 World Summit Outcome*, A/RES/60/1, Oct. 24, 2005 para 138. The document continues by stating:

> The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII.

Id. para 139.

The concept of RtoP was applied in Operations ODYSSEY DAWN and UNIFIED PROTECTOR in 2011 which authorized:

> Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya.

S.C. Res. 1973, U.N. Doc. S/RES/1973 para. 4 (Mar. 17, 2011).

itself must be between two states as "high contracting parties."[45] The wording from Common Article 2 (CA 2) of the Four Geneva Conventions of 1949 states that the Conventions shall "apply to all cases of declared war or any other armed conflict which may arise between two or more High Contracting Parties, even if the state of war is not recognized by one of them."[46] It is important to note that, though scholars differ on this point, the duration of the conflict is immaterial. The only requirement is that the conflict be "armed."[47]

2. Common Article 3 and Non–International Armed Conflict

A Non–International Armed Conflict (NIAC) is interpreted though the wording of Common Article 3 (CA 3) of the 1949 Geneva Conventions and states in relevant part, that a NIAC is a conflict "not of an international character occurring in the territory of one of the High Contracting Parties."[48] In other words, CA 3 protections only apply to internal conflicts within one of the contracting states. CA 3 was termed as "[a] '[c]onvention in minature' . . . [applicable] to non–international armed conflicts only" and was to be the only Article "applicable to them until such time as a special agreement between the Parties" brought another convention into force.[49]

Thus, CA 3 was intended to deal with internal conflicts resulting in vague and less robust protections. For example, as the Commentaries to the Additional Protocols to the Geneva Conventions state,

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[45] *See generally* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) art. 2, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (GC II) art. 2, Aug 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War (GC III) art. 2, Aug 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) art. 2, 75 U.N.T.S. 287.

[46] *Id.*

[47] Notably, Jean Pictet's Commentaries to Common Article 2 state:

> Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of the state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.

COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean S. Pictet ed., Geneva 1960) [hereinafter COMMENTARY III]. For a counter perspective, *see* YORAN DINSTEIN, WAR, AGGRESSION, AND SELF–DEFENSE 11-12 (5th ed. Cambridge Univ. Press 2012).

[48] GCs I-IV, *supra* note 45, art 3.

[49] COMMENTARY III, *supra* note 48, at 34.

> In accordance with the intention of its authors, common Article 3 would cover all armed conflicts not of an international (inter States) character, i.e., in accordance with the ideas prevailing at the time, particularly colonial wars. The main arguments advanced against the mandatory application of the Conventions as a whole to all conflicts were less concerned with the practical impossibility of such a task than with the risk, in conflicts not of an international character, of granting such rebels a degree of recognition *de facto,* or of undermining government action aimed at defending the existing structure of the State.[50]

Consequently, the Geneva Conventions are, as one scholar observed, "mutually exclusive: any armed conflict is either international or non–international, and consequently covered either by CA 2 or CA 3."[51] However, as noted above, the nature of armed conflict has changed but the law has not. The law's stagnation has required scholars and experts to rework and redefine when CA 3 applies and when an "armed conflict" exists.

For example, in 1995, the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber in *Prosecutor v. Tadić* stated, "[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[52] In so doing, the ICTY Court established the famous two part "Tadić Test" to determine whether an "armed" conflict exists, factoring the intensity of the conflict itself along with the degree of organization of the armed forces participating therein.[53] The court was not confronted with the challenges of transnational belligerency, but rather a civil war. Thus the law continued to develop further in this context especially in larger international judicial bodies like the ICC.

For example, the 1998 ICC Statute at Article 8 states that armed conflicts are ones "that take place in the territory of a State when there is protracted armed

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[50] COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 46 (Yves Sandoz et al. eds., 1987), [hereinafter AP COMMENTARIES].

[51] ELS DEBUF, CAPTURED IN WAR: LAWFUL INTERNMENT IN ARMED CONFLICT 124 (Hart Publ'g Oxford 2013).

[52] Prosecutor v. Dusko Tadic, International Criminal Tribunal for the Former Yugoslavia (ICTY), Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 70.

[53] Prosecutor v. Ramush Haradinaj *et. al*, ICTY, Case No. IT-04-84*bis*-T, Trial Chamber II, Retrial Judgment, 29 November 2012, para 400 at, http://www.icty.org/x/cases /haradinaj/tjug/en/121129_judgement_en.pdf ("The Parties have agreed that an 'armed conflict existed in Kosovo at all times relevant to the Indictment . . . .' In doing so, the Chamber will look at (1) the intensity of conflict between the Serbian forces and the KLA in Kosovo and (2) the level or organization of the KLA from Mar. 1–Apr. 21, 1998.").

conflict between governmental authorities and organized armed groups or between such groups."[54] Again, the ICC Statute did not contemplate transnational belligerency. However, in 2006, after the September 11, 2001 attacks, the United States Supreme Court drew a distinction between conflicts which are a "clash between nations" and those which were "not of an international character" with the latter applying to *all* armed conflicts that are not between two nation–states.[55] Thus, the Supreme Court recognized that the term "conflict not of an international nature" is to be interpreted as a contradistinction to a conflict between nations.[56]

Though the threshold of what constitutes an *armed conflict* appears more grounded, there remains considerable debate as to what *non–international* actually means. Some argue consistent with the Court's ruling in *Hamdan* that, "[n]on–international armed conflicts are not defined by geographical boundaries but by the nature of the parties to the conflict."[57] This view would seem to recognize how transnational belligerency has changed warfare overall. However, the majority view remains fixated on the notion that "non-international armed conflict is confined to the territory of a single State, and that spill–over, cross-border or transnational armed conflicts therefore fall outside the scope . . ." of the Law of Armed Conflict (LOAC) as applied to NIACs.[58] The majority no doubt relies on CA 3's applicability as being "in many respects similar to an international war, but take place within the confines of a single country."[59]

Such a territorial restriction regarding NIAC applicability overall seems at odds with the purpose of CA 3. For example, the commentary to the Geneva Conventions provides that CA 3 "does not in any way limit the right of a State to put down rebellion . . ." rather "[i]t merely demands respect for certain rules which are already recognized as essential in all civilized countries."[60] In other words, CA 3 was simply intended to apply humanitarian protections liberally especially in the case of civilians. Consequently, a strict notion of the applicability of CA 3 as being solely within a state's territory leaves a gap which addresses neither the nature of transnational belligerency nor of transnational belligerents. Such a gap has given rise to notions like complementarity as a means to fill those gaps.

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[54] Rome Statute *supra* note 41, art. 8 *et seq*.
[55] Hamdan v. Rumsfeld, 548 U.S. 557, 777 (2006) (emphasis added).
[56] *Id.* at 630.
[57] DEBUF, *supra* note 51, at 129.
[58] YORAM DINSTEIN, CHARLES GARRAWAY & MICHAEL N. SCHMITT, THE MANUAL ON THE LAW OF NON–INTERNATIONAL ARMED CONFLICT, WITH COMMENTARY 3 (Int'l Inst. of Humanitarian Law San Remo 2006), *available at* http://www.iihl.org/iihl/Documents /The%20Manual%20on%20the%20Law%20of%20NIAC.pdf.
[59] COMMENTARY III, *supra* note 47, at 37.
[60] *Id.* at 36.

3. Complementarity and the Shortcomings of Common Article 3 Law

Complementarity as a concept has arguably originated to address the void in NIAC and CA 3 outlined above. The concept of complementarity posits that both LOAC (IHL) and International Humanitarian Rights Law (IHRL) should be read to "complement" each other. Proponents believe that "[c]omplementarity means that human rights law and humanitarian law do not contradict each other but, being based on the same principles and values can influence and reinforce each other mutually."[61]

Supporters argue that the reason complementarity works is because "one can say that human rights law and humanitarian law have in common that they seek to protect people from abusive behaviour [*sic*] by those in whose power they are . . . ."[62] Article 31(3)(c) of the Vienna Convention on the Law of Treaties is often cited as support of complementarity and states in part that nations must account for "any relevant rules of international law applicable in the relations between parties."[63]

Authors often cite to two distinct opinions from the International Court of Justice (ICJ) to expand upon these concepts. First, in what has been termed the Nuclear Weapons case, the ICJ stated that protections provided under the International Covenant on Civil and Political Rights did not "cease in times of war except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."[64]

As one author astutely observed, the court was not studying the relationship between LOAC and IHRL per se, but rather one "particular IHRL norm, the right to life, and at that, the right to life as it is formulated in Article 6 International Convention on Civil and Political Rights (ICCPR) . . . , and the relevant rules of [LOAC]". [65] Thus, the Court's analysis applied *lex specialis* in terms of increasingly specific rules relative to one norm, which then caused academics to extrapolate the concept to apply to LOAC and IHRL overall.[66]

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[61] Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict,* 40 ISR. L. REV. 310, 337 (2007).
[62] *Id.* at 341.
[63] Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331.
[64] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226.
[65] Marko Milanović, *Norm Conflicts, International Humanitarian Law and Human Rights Law*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 99 (Orna Ben–Naftali ed. 2011).
[66] *Id.*

Nevertheless, in 2004 the ICJ carried this notion forward in the Wall case stating,

> As regards the relationship between international humanitarian law [LOAC] and human rights law, there are thus three possible situations: some rights may be exclusively matters of [LOAC]; others may be exclusively matters of [IHRL]; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[67]

What is important about complementarity as a general concept is that is seeks to fill gaps, especially in terms of NAICs. In other words, what complementarity not surprisingly seeks to do is place law where there is none, namely in the realm of CA 3 and NIACs. As noted above, legal protections in a NIAC are almost exclusively limited to CA 3 alone.

Consequently, especially in terms of belligerent status, the importation and application of alternative bodies of international law is attractive if only for the purpose of avoiding the challenges of a fully renewed international legal dialogue. However, with the exception of the present time, an international legal dialogue is precisely what has taken place each and every time the world has seen significant changes in warfare. Arguably, why complementarity exists at all as a concept is because scholars and experts alike have identified the necessity for more law in this area.

The most significant treaty law has developed following significant changes in warfare. For example, modern conceptions of LOAC (IHL) were put in place after WW II most prominently by the United Nations' Universal Declaration of Human Rights.[68] The Declaration's Preamble underscored that States had the universal duty to protect the "inherent dignity" and "inalienable rights" of all people.[69]

Likewise, on August 12, 1949, the Geneva Conventions were concluded and sixty–one countries had already signed all four Conventions as early as February

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[67] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, I.C.J. 36.

[68] The U.N. Charter was signed on June 26, 1945 in San Francisco at the conclusion of the United Nations Conference on International Organization, and entered into force on October 24, 1945. *See generally*, BARDO FASSBENDER, THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY (Brill 2009).

[69] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948), pmbl.

12, 1950.[70] The subsequent years following WWII saw little affirmative development of LOAC until the 1977 Additional Protocols (AP) I and II to the Geneva Conventions.[71] The Additional Protocols, especially AP II, were created in response to the increasing pervasiveness of guerilla warfare in Vietnam and in other regional wars.[72] Since that time there has again been no significant development in treaty–based LOAC to address the realities of transnational belligerency.

Some scholars depart from this assertion arguing instead that since 1990, there has been a "revolution in the regulation of armed conflict."[73] Proponents of this position argue that there are three main areas of novel legal development. First, supporters submit that there is an emergence of significant customary international law through bodies like the ICTY Statute's "prohibition on attacks against civilians" and similar laws.[74] Second, complementarity has emerged as a method of gap–filling as outlined above. Finally, proponents support what can be characterized as a "resort to international criminal law" to provide a "useful means by which international humanitarian law may be enforced."[75]

These perspectives are notable, but unfortunately underscore the need to truly define transnational belligerents and transnational belligerency overall. As noted above, international bodies like the ICTY and the ICJ have been forced into a position of creating the law in the context of NIACs due to the absence of more authoritative international law. Thus, their precedent may be expressions of customary law to some degree but are in fact more indicative of a legal vacuum in the area of NIACs rather than firm advancements of the same.

Second, the greatest weakness of complementarity is that, though LOAC and IHRL do share some aspects in common, they are designed with opposing objectives. LOAC is intent on protecting civilians from war or belligerency. IHRL is intent on protecting civilians from their own governments. Finally, any

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[70] COMMENTARY III, *supra* note 47, at 9.

[71] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. *See also* Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non–International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

[72] *See generally* 4 THE VIETNAM WAR AND INTERNATIONAL LAW: THE CONCLUDING PHASE (Richard A. Falk ed., Princeton Univ. Press 1976). It is important to note the language from AP I art. 1(4) which defined "international armed conflict" as "armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self–determination." *Id.* Thus, the law at the time was focused on post–colonialism and its many issues, not transnational belligerency.

[73] Sandesh Sivakumaran, *Re-envisaging the International Law of Internal Armed Conflict,* 22 EUR. J. OF INT'L L. 219, 225 (2011).

[74] *Id.* at 228 (citing Tadić, *supra* note 52, paras 220-222).

[75] *Id.* at 232.

full commitment to international criminal law risks creating skewed results, constant reassessment of what crimes apply and an invariable reevaluation of what the definitions of the various crimes actually mean. This is readily apparent in the international dialog over defining terrorism and its acts.

III. What's In a Name? Definitions Range From Terrorist to Guerilla Fighter

As noted above, transnational terrorists have focused almost exclusively on attacks against civilians. However, coherent approaches to the problem of terrorist status is compounded because there is no cohesive definition of what constitutes a terrorist or a terrorist act.[76] Scholars and governments alike typically hold in common that transnational belligerent actors target civilians.[77] International consensus regarding the use of civilians as targets of terrorism is also well supported in studies and literature.

For example, the United States Department of Homeland Security's National Consortium for the Study of Terrorism and Responses to Terrorism (START) reported that in 2013 alone, there were a total of 9707 terrorist attacks resulting in more than 17,800 deaths and more than 32,500 injuries.[78] Furthermore there were an additional 2990 people kidnapped or taken hostage.[79] This data translates to approximately 808.91 attacks resulting in 1,490.2 deaths per month in ninety–three different countries worldwide in 2013.[80] Furthermore, according to the study, "more than half of all targets attacked in 2013 (52.1%) were classified as private citizens, property, or police."[81]

Likewise, the U.S. State Department noted that "[t]errorist violence in 2013 was fueled by sectarian motivations marking a worrisome trend, in particular in Syria, Lebanon, and Pakistan, where victims of violence were primarily among

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[76] *See generally* Johan D. van der Vyver, *Prosecuting Terrorism in International Tribunals*, 24 EMORY INT'L L. REV. 527 (2010).
[77] *Id.* at 529.
[78] U.S. Department of State (DoS) Bureau of Counterterrorism; National Consortium for the Study of Terrorism and Responses to Terrorism (START), *Country Reports on Terrorism 2013: Annex of Statistical Information*, 3 (Apr. 2014) , http://www.state.gov/documents/organization/225043.pdf [hereinafter START Report 2013]. The START is a cooperative effort between the University of Maryland and the DoS and their reports are required to be published annually online pursuant to 22 U.S.C. § 2656f of the Foreign Relations Act, Pub. L. 100-204, 101 Stat 1347 (1987) *as amended by* Pub. L. 108-487, 118 Stat. 3777, Jan. 7, 2011.
[79] *Id.* at 4.
[80] *Id.*
[81] *Id.* at 10.

the civilian populations."[82] Some countries, but not all, have either passed or proposed legislation making civilians central to definitions of terrorism.

A. National Definitions of Terrorism

Kenya proposed anti–terrorism legislation in 2003 proscribing "the use or threat of action where . . . [t]he action used or threatened . . . involves serious violence against a person . . . ."[83] This proposed legislation was in response to the 1998 U.S. Embassy bombing in Nairobi[84] and the Paradise Hotel in Mombasa in 2002.[85] It was not until approximately ten years later—after a tragic attack on Nairobi's Westgate Mall in 2013—that Kenya passed the Prevention of Terrorism Act. The Act criminalizes the "commission of a terrorist act" and defined a terrorist act as "an act or threat of action which involves the use of violence against a person . . . ."[86] However, Kenya's civilian–centered approach to the Prevention of Terrorism Act is not shared by other countries in the Middle East of Africa.

For example, Pakistan has an expansive criminal definition and approach to terrorism which incorporates both act and purpose. Pakistan's Anti–Terrorism Act, 1997 section 6, defines terrorism as an "action" the "use or threat [of which] is designed to coerce and intimidate or overawe the Government or the public" or a section or "sect" of the population which creates "a sense of fear or insecurity in society."[87] Most recently, Pakistan took a more aggressive stance on terrorism through the Protection of Pakistan Ordinance which criminalizes acts intended to wage war against Pakistan or threaten public security.[88] Such acts include, among

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[82] U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON TERRORISM 2013, at 6 (Apr. 2014), http://www.state.gov/documents/organization/225886.pdf.

[83] Charles Lenjo Mwazighe, *Legal Responses to Terrorism: Case Study the Republic of Kenya*, Masters Thesis Navy Postgraduate School, Dec. 2012, 58, http://www .dtic.mil/dtic/tr/fulltext/u2/a574555.pdf (citing *Kenya's Suppression of Terrorism Bill*, 2003, Clause 3). Mwazighe further reviewed several UN Resolutions published between 1997 and 2006 and noted "[n]one of these documents provides a clear definition of terrorism and no globally accepted standard meaning has coalesced." *Id.* at 59.

[84] James C. McKinley, Jr., *Two U.S. Embassies in East Africa Bombed,* N.Y. TIMES, Aug. 8, 1998, http://partners.nytimes.com/library/world/africa/080898africa-bombing.html.

[85] Dexter Filkins, *Terror in Africa: Attacks in Mombasa*, N.Y. TIMES, Nov. 30, 2002, http://www.nytimes.com/2002/11/30/world/terror-africa-attacks-mombasa-kenyans-hunting-clues-bombing-toll-rises-13.html.

[86] Prevention of Terrorism Act, 2012, Republic of Kenya, Oct. 12, 2012, Act No. 30 of 2012, http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No. 30 of 2012 &term=terrorism.

[87] Anti–Terrorism Act, 1997, Islamic Republic of Pakistan (پاکستان یـئجمہور یاسـلام), No. F. 9(39)/97-Legis, Aug. 20, 1997, sec. 6 at http://www.na.gov.pk/en/search_content.php, https://www.unodc.org/tldb/showDocument.do?documentUid=7781 &node=docs&cmd=add&country=PAK.

[88] Protection of Pakistan Ordinance No. IX of 2013, Islamic Republic of Pakistan, Oct. 31, 2013, sec 2(i)(1) Schedule of Offenses, http://www.na.gov.pk/uploads/documents/

others, "use of arson, fire-bombs, suicide bombs . . . or other materials capable of exploding or creating bombs employed to kill persons or destroy property."[89]

The Ordinance also allows for "preventive detention" for up to ninety days.[90] As noted above, Pakistani anti–terror laws are not squarely focused on attacks against civilians as the nexus crime. For example, their most recent anti-terror laws focus primarily on attacks on public officials, services, mass transit systems, oil or gas pipelines, and aircraft.[91] Thus, the law focuses in some respects on where civilians may be, but not on them as objects of attack, per se.

Egypt, no stranger to transnational belligerents, has been criticized for a disproportionate degree of criminal liability assigned solely to public officials as terrorist targets. For example, in 2009 the United Nations Special Rapporteur, in discussing criminalization of membership in terrorist organizations in Egypt, advised that future "definitions of terrorist crimes should be confined exclusively…to the use of deadly or serious violence against civilians."[92] The Special Rapporteur continued by noting specifically in the case of Egypt that their laws had arguably wide ranging goals, like criminalization of "any threat or intimidation" and preventing or impeding "public authorities in the performance of their work."[93] The Rapporteur also noted with interest Egypt's criminalization of terrorist "organizations,"[94] a trend which appears to be uniformly applied in other Egyptian criminal statutes.[95]

1383819468_951.pdf.

[89] *Id.* sec. 2(i)(1)(iv).

[90] *Id.* sec. 6, (amended by Ordinance I of 2014, Islamic Republic of Pakistan, Jan. 22, 2014), sec 6, Preventive Detention, at http://www.na.gov.pk/uploads/documents /1391322775_795.pdf.

[91] Protection of Pakistan Ordinance No. IX of 2013, *supra* note 88, sec. 2(i) *et seq*.

[92] Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism**,** *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism–Mission to Egypt* 18, U.N. Doc. A/HRC/13/37/Add.2 (Oct. 14, 2009), http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-37-Add2.pdf.

[93] *Id.* at 7. (Special Rapporteur Egypt).

[94] *Id.* at 8. (Special Rapporteur Egypt) (noting specifically that "[t]he Special Rapporteur during his meetings with Egyptian authorities strongly advised against any wording in the future anti–terrorism law that would define a terrorist organization on the basis of its aim to commit any act legally characterized as terrorist, rather than on the commission of specific acts").

[95] *See e.g.*, Stephen Kalin, *Egypt Plans Blanket Anti–terrorism Law against 'Disrupting Order'*, REUTERS (Nov. 26, 2014), http://www.reuters.com/article/2014/11/26/us-egypt-security-idUSKCN0JA1U520141126.

B. The Lack of International Consistency for Terrorism as Attacks against Civilians

As noted above, many nations affected by terrorism have vastly divergent definitions of terrorism and some do not make attacks against civilians central to their crimes. This is no different from an international legal perspective. For example, the Rome Statute of the International Criminal Court (ICC) seeks to place terrorism as a species of a larger "crime against humanity" rather than criminalize it outright.[96]

Article 7 of the Rome Statute allows for jurisdiction in cases where a group carries out a "widespread or systemic attack against any civilian population" done "pursuant to or in furtherance of State or organizational policy to commit such an attack" under the theory that it is a "crime against humanity."[97] The Rome Statute does include terms such as "murder, extermination, and enslavement . . ." but omits any permutation of terrorism altogether.[98]

The omission of "terrorism" as a separate enumerated offense under the Rome Statute was intentional based on a majority consensus during the conference.[99] The proposed language would have criminalized offenses involving firearms, weapons, or explosives "when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations . . . ."[100]

Notably, the United States opposed inclusion of terrorism as a separate offense. The United States offered that "while that crime had an international dimension, [it] was not itself a sufficient rationale for the crime of terrorism to be placed within the purview of the ICC."[101] The United States was not alone. The 1996 Report of the Preparatory Committee on the Establishment of the International Criminal Court explained,

> There was no general definition of the crime and elaborating such a definition would substantially delay the establishment of the Court: these crimes were often similar to common crimes

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[96] Rome Statute, *supra* note 41, at art. 7.
[97] *Id.*
[98] *Id.*
[99] Aviv Cohen, *Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism*, 20 MICH. ST. INT'L L. REV. 219, 223 (2012).
[100] *Id.* (citing U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15-July 17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, p. 21, U.N. Doc. A/CONF.183/2 (Apr. 14, 1998)). It is important to also note that the definition of "acts of terrorism" included "acts of violence against another State directed at persons." *Id.*
[101] CIARA DAMGAARD, INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES: SELECTED PERTINENT ISSUES 381 (Springer–Verlag Berlin Heidelberg 2008).

> under national law in contrast to the crimes listed in other subparagraphs of article 20; the inclusion of these crimes would impose a substantial burden on the Court and significantly increase its costs while detracting from the other core crimes; these crimes would be more effectively investigated and prosecuted by national authorities under existing international cooperation arrangements for reasons similar to those relating to drug trafficking; and the inclusion of the crimes could lessen the resolve of States to conduct national investigations and prosecutions and politicize the functions of the Court.[102]

Interestingly, the United States, along with nations like Canada, Denmark, Lichtenstein, and Oman, opposed including "terrorism" as a "crime against humanity" as well. The stated rationale for non–inclusion in the larger over–arching definition was because "agreement could not be reached on the definition of terrorism," and that terrorism had "never been categorized as a crime against humanity."[103]

The nations further opined that inclusion of terrorism in the ICC's "crimes against humanity" jurisdiction would risk politicizing the Court and that not all acts of terrorism rose to the level to be considered sufficiently serious to be prosecuted by the ICC.[104] The United States and others also reasoned that national tribunals were better suited to handle terrorism prosecutions than the ICC, and also stated the greater concern that the ICC Statute did not "distinguish between terrorism and the struggle of peoples under foreign or colonial domination for self–determination and independence."[105] However, many national courts have proven either ill–equipped or unable to handle terrorist prosecutions necessitating the creation of ad hoc tribunals.[106]

1. How ad hoc Tribunals Address Civilians as Terrorist Targets

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[102] *Id.* at 382 (citing *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, Supp. No. 22, U.N. Doc. A/51/22 (1996) Vol. I § 106).

[103] *Id.* at 384.

[104] *Id.*

[105] *Id.*

[106] INT'L CRIMINAL TRIBUNAL FOR RWANDA, COMPLEMENTARITY IN ACTION: LESSONS LEARNED FROM THE ICTR PROSECUTOR'S REFERRAL OF INTERNATIONAL CRIMINAL CASES TO NATIONAL JURISDICTIONS FOR TRIAL (2015), http://www.unictr.org/sites/unictr.org/files/legal-library/150210_complementarity_in_action.pdf. The Chief Prosecutor discusses how the ICTR referred eight cases to the Rwandan national court system for prosecution after significant international oversight lasting over a decade to ensure the court had capacity and was operating in compliance with international human rights law. *Id*.

Not unlike the ICC, other tribunal–based international tribunals have defined the term *crimes against humanity* in divergent terms with many not focusing on civilians as central to the definition. A notable exception was the International Military Tribunal (IMT) for the Far East. Termed the Tokyo IMT, Article 5(c) criminalized "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war . . . ."[107] The definitions contained in the Statute for the International Tribunal for Rwanda (ICTR),[108] Article 3, and the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia[109] (ICTY), Article 5, have nearly identical definitions of *crimes against humanity* with one important exception. The ICTR Statute provides that crimes such as "murder; extermination; enslavement . . ." are proscribed when committed as "part of a widespread or systemic attack against any civilian population."[110]

The ICTY Statute proscribes the same series of crimes "when committed in armed conflict, whether international or internal in character, and directed against any civilian population."[111] Article 2 of the Statute of the Special Court for Sierra Leone (SCSL) grants the power to prosecute an identical list of crimes as those above (murder, extermination, enslavement), when they are committed "as part of a widespread or systematic attack against any civilian population."[112] The common theme in all of the above–listed tribunal–based statutes is that they all criminalize acts directed against a civilian population.

Notably, only the 1994 ICTR Statute and the 2002 SCSL address the issue of terrorism. Article 4 of the ICTR Statute lists as separate offenses "[v]iolations of Article 3 common to the Geneva Conventions and Additional Protocol II" and includes crimes such as "[t]aking hostages; [a]cts of terrorism; [and] [o]utrages on personal dignity, in particular humiliating and degrading treatment, rape,

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[107] General Headquarters Supreme Commander for the Allied Powers, General Order No. 1 Charter of the International Military Tribunal for the Far East (19 Jan. 1946), http://lib.law.virginia.edu/imtfe/content/page-1-1590.

[108] Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994), http://www.unictr.org/sites/unictr.org/files/legal-library/941108_res955_en.pdf [hereinafter ICTR Statute].

[109] Statute of the International Criminal Tribunal for the Former Yugoslavia. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N.Doc. S/RES/808 (1993); further amended in U.N. Security Council Resolutions 1166 (13 May 1998), 1329 (30 Nov 2000), 1411 (17 May 2002), 1431 (14 Aug. 2002), 1481 (19 May 2003), 1597 (20 Apr. 2005), 1660 (28 Feb. 2006), 1837 (29 Sep. 2008), 1877 (7 July 2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [hereinafter ICTY Statute].

[110] ICTR Statute, *supra* note 108, art. 3.

[111] ICTY Statute, *supra* note 109, art. 5.

[112] Statute of the Special Court for Sierra Leone (UN Sec/Res 1315 (2000) Aug. 14, 2000, Art. 2, http://www.rscsl.org/Documents/scsl-statute.pdf. The Special Court Statute was entered into force on Jan. 16, 2002 and the Special Court was formed by virtue of a Special Court Agreement between the United Nations and the Government of Sierra Leone on the same date, [hereinafter SCSL Statute]. *Id.*

enforced prostitution and any form of indecent assault."[113] Article 3 of the SCSL Statute includes ostensibly identical language.[114] However, neither statute defines the term *acts of terrorism*.

Nonetheless, Article 4 of the SCSL Statute does grant prosecutorial jurisdiction over other "serious violations of international humanitarian law" and criminalizes "[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities."[115] Again, though terrorism is not specifically defined, the SCSL criminalizes acts directed at civilians in three separate ways. Thus, the SCSL is the closest that a tribunal has come to criminalizing terrorism per se. It is troubling to note that ad hoc tribunals which seek to prosecute terrorists, transnational or otherwise, have failed to address the issue.

An example of such a definitional application in practice is the Special Tribunal for Lebanon (STL).[116] The tribunal was formed as the result of a failed agreement between the United Nations and Lebanon as a means of addressing the terrorist attack against Lebanese Prime Minister Rafik Hariri that took place in Beirut on February 15, 2005.[117] The bomb which claimed Prime Minister Hariri's life also killed his twenty–two person security detail and injured over two hundred other civilians.[118]

Though several attempts were made, no final agreement on a foundational document could be reached.[119] Consequently, the United Nations Security Council, pursuant to its Chapter VII authority, and at the request of the Lebanese government, passed Resolution 1757 forming the tribunal.[120] The STL was authorized only to prosecute those responsible for the attack by interpreting the Criminal Code of Lebanon rather than forming a separate criminal statute.[121]

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[113] ICTR Statute, *supra* note 108, art. 4.
[114] SCSL Statute, *supra* note 112, art. 3.
[115] *Id.* at art. 4.
[116] *See e.g.*, Ben Saul, *Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon invents an International Crime of Transnational Terrorism* 24 LIEDEN J. OF INT'L L.677 (2011); *see also* Kai Ambos, 24 LIEDEN J. OF INT'L L. 655 (2011).
[117] *See* RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 651 (Ben Saul ed., Edward Elgar Publishing Ltd. United Kingdom 2014).
[118] *Id.*
[119] *Id.*
[120] United Nations Security Council Resolution 1757, U.N. Doc. S/REC/1757 (2007), http://www.stl-tsl.org/en/documents/un-documents/un-security-councilresolutions/security-council-resolution-1757 [hereinafter UNSCR 1757].
[121] D. A. Bellemare, *Bringing Terrorists Before International Justice: A View From the Front Lines*, 23 CRIM. L.F. 425, 429 (2012), http://link.springer.com/article/10.1007%2Fs10609-012-9181-5. These are notes for an Address by the Former Chief Prosecutor to the Special Tribunal for Lebanon from 2009-2012. *Id.*

Consequently, there was no United Nations statutory definition of what constituted terrorism.[122] It was not until 2011 that the Appeals Chamber of the STL issued an interlocutory appeal addressing the issue of a definition of terrorism at all.[123] The Appeals Chamber saw the task of defining terrorism under international law as outside of their mandate.[124] Rather they drafted a definition under Article 314 of the Lebanese Criminal Code which was to be interpreted in "consonance with international law." The Chamber defined terrorist acts under the following elements:

> a. the volitional commission of an act;
> b. through means that are liable to create a public danger, and;
> c. the intent of the perpetrator to cause a state of terror.[125]

The Chamber avoided state practice as establishing custom where it stated "the fact that all States of the world punish murder through their legislation does not entail that murder has become an international crime."[126] Thus, "[t]o turn into an international crime, a domestic offense needs to be regarded by the world community as an attack on universal values (such as peace or human rights)," rather than simply criminalized in their statutes.[127]

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[122] UNSCR 1757, *supra* note 120, art. 2(a). The UN stated the tribunal had authorization under "[t]he provisions of the Lebanese Criminal Code relati[ng] to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crime and offenses . . . ." *Id.*

[123] Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I/AC/R176-*bis* (Feb. 16, 2011), http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/appeals-chamber/f0936 [herinafter Interlocutory Decision].

[124] *Id.* at para. 123. The Chamber stated, "As we have previously noted, the text of Article 2 of the Tribunal's Statute makes clear that Lebanese law, not customary international law, should be applied to the substantive crimes to be prosecuted by the Tribunal." *Id.*

[125] *Id.* at para. 147. Murder was addressed Pursuant to Article 547 of the Lebanese Criminal Code. *Id.* at para. 150.

[126] *Id.* at para. 91.

[127] *Id.* The chamber based their rationale on the famous Italian legal scholar Dionisio Anzilotti who wrote:

> [T]he fact that all States of the world punish murder through their legislation does not entail that murder has become an international crime . . . . To turn into an international crime, a domestic offense needs to be regarded by the world community as an attack on universal values (such as peace or human rights), rather than simply criminalized in their statutes.

Id. (quoting D. ANZILOTTI, I CORSO DI DRITTO INTERNAZIONALE 100) (4th ed. CEDAM 1955).

Consequently, the Chamber used the definition from the Lebanese Criminal Code, which provided "[t]errorist acts are all acts intended to cause a state of terror and committed by means liable to create a public danger such as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents. [128] Thus, the Lebanese Tribunal did not address per se international terrorism and those crimes which would otherwise fall under the jurisdiction of other tribunals constituted under the United Nations "*stricto senso*."[129] Consequently, all nations bear the responsibility to prosecute violators of this category of laws, which may be fairly categorized as crimes against humanity, genocide and war crimes.[130] However, as demonstrated by ad hoc tribunals, the over–arching concept of proscribing the systemic act of targeting or attacking civilians by any organized belligerent organization has been met by considerable challenges despite having a strong basis in international law.

2. Prohibitions against Attacking Civilians and the Additional Protocols

As noted above, the most current embodiments of prohibitions against civilians being attacked are Articles 51(2) of AP I[131] and 13(2) of AP II[132] from 1977. Both Protocols contain mirror language which read "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[133] This appears to address the issue head–on.

However, given the time they were drafted and the reasons for them, the above prohibitions are couched in terms of *military operations* and contemplated neither transnational belligerency nor terrorism.[134] The issue then turns to

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[128] Lebanese Criminal Code, art. 314.

[129] Heather Noël Doherty, *Tipping the Scale: Is the Special Tribunal for Lebanon International Enough to Override State Official Immunity?* 43 CASE W. RES J. INT'L L.J. 831, 834 (2014). S*tricto senso* is the legal doctrine that some are considered "enemies of all mankind." *Id.*

[130] *Id.* at 834-35.

[131] AP I, *supra* note 71, at art. 51(2).

[132] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non–International Armed Conflicts art. 13(2), June 10, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

[133] AP I, *supra* note 71, at art. 51(2); AP II, *supra* note 71, at art. 13(2).

[134] *Id.* at art. 13(1). "The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances . . . ." *Id. See also* AP I, *supra* note 71, at art. 51(1).

> The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to

whether terrorism or transnational belligerency may ever be considered *military operations*. In *Prosecutor v. Galić*, the ICTY sought to clarify this issue.[135]

In *Galić*, the ICTY Appeals Chamber stated, in relation to the military seizure of Sarajevo, that "a breach of the prohibition of terror against the civilian population gave rise to individual criminal responsibility pursuant to customary law . . . ."[136] The Appeals Chamber was clearly dealing with a *military operation*. Stanislav Galić was, at the time of the seizure of Sarajevo, a Major General in command of the Sarajevo Romanija Corps and reported directly to the Chief of Staff of the Army of the Serbian Republic.[137]

Galić was indicted on multiple counts for "inflicting terror upon the civilian population" through a shelling and shiping campaign directed at the inhabitants of Sarajevo but not for terrorism as its own enumerated crime.[138] The AP I and AP II prohibitions appear clearly linked to military operations directed toward civilians, operations which in practical effect terrorize civilians, rather than per se terrorist acts directed towards civilians. Both AP I and AP II fall short of proscribing terrorist tactics against civilians. The language from both GC IV and AP II clearly illustrates this point.

For example, Article 33 of GC IV reads in relevant part that "[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited."[139] However, similar to *Galić* above, the protections outlined in Article 33 explicitly apply to civilians who "find themselves" in the "hands of" an adversary in an IAC.[140] Hence the protections are very clear but, as noted above, do not apply to NIACs.

Article 4 of AP II does apply in a NIAC to people who "do not take direct part or who have ceased to take direct part in hostilities" as being protected from "violence . . . in particular murder [and] acts of terrorism."[141] Thus, clearly, the focus of these two laws is to prevent a controlling party from terrorizing civilians

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> other applicable rules of international law, shall be observed in all circumstances.

Id.

135 Appeals Chamber, International Criminal Tribunal for Former Yugoslavia, decision of Nov. 30, 2006, IT-98-29-A, at para. 4, http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf.

136 *Id.* at para. 86.

137 *Id.* at para. 2.

138 *Id.* at para 3. It is important to note that the Appeals Chamber considered both provisions of the Additional Protocols customary international law in order to apply them as criminal provisions under their jurisdiction. *Id.* at para. 81 *et seq*.

139 GC IV, *supra* note 45, art. 33.

140 GC IV, *supra* note 45, art. 4.

141 AP II, *supra* note 71, arts. 4(1), (4)(4)(a), (d).

who may fall under their control.[142] However, as noted above, definitions fall short in the transnational belligerency context in that AP II and CA 3 were designed to address cases of internal rebellion by guerillas, not by transnational terrorist organizations such as ISIS.

This is not surprising considering the origins of the term guerilla.[143] Leo Tolstoy, in describing the how the Spanish forces fought against Napoleon wrote,

> One of the most obvious and advantageous departures from the so–called laws of war is the action of scattered groups against men pressed together in a mass. Such action always occurs in wars that take on a national character. In such actions, instead of two crowds opposing each other, the men disperse, attack singly, run away when attacked by stronger forces, but again attack when opportunity offers. This was done by the guerrillas in Spain, by the mountain tribes in the Caucasus, and by the Russians in 1812. People have called this kind of war "guerrilla warfare" . . . .[144]

Hence the term itself arose out of partisan necessity to fight against occupying forces. This was clear from the AP II Commentary which noted that the Protocol was "the result of a compromise between humanitarian requirements and those of State security, the negotiators also considered it necessary to include a clause safeguarding the inviolability of the national sovereignty of states."[145] Indeed, this impetus was clear when the commentators wrote that "[s]ince the Second World War the type of weapons developed and the widespread use of guerilla warfare as a method of combat have resulted in growing numbers of victims amongst the civilian population" especially in "internal armed conflicts, which are becoming increasingly common."[146]

It is clear to see that the protection of civilians was central to the analysis in 1977 when the Additional Protocols were drafted. The term guerilla, however, addresses belligerency within a very specific factual scenario and does not adequately capture transnational belligerents. Consequently, this incongruence has resulted in states creating additional categories which seek to sufficiently address the reality of transnational belligerents.

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142 AP I, *supra* note 71, at art. 51(2); AP II, *supra* note 71, at art. 13(2).
143 Literally translated from Spanish as "little war."
144 LEO TOLSTOY, 4 THE COMPLETE WORKS OF COUNT TOLSTOY 173 (Leo Weiner trans., J. M. Dent & Co. 1904).
145 AP COMMENTARIES, *supra* note 50, at 1344.
146 *Id.* at 1444.

C. Unlawful Combatants and Belligerents: Similar, But Not Identical

Professor Solis, retired United States Marine Corps Judge Advocate and Adjunct Professor of Law at Georgetown and George Washington Universities, captured this idea best when he commented that "unlawful combatant" is "a *de facto* individual status . . . [which] [j]ust as guerillas and militias are a subset of 'combatant,' unlawful combatants are a subset of 'civilian.'"[147] The term arose out of the Global War on Terror and has created considerable controversy as to whether the United States' use of the classification unlawful combatant or unprivileged belligerent creates a third class of combatant recognized under the law.[148]

1. Unlawful Combatant and Unprivileged Belligerent

The United States's use of the term "unlawful combatant" finds its origins in the *Ex parte Quirin* case. The United Sates Supreme Court reasoned,

> [B]y 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 by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[149]

The Court's distinction at this point in the law's development is important for two reasons. First, it imposed the additional criteria or liability that an unlawful combatant is potentially subject to trial by military tribunal. Second, the Court clearly indicated that through their actions, a combatant may ostensibly waive their legal protections through their actions.

In 2004 the Court relied on this separate classification of combatants in *Hamdi v. Rumsfeld* to conclude that removing the combatant from hostilities was permissive and, further, that the detainee may be subject to military tribunal when he falls into the unlawful combatant category.[150] The *Hamdi* Court relied heavily

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[147] GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 207-208 (Cambridge 2010).

[148] *See, e.g.*, John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict*, 40 ISRAEL L. REV. 396, 402 (2007).

[149] Ex parte Quirin, 317 U.S. 1, 31 (1942).

[150] Hamdi v. Rumsfeld, 542 U.S. 507, 518 *et seq.* (2004). The court reasoned that detention was "neither revenge, nor punishment, but solely protective custody, the only purpose of

upon his participation as a Taliban fighter against the Northern Alliance to conclude that his participation in hostilities separated him from being a civilian or otherwise lawful combatant and relegated Hamdi's status to that of an "enemy combatant."[151]

The United States presently defines unlawful combatant using the alternative definition of unprivileged belligerent. The Department of Defense (DoD) currently defines an unprivileged belligerent as "[a]n individual who is not entitled to the distinct privileges of combatant status (e.g. combatant immunity), but who by engaging in hostilities has incurred the corresponding liability of combatant status." [152] The DoD proffers two examples of unprivileged belligerency. The first example are those "[i]ndividuals who have forfeited the protections of civilian status by joining or substantially supporting an enemy non–state armed group in the conduct of hostilities."[153] The second example are those "[c]ombatants who have forfeited the privileges of combatant status by engaging in spying, sabotage, or other similar acts behind enemy lines."[154] Most notably, the DoD underscores the entire definition by stating that the "term 'unlawful enemy combatant' used in other DoD regulations is synonymous with the term 'unprivileged belligerent' contained in this directive."[155]

In 2009, the United States re–codified the term unprivileged enemy belligerent as "an individual (other than privileged belligerent) who (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al–Qaeda at the time of the alleged offense

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which is to prevent the prisoners of war from further participation in combat." *Id.* It is important to note the *Hamdi* Court's reasoning cited *Ex parte Milligan* as authority. In *Milligan*, the Court found that he was not entitled to prisoner of war status, consequently making him subject to trial by military tribunal, specifically because he had not fought and was arrested in his home in Indiana. *Id.* at 521-22 (citing Ex parte Milligan, 71 U.S. 2 (1866)).

[151] *Id.* at 522 n.1. The Court wrote, "[T]he basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield; that is, that he was an enemy combatant.". *Id.*

[152] U.S. DEP'T OF DEF., DIR. 2310.01E, DOD DETAINEE PROGRAM 14, (Aug 19, 2014), http://www.dtic.mil/whs/directives/corres/pdf/231001e.pdf [hereinafter DoD D2310.01E].

[153] *Id.*

[154] *Id.*

[155] *Id.* Consistent with the status of U.S. law at the time, the 2006 version of the same regulation defined "unlawful enemy combatant" as "persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the law and customs of war during and armed conflict." U.S. DEP'T OF DEF., DIR. 2310.01E, DEPARTMENT OF DEFENSE DETAINEE PROGRAM 9 (5 Sep 2006), encl.2, para.E2.1.1.2, http://www.defense.gov/pubs/pdfs/Detainee_Prgm_Dir_2310_9-5-06.pdf.

under this Chapter."[156] The United States defines the term "hostility" as "any conflict subject to the laws of war."[157]

In comparison, Israel, shortly after the September 11, 2001 terrorist attacks, promulgated a law "intended to regulate incarceration of unlawful combatants not entitled to prisoner-of-war status, in a manner conforming with the obligations of the State of Israel" under "international humanitarian law."[158] The Israelis define an unlawful combatant as,

> [a] person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in Article 4 of the Third Geneva Convention of 12th August 1949 with respect to prisoners–of–war and granting prisoner–of–war status in international humanitarian law, do not apply to him.[159]

However, these terms fall short of adequately describing what a combatant, or belligerent, truly is. For example, Judge Wilkinson in *Al–Marri v. Pucciarelli* proposed a definition of enemy combatant describing an enemy as a member of an organization or nation against whom Congress declared war or authorized armed force.[160]

Combatant is defined as a person who knowingly plans or engaged in conduct harming persons or property for the purposes of furthering the military objectives of his government or organization.[161] Here again, these definitions interpret statutory language rather than address the overarching concepts of transnational belligerency or belligerents. However, belligerency in application is precisely what the United States Supreme Court faced in the mid–nineteenth century.

2. Belligerents

After the American Civil War, the Supreme Court was presented with the issue of determining whether the Union was *at war* with the Confederacy or not. The Court in the *Prize* Cases stated,

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[156] Military Commissions Act of 2006, Pub L. No. 109-366, 120 Stat. 2600 (2006), *codified at* 10 U.S.C. §§ 948a *et seq*. as amended by Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190.
[157] *Id.*
[158] Incarceration of Unlawful Combatants Law 5762-2002, para. 1, https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/7A09C457F76A452BC12575C30049A7BD.
[159] *Id.* at para. 2.
[160] Al–Marri v. Pucciarelli, 534 F.3d 230, 323 (4th Cir. 2008) (Wilkinson, J., concurring in part and dissenting in part).
[161] *Id*. at 323-24.

> A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the person[s] who originate [it] and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign the world acknowledges them as belligerents, and the contest a war.[162]

Consequently, the Court made a determination that the war with the South was not an insurrection, but rather a belligerency under international law based on the degree of violence faced by the United States.[163] The South as a whole, including civilians, was considered a public enemy, [164] and was subject to measures like suspension of habeas corpus upon capture for public security concerns.[165] The term belligerency went into disuse until the end of WWII.

The subject of belligerency was a topic of significant import during the negotiations of the 1949 Geneva Conventions.[166] However, as noted above, the conditions of the belligerency were nevertheless couched in terms of an internal armed conflict. Thus, the mere recognition of an opposing belligerent party would transform the conflict from a belligerency into a full blown international armed conflict. For example, Lauterpacht's comments on the subject described the procedures for belligerency recognition as follows:

> [F]irst, there must exist within the State and armed conflict of a general (as distinguished from a purely local) character; secondly, the insurgents must occupy and administer a substantial portion of national territory; thirdly, they must conduct the hostilities in accordance with the rules of war and

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[162] ELLERY C. STOWELL & HENRY F. MUNRO, 2 INTERNATIONAL CASES: ARBITRATIONS AND INCIDENTS ILLUSTRATIVE OF INTERNATIONAL LAW AS PRACTICED BY INDEPENDENT STATES 261 (The Riverside Press Cambridge 1916) [hereinafter WAR AND NEUTRALITY], (citing the Prize Cases, 67 U.S. (2 Black) 635, 666-67 (1862)).

[163] *Prize Cases*, at 670. The Supreme Court stated that "Whether the president . . . in suppressing an insurrection, has met with such armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to them the character of belligerence is a question to be decided by him . . . ." *Id.*

[164] *See, e.g.*, Ford v. Surget, 97 U.S. (7 Otto) 594, 610 (1878). The Court stated that "powers are entitled to remain indifferent spectators of the contest, and to allow impartially to both belligerents the free exercise of those rights which war gives to public enemies against each other . . . ." *Id.* (citing Twiss, Law of Nations (2d ed.) sec. 239. (Sir Travis Twiss D.C.L)).

[165] Presidential Proclamation of September 24, 1862, 13 Stat. 730.

[166] HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 176 (Cambridge Univ. Press 1947).

> through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside states to define their attitude by means of recognition of belligerency.[167]

Thus, States at the time were concerned that international recognition would ostensibly delegitimize their governments and affect their ability to stop insurrections. There was also concern that international "support for the cause of the insurgents" would have a negative impact on the State government.[168] Most importantly, States did not want the insurgency to be given the import of international law. For example, in situations where a third country might send in their forces to support an insurrection, the conflict would necessarily become an international armed conflict. Such a situation would result in a conflict between the rules of both NIAC and IAC being in place simultaneously.[169] Such a situation is present today in debates over the status of individuals: the law of both NIAC and IAC apply, especially in context of categories like unprivileged belligerents. Thus, adoption of an entirely new transnational belligerent category would more adequately capture the challenges of modern combat.

The term unprivileged belligerent currently being used by the DoD illustrates this point.[170] The term itself is often attributed to Richard Baxter where he defined unprivileged belligerents as

> [a] category of persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949 . . . .[171]

The term belligerent, especially in context of entities like ISIS, seems more in line with classical conceptions of belligerency and its recognition. For example, this was a subject of considerable debate at the turn of the 20th Century where, as one author noted, "In modern times the question has arisen whether recognition of a condition midway between belligerency and mere unauthorized and lawless violence might not be given with advantage."[172] The author used

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[167] *Id.*

[168] *Id.* at 254.

[169] *See generally* George H. Aldrich, *The Law of War on Land*, 94 AM. J. INT'L L. 42 (2000).

[170] DoDD 2310.01E, *supra* note 152, at 14.

[171] R.R. Baxter, *So-called "Unprivileged Belligerency": Spies, Guerrillas, and Sabateurs* 28 B.Y.I.L. 323, 328 (1951). Baxter argued that civilians who participated in belligerency placed them on par with spies making them, through their conduct, no longer protected or "privileged" under the law. *Id.*

[172] THOMAS J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 331 (7th ed. MacMillan 1928).

stateless ships that did not hoist "the black flag" as examples of entities which could not be "looked on as regular belligerents, because belligerency and territory [were] inseparably connected."[173] Thus, territorial control, as demonstrated by ISIS, would technically be in line with classical concepts of belligerency.

In fact, the term transnational belligerency as a descriptive term of art is likewise consistent with its Roman origins. For example, the term belligerent derives from the Latin idiom *bellum gerere*, which literally means to "wage war."[174] It was a phrase famously used by Julius Caesar in his commentaries on the Roman wars with Gaul.[175] As previously discussed, it was not until the mid–nineteenth century that the term belligerent achieved a territorial nexus in international law.

For example, as one prominent American legal scholar, Major General Henry W. Halleck, observed in 1861,

> It has already been stated that a war, duly commenced and ratified, is not confined to the Governments or authorities of the belligerent State, but that it makes all the subjects of the one State the legal enemies of each and every subject of the other. This hostile character results from political ties, and not from personal feelings or personal antipathies; their *status* is that of legal hostility, and not of personal enmity.[176]

Halleck comments on the right of a belligerent state to kill an enemy in war by stating that it is "applicable only to such public enemies as make forcible resistance, this right necessarily ceases [as] soon as the enemy lays down his arms and surrenders his person or asks for quarter."[177] This statement is no doubt a precursor to what would later become known as *direct participation of hostilities* discussed below.

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[173] *Id.* at 332.

[174] A LIVY READER: SELECTIONS FROM AB URBE CONDITA 47 (Mary Jaeger ed., Bolchazy-Carducci 2011).

[175] *See* JULIUS CAESAR, CAESAR DE BELLO GALLICO 173 (J. M. Merryweather & C. C. Tancock eds., Longmans, Green & Co. 1897).

[176] HENRY W. HALLECK, 2 RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 1 (3d ed. Kegan Paul, Trench, Trübner, & Co. 1893). Halleck continues by arguing that, "The law of nature gives to a belligerent nation the right to use such force as may be necessary, in order to obtain the object for which the war was undertaken . . ." but that States "have no right to take the lives of non–combatants, or of such public enemies as they can subdue by other means . . . ." *Id.* at 2.

[177] *Id.* at 19.

The significant import of cessation of hostilities upon surrender was also underscored by Halleck when he stated that "Qui merci prie, merci doit avoir"[178] was an old maxim. After such surrender the opposing belligerent had no power over his life, unless new rights are given by some new attempt at resistance.[179] As noted above, the law at the time was fixated on the belligerency of groups of people facing occupiers and those rights afforded to them by nations engaging in war.

However, the law has not yet contemplated what takes place when it is the insurgency or belligerency itself that is transnational, especially when the target is not a state, but rather, its people. Recognition by one state of a belligerent organization quickly becomes irrelevant because there is not just one state that is affected by the belligerency. Rather, as in the case with transnational belligerents like ISIS, every state is affected because all civilians are potentially objects of attack.

3. Lawful Combatants, Civilians and Those who Target Them

International law does not affirmatively define civilian.[180] The draft of the 1977 Additional Protocol II (AP II) to the Geneva Conventions sought to define civilian as "any person who is not a member of armed forces . . . ."[181] A subsequent draft read "a civilian is anyone who is not a member of the armed forces or [a member] of an organized armed group."[182] Neither definition was included in the final version, leaving the term undefined, which resulted in a default negative definition.[183]

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[178] The original text read: "Qui merci prie, merci doit avoir; dites–leur qu'ils ouvrent leur ville et nous laissent entrer dedans: nous les assurons de nous et des nôtres." J. A. BUCHON, 2 COLLECTION DES CHRONIQUES NATIONALES FRANÇAISES 195 (Paris 1824). In 1545, Jean Foissart attributed this quote to the Earl of Derby who made the guarantee to the inhabitants of the captured town of Bergerac, France at the Battle of Auberoche during the Hundred Years War. *Id*.

[179] HALLECK, *supra* note 176, at 19.

[180] For example, the Hague Regulation proscribe "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended," but provides no definition of civilians. Convention IV Respecting the Law and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land; The Hague, art. 25, Oct. 18, 1907 [hereinafter 1907 Hague Regulations].

[181] THE LAW OF NON–INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA CONVENTIONS 449-70 (Howard S. Levie ed., Martinus Nijhoff Publishers 1987) (quoting Draft Additional Protocol II Submitted by the ICRC to the Diplomatic Conference Leading to the Adoption of the Protocols, art. 25, sec. 706).

[182] *Id.*

[183] *Id*.

The approach of defining civilians in the negative is no–doubt tied to Jean Pictet, who famously stated,

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no* intermediate status; nobody in enemy hands can be outside of the law.[184]

Supporters of the exclusive two–category approach contend that the narrowly–tailored lawful combatant definitions found in GC III taken together with the relatively broad (negative) classifications of civilians or protected persons under GC IV ensure that no one is left without a classification.[185] Thus, a civilian is "any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3), and (6) of the Third Convention and in Article 43 of this protocol."[186] However, at the time the conventions were written, organizations like ISIS did not exist and the nature of warfare has changed despite subsequent attempts to define civilians.[187]

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[184] COMMENTARY IV: INTERNATIONAL COMMITTEE OF THE RED CROSS COMMENTARY, FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (Jean S. Pictet ed. 1958) [hereinafter COMMENTARY IV].

[185] *See generally* Shlomy Zachary, Additional Article*: Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?*, 38 ISR. L. REV. 378 (2005). *See also* Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 TEX. INT'L L.J. 1 (2007).

[186] AP I, *supra* note 71, at art. 50. GC III Article 4 defines lawful combatants as:

> (A) (1) members of the armed forces of a Party to the conflict including militias, (2) resistance movements operating in or outside of their own territory so long as they are commanded by a person responsible for their subordinates, have a fixed distinctive sign recognizable at a distance, carry arms openly, and conduct operations in accordance with the laws and customs of war, (3) members of regular armed forces professing allegiance to a government, and (6) inhabitants of a non-occupied territory who take up arms in resistance of invasion.

GC III, *supra* note 45. Additional Protocol I art. 43 reads in relevant part that an armed force of a party to a conflict "consists of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates" even where that Party does not recommend the government of the armed force. *Id.* at art. 43.

[187] For example, International Committee of the Red Cross's (ICRC's) 1971 submission to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts states,

On its face, this logic seems very persuasive especially in the context of captured persons. However, as was the case with the Hague Regulations, nations understand that the nature of combat changes. For example, Fyodor Fyodorovich Martens, the Russian delegate to the Hague Peace Conference of 1899, wrote the Preamble from the Hague Convention which reads,

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.[188]

Termed the Martens Clause, the language was introduced as a compromise between the more powerful super delegates and smaller nations over whether the *francs–tireurs*[189] should be treated like spies and subject to execution upon capture because they did not wear uniforms.[190] The less powerful countries maintained that the *francs–tireurs* were lawful combatants repelling an occupying force.[191] Notably, the Martens Clause is absent from the 1949 Geneva Conventions, though a modified form does appear again in AP I.[192]

> Among those in favor of a definition, there is only a small number who supported a positive definition of the civilian population considered as an entity . . . [for fear that it] created the grave danger that categories not mentioned are considered—*a contrario*—as being licit personal objectives.

ICRC SUBMISSION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS III: PROTECTION OF THE CIVILIAN POPULATION AGAINST DANGERS OF HOSTILITIES 17-19, Geneva May 21–Jun. 12, 1971. The proposed definition was "[c]ivilians are those persons who do not form part of the armed forces, nor of organizations attached to them or who do not directly participate in military operations (or: in operations of a military character)." *Id.* at 26.

[188] Convention (II), with respect to the Laws and Customs of War on Land and Its Annex (Hague II) July 29, 1899, 32 Stat. 1803, 1 Bevans 247.

[189] Literally "free shooters," they were non–standard specialized irregular expert riflemen employed by the French during the Franco–Prussian War and did not wear uniforms during combat. PASCAL MELKA, VICTOR HUGO: UN COMBAT POUR LES OPPRIMÉS: ÉTUDE DE SON ÉVOLUTION POLITIQUE, 405-06 (La Compagnie Littéraire 2008).

[190] *See* J. M. SPAIGHT, WAR RIGHTS ON LAND 41-51 (MacMillan & Co. 1911); *see generally* V. V. Pustogarov, *The Martens Clause in International Law*, 1 J. HIST. INT'L L. 125 (1999).

[191] *Id.*

[192] That version reads in relevant part,

The Martens Clause sought to provide protections to otherwise undefined classes of combatants and to encourage parties to act like lawful combatants by distinguishing themselves from the civilian population. Consequently, the 1874 Project of an International Declaration Concerning the Laws and Customs of War, Article 9 stated that "[t]he laws, rights and duties of war apply not only to armies, but also militia and volunteer corps" only where they fulfilled four criteria:

> 1. That they be commanded by a person responsible for his subordinates;
> 2. That they have a fixed distinctive emblem recognized at a distance;
> 3. That they carry arms openly; and
> 4. That they conduct their operations in accordance with the laws and customs of war.[193]

The Declaration specifically noted that "in countries where militia constitute the army, or form part of it, they are included under the denomination 'army.'"[194] Consequently, the 1907 Hague Regulation pays considerable attention to those persons engaged in a *levée en masse*.[195] The law was put in place to protect those

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> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

AP I, *supra* note 71, at art. 1.2.

[193] Project of an International Declaration Concerning the Laws and Customs of War art. 12, Aug. 27, 1874, 4 Martens Nouveau Recueil (ser. 2) 219, http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=125329. The original draft was sent from the Russian government to fifteen delegates meeting in Brussels on July 27, 1874 who sought to make the first international agreement concerning the laws and customs of war. *Id.* It was never entered into force. *Id.*

[194] *Id. See also* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 283 (Dinah Shelton ed., 1st ed. 2013) (citing Hague II, *supra* note 188). Notably, the same famous four–part test was included in the Hague Conventions of 1899 (Hague II), the 1907 revisions to the same, and also in GC I through GC III. *Id.*

[195] It is important to note that the term *levée en masse* finds its origins in the French Revolution and was used to describe what was ostensibly forced conscription into the French National Army whose forces were assembled to repel invaders from Austria, Prussia, Spain, Britain, Belgium, Piedmont and the Netherlands. *See* GUNTHER E. ROTHENBERG, THE ART OF WARFARE IN THE AGE OF NAPOLEON 95-110 (1980). One of the first examples of a *levée en masse* was declared by the French National Convention on Aug. 23, 1793 where they stated that, "From this moment until that in which the enemy shall have been driven from the soil of the Republic, all Frenchmen are in permanent

"inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops."[196] However, the 1907 Hague Regulation also made the very important caveat that the rules only apply to those forces that have not had time to organize "in accordance with Article 1 . . . ."[197] This is why forces are allowed belligerent status under the circumstances in which "they carry arms openly and if they respect the laws and customs of war."[198] Distinctive emblems, under those limited circumstances, were not required.

However, distinctive emblems were a subject of considerable emphasis even for militia. As a notable scholar of the time, Thomas Hollande, wrote in 1908, "The object of requirement No. 2 [fixed distinctive emblem] is to draw a distinct line between combatants and peaceful inhabitants, by insisting that the former shall wear something in the nature of a uniform" which was not easily taken off.[199] In fact, Holland emphasized that "[t]his [uniform] requirement . . . was not insisted on during the war with South Africa."[200]

Thus, there were very limited circumstances where lawful combatants could waive their status, or non–combatants could alternatively claim prisoner of war

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requisition for the service of the armies." David A. Bell, *When the Levee Breaks: Dissenting from the Draft,* 170 WORLD AFF. 59-64 (2008).

196 1907 Hague Regulations, *supra* note 180, at Annex I, Sec. I, Chap. I, Art. 2.

197 *Id.*

198 *Id.* The 1949 Geneva Conventions use a variation which states:

> Inhabitants of a non–occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

GC I, at art 13(6); GC II, at art. 13(6); GC III, art. 4(6), *supra* note 45. This variation was to denote their status upon capture only.

> The drafters of the 1949 Convention considered, from the outset, that the Convention should specify the categories of protected persons and not merely refer to the Hague Regulations. Article 4 is in a sense the key to the Convention, since it defines the people entitled to be treated as prisoners of war.

COMMENTARY III, *supra* note 47, at 49.

199 THOMAS ERSKINE HOLLAND, K.C., THE LAWS OF WAR ON LAND: WRITTEN AND UNWRITTEN 20 (Oxford Clarendon Press 1908).

200 *Id.* Holland is no doubt referring to the Boer War of 1899 (technically the Second Boer War), where there was considerable debate over the absence of the use of uniforms by the Boer Commandos against the British regular forces, and the subsequent treatment of the commandos. *See* FRANSJOHAN PRETORIUS, LIFE ON COMMANDO DURING THE ANGLO–BOER WAR 1899-1902, 74-75 (Human & Rousseaus 1999).

protections under the law.[201] There was also no legal mechanism which recognized *how* civilians waive their status because the law contemplated combat between regular forces, militia, and civilians, only. It was not until the post–Vietnam era that guerilla fighters were added to the international lexicon in AP I and AP II. Consequently, the development of a means of civilians waiving their status by participating in hostilities is a comparatively new concept.

4. Direct Participation in Hostilities and Waiver of Civilian Status

The proposition that combatants and civilians can waive their status by engaging in unprivileged belligerency is very logical. Nonetheless, the concept of waiver is relatively new and does not fully capture the complexities of transnational belligerents. For example, AP I, in the context of post–Vietnam guerilla warfare, states that civilians may be objects of attack "for such time as they take direct part in hostilities."[202] This test was useful at the time, but does not address belligerents who continuously plan further attacks against civilians.[203]

Common Article 3 of the 1949 Geneva Conventions—arguably the origin of the concept—proscribes attack or inhumane treatment of "Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness [or] wounds . . . ."[204]

The ICRC's Direct Participation in Hostilities (DPH) guidance bases the critical determination not upon a "person's status, function or affiliation, but [rather upon] his or her engagement in specific hostile acts."[205] The DPH calculus is made "regardless of whether the individual is a civilian or a member of the armed forces."[206] The ICRC's view is that "any extension of the concept of direct participation in hostilities beyond specific acts would blur the distinction in IHL between temporary, *activity–based loss of protection* (due to direct participation

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[201] *Id.* Holland did make an important exception for spies, who by virtue of not wearing uniforms, could not "claim to be treated as prisoners of war." *Id.* at 41-46.

[202] AP I, *supra* note 71, at art 51(3).

[203] *See generally* S. Bosc, *The International Humanitarian Law Notion of Direct Participation in Hostilities—A Review of the ICRC Interpretive Guide and Subsequent Debate*, 17 AFR. JOURNALS ONLINE 999 (2014), http://www.ajol.info/index.php/pelj/article/view/107846.

[204] GC I–IV, *supra* note 45, at art. 3.

[205] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 44 INT'L COMM. OF THE RED CROSS 44 (2009), https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf.

[206] *Id.*

in hostilities), and *continuous, status, or function–based loss of protection* (due to combatant status or continuous combat function)."[207]

Thus, the DPH guidance remains focused on engagement, using language such as: for "such time" as persons are engaged in hostilities. This application creates significant problems in the context of transnational belligerents.[208] For example, as the Israeli Supreme Court observed, "The First Protocol presents a time requirement . . . [where a] civilian . . . loses the protection from attack 'for such time' as he is taking part in those hostilities. If 'such time' has passed—the protection granted to the civilian returns."[209] The Court continued stating that a civilian,

> who has joined a terrorist organization which has become his "home", and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack "for such time" as he is committing the chain of acts.[210]

The Israeli Supreme Court concluded, "Indeed regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility."[211] The Israeli Supreme Court has correctly identified the issue with the guidance, especially in light of current circumstances. The DPH "for such time" test is still locked in outmoded conceptions of occupation forces and classical ideas of surrender, rather than truly addressing the status of transnational belligerents and their actions.

For example, in the mid–eighteenth century, Emerich De Vattel said that in "just war," States have "a right to employ all means which are necessary for its attainment."[212] Vattel stated,

> On an enemy's submitting and laying down his arms, we cannot with justice take away his life. Thus, in a battle, quarter is to be given to those who lay down their arms; and, in a siege, a

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[207] *Id.* at 44-45 (emphasis in original). It is important to note "[d]irect participation means acts of war which by their nature or purpose are likely to cause actual harm" to the enemy. *See also* AP COMMENTARIES, *supra* note 50, at 618.

[208] AP I, *supra* note 71, at art. 51(3).

[209] The Public Committee against Torture in Israel et al. v. The Government of Israel et al., Case No. HCJ 769/02, Judgment 38 (Dec. 11, 2005), http://www.haguejustice portal.net/Docs/NLP/Israel/Targetted_Killings_Supreme_Court_13-12-2006.pdf.

[210] *Id.* at 39.

[211] *Id.*

[212] MONSIEUR DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 346 (Translated by Joseph Chitty, Esq., 1859) (1758) (Book III, Chap. VIII).

> garrison offering to capitulate are never to be refused their lives.[213]

Arguably, the "for such time" construct found in DPH is only a reapplication of those concepts for persons surrendering to occupation forces, rather than any substantive rights waiver. This explains why civilians are able to regain their protected status. In other words, under DPH, a civilian is ostensibly surrendering by mere cessation of belligerency which is why they are able to regain their protected status. Such a waiver, and reacquisition of protected status, in the context of ISIS and similar transnational belligerents, simply makes no sense. ISIS seeks to attack civilians—the exact same class of persons in which the law currently places ISIS. This is why a new separate transnational belligerent category is so critical to the development of the law in relation to emerging organizations like ISIS, and why previous attempts to create a separate category have been historically unsuccessful.

IV. Analysis and Proposal

Scholars and experts have attempted to create a separate category, in order to remedy the current shifting status definition issues, without success. These attempts have largely been unsuccessful because they have simply renamed terrorists and attempted to equate their status evenly between the NIAC and IAC categories. For example, in a recent article Professor Corn underscored this trend by defining belligerent as "a member of an armed group who performs the type of function historically performed by lawful combatants who are members of the regular armed forces of a State."[214] Similar logic was used by the drafters of the 2006 Sanremo Manual on Non–International Armed Conflict. The 2006 Sanremo Manual defines fighters as "members of armed forces and dissident armed forces

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[213] *Id.* at 347-48. Vattel makes a critical distinction between besieged enemies who have laid down their arms and those who are "Women, children, feeble old men, and sick persons." *Id.* at 351.

[214] Geoffrey Corn & Chris Jenks, *Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts*, 313 n.1 U. PA. J. INT'L L 313 (2011). Professor Corn states that terms like "unlawful combatant, unprivileged belligerent, fighter, non–state actor, and non–state opponent" have been offered to explain the law, but that since the term combatant only applies in an IAC:

> All of these terms reflect a common underlying meaning: designation of an individual who, as the result of his relationship with enemy belligerent leadership and function as an enemy belligerent operative, should be treated for purposes of attack authority no differently than a combatant within the meaning of Protocol I.

Id.

or other organized armed groups, or [those] taking active (direct) part in hostilities." [215]

What these trends in terminology demonstrate is the attempt by scholars to apply status–based IAC law onto a NIAC scenario. However, the equivocation between IAC and NIAC law is not what the original drafters of the Geneva Conventions envisioned. For example, CA 3 was a hard–fought compromise, but only because the parties to the conventions were addressing an entirely different threat than the one we presently face from ISIS. More importantly, previous attempts to rename transnational terrorists as non–state actors or otherwise, does not escape the legal reality that irrespective of what name you call them, they are still civilians in a NIAC.[216] As noted above, transnational belligerents like ISIS should not legally belong to the same class of persons that they systemically target and attack.[217]

Consequently, the status of the law has forced a lineage of descriptive terminology, such as fighter, armed opponent, non–state actor, etc., to attempt to place transnational belligerents into a legal construct that has been stagnant since 1977.[218] Even if one considers the 1998 Rome Statue as an update to the law, the term terrorist was still intentionally left out, mainly because terrorists operated in a different manner at that time.[219] This legal disjuncture is clearly demonstrated through complementarity's very existence, a system which seeks to graft the laws from one system upon the laws of war in a CA 3 NIAC.[220]

The DoD definition of unprivileged belligerent also demonstrates that creating new law is necessary. The DoD definition recognizes a way in which civilian status may be waived, but does not adequately answer how such determinations are made, or to which new legal status category the belligerent now belongs.[221] More importantly, the very concept of status waiver places the unprivileged belligerent into a civilian sub–category, which is arguably why previous attempts to create a status using this logic have failed in the past.

The several alternatives in terminology are simply variations of what are all ultimately civilians, because the present law offers no other class in a NIAC.[222] The law needs to be brought up–to–date. However, such an update must answer how to determine what a transnational belligerent is. Transnational belligerents

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[215] MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON–INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 4 para.1.1.2 (Int'l Inst. of Humanitarian Law 2006).
[216] *See* Hamdan, *supra* note 55.
[217] *See* discussion, *supra* note 40.
[218] *See, e.g.*, AP II, *supra* note 71.
[219] Rome Statute, *supra* note 41. *See also* discussion *supra* note 102.
[220] *See* GC II.B.2, *infra.*
[221] *See* DoDD 2310.01E, *supra* note 152.
[222] COMMENTARY IV, *supra* note 184.

better match classical conceptions of belligerents rather than the post–WW II era Geneva traditions. In fact, the term belligerent in classical approaches accurately captures the nature of transnational belligerents like ISIS. Thus, it is critical to not only to create a new status, but to also define how to identify who belongs in that new status. The Hague approach to determining belligerency would best apply to the challenges we face from ISIS.

A. Proposing a Test for Transnational Belligerents

The Hague tradition is a logical starting point in formulating a new test, because this is where belligerency was initially defined. Hague II had a list of qualifications for belligerent status in the context of a conflict between nations.[223] However, every conflict we have faced in the last several decades has not been a conflict between nations, it has been transnational. More importantly, it is organizations like ISIS who have pushed current conflicts across international borders.[224] In the case of ISIS, the conduct of operations across existing national borders occurs by design.[225] Moreover, the nature of transnational belligerent operations—targeting civilians—makes them a true global public enemy and an international concern in the extreme.[226]

This article proposes the following modified Hague test to determine transnational belligerent status. Parties are transnational belligerents if they:

a) Are directed by a person or groups of persons;
b) Adhere to a cognizable ideology which espouses targeting civilians as central;
c) Engage in continuous operations intended to cause death or bodily harm; and
d) Conduct operations in violation of the laws of war.

Though descriptive, the test resembles that logic found in the Hague tradition and is likewise consistent with more recent developments in international law.[227] The test excludes what has been termed "lone wolf" terrorism because that form

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[223] *See* Hague II, *supra* note 188, at art. 1; *see also* Project of an International Declaration Concerning the Laws and Customs of War, *infra* Appendix A.
[224] *See generally* Jabareen, *supra* note 3.
[225] *See* Wood, *supra* note 6.
[226] *See* discussion, *supra* sec. II(A)(2).
[227] For example, the Commentary to AP I states that "[i]t should not be forgotten that under the terms of Article 85 (Repression of breaches of this Protocol), paragraph 3(a), the willful attack on a civilian population or individual civilians is included among the grave breaches." AP COMMENTARY, *supra* note 50, at 517.

of conduct would be more appropriately handled in a law enforcement context.[228] The test also recognizes that transnational belligerents do little to follow the law of war and avoid any attempt to gain protected combatant status.[229]

The empirical data clearly supports the above conclusion. For example, ISIS, credited with 813 total terrorist incidents, only attacked seventy–five military targets.[230] The remaining categories—NGOs, utilities, police, government, etc.—are attacks against the civilian population. In the case of ISIS, civilian attacks comprise over 92% of their operations.

Of the terrorist groups, Al Shabaab has committed the most incidents against military objectives, at 318, but civilian objectives nevertheless still comprised over 64% of their operations.[231] Boko Haram's attacks against military targets comprised less than 10% of their entire operations, leaving 723 out of 808 total terrorist incidents against civilian objectives.[232] The data clearly shows that transnational belligerents like ISIS seek civilians as their primary objective, and do not follow the law of war. Put another way, if ISIS attacked only military objectives, then one could conclude that they are, in fact, seeking combatant status, but the data yields the opposite conclusion.[233] Nonetheless, the

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[228] *See, e.g.*, GEORGE MICHAEL, LONE WOLF TERROR AND THE RISE OF LEADERLESS RESISTANCE 32-35 (2012).

[229] It is important to make the distinction between lawful combatants (IAC) and transnational belligerents. In the IAC context, the requirement for a commander is for the purpose of enforcing the law. In the NIAC transnational belligerent context, the purpose of a "commander" is for precisely the opposite purpose. For example, the AP I Commentators underscore that under Article 43 (Armed forces) the following preconditions "should all be met to participate in hostilities":

> a) subordination to a 'Party to the conflict' which represents a collective entity which is, at least in part, a subject of international law;
> b) an organization of a military character;
> c) a responsible command exercis[ing] effective control over the members of the organization;
> d) respect for the rules of internal law applicable to armed conflict.
> These four conditions should be fulfilled effectively and in combination in the field.

AP COMMENTARY, *supra* note 50, at 517.

[230] *See* Table B–1 *infra* Appendix B.

[231] *See* Table B–3 *infra* Appendix B.

[232] *See* Table B–4 *infra* Appendix B.

[233] Notably, Article 44 of AP I states that combatants, to distinguish themselves from civilians, when unable to properly distinguish themselves (i.e. distinctive insignia), will not be considered perfidious when they carry their arms openly, during each military engagement, and visibly to the enemy while he is engaged. The position of this paper is: that does not lower the normal four–part privileged combatant test. The clause merely states what will *not* be considered perfidious under certain limited circumstances. *See* AP I, *supra* note 71, at art. 44(3).

transnational belligerent class must first be identified and their characteristics known. The above test is a proposed means to identify this new category. Once the class has been identified, the question becomes what legal procedure should be used to prosecute their actions?

B. Ad Hoc Tribunals and the Allure of Universal Jurisdiction

As outlined above, ad hoc tribunals have sought to address the issue of terrorism with inconsistent results. Although the approaches have differed, one constant remains: ad hoc prosecution is lengthy. For example, the ICTY prosecuted 111 total cases between 1996 and 2015.[234] In contrast, the STL has indicted only five people since 2007 and is now prosecuting them in absentia.[235] The ICC also has had challenges, convicting only two people in twelve years.[236]

Irrespective of the outcome, prosecution of transnational belligerents using a universal jurisdictional model is critical to successfully combating this new threat. Thus, any new status–based prosecutorial model must allow for sufficient regional flexibility to allow states the ability to quickly respond to transnational belligerents. The most successful way to prosecute under the circumstances would be an off–the–shelf international tribunal model that could be implemented at any level.[237]

C. Proposing an Approach to Decentralized Prosecution of Transnational Belligerents

An off–the–shelf model via a multinational tribunal treaty could meet all of these concerns in the short term. Such a treaty would allow for the required flexibility and speed to prosecute transnational belligerents. A tribunal treaty would also allow for nations facing transnational belligerents to have the tools to

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[234] S*ee generally* UN ICTY Judgement List, http://www.icty.org/sections/TheCases/JudgementList.

[235] *See* Decision Relating to the Prosecution Requests of 8 November 2012 and 6 February 2013 for the Filing of an Amended Indictment, STL-11-01, Apr. 24, 2013, at http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/pre-trial-judge/f0848; *and* Decision to Hold Trial In Absentia, STL-13-04, Dec. 20, 2013, http://www.stl-tsl.org/en/the-cases/prosecutor-v-merhi-stl-13-04/filings/ordersand decisions/trial-chamber/f0037.

[236] David Davenport, *International Criminal Court: 12 Years, $1 Billion, 2 Convictions*, FORBES (Mar. 12, 2014), http://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/.

[237] Off–the–shelf would mean that there is an international agreement which would have a complete tribunal model, including court procedures, rules, statutes, and laws which could be implemented in any scenario, allowing for a standardized tribunal approach to prosecution outside of permanent courts like the ICC.

face the enemy now. More importantly, such a treaty would serve to memorialize transnational belligerent as a new status under the law and provide a comprehensive baseline for a subsequent Additional Protocol or a new Geneva Convention.

Since transnational belligerents operate on a decentralized attack model, the law must match this threat in a way that increases rather than limits jurisdiction.[238] Such an approach has been considered in the past. For example, as one group of authors observed it in the context of the STL in 2008,

> Moreover, as the short period of time needed for the negotiations indicates, the international criminal tribunals of the recent past now provide so much institutional experience that one can almost speak of the possibility of courts "off the shelf." . . . [T]he Tribunal highlights that even after the coming into force of the Rome Statute, a need for new international tribunals may arise, especially in cases where the ICC has no jurisdiction.[239]

Thus, as terrorism prosecution has developed, there have been several tribunal–based models that have emerged which would yield vast institutional experience. Such experience would serve to create the most successful prosecutorial approach. Furthermore, an off–the–shelf model would allow for prosecutions in a state, regional, multinational, or coalition context through a standardized set of laws. Signatories could agree in advance on what rights should be offered in a treaty–based instrument. Such a treaty would prevent the superimposition of IHRL (i.e., complementarity) on CA 3 conflicts while also providing much–needed updates to LOAC. Most importantly, a new international tribunal treaty would allow the entire model to be legally permissible in a NIAC.

V. Conclusion

Transnational belligerents like ISIS have changed the nature of warfare forever. Consequently, it is they who have created a new status under the law. The law simply has not changed to match the reality that ISIS has placed upon us. Current rules for a NIAC must be updated, because ISIS attacks civilians, and the law still places them in the same civilian category as the people they attack.

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[238] *See generally* Joel Brinkley, *Islamic Terror: Decentralized, Franchised, Global*, 176 WORLD AFF. 43-55 (2013), http://www.worldaffairsjournal.org/article/islamic-terror-decentralized-franchised-global.

[239] Jan Erik Wetzel & Yvonne Mitri, *The Special Tribunal for Lebanon: A Court "Off the Shelf" for a Divided Country*, 7 THE L. & PRAC. OF INT'L COURTS & TRIBUNALS 113 (2008).

Complementarity has attempted to place new law in the NIAC context, but this is not ideal because IHRL seeks different objectives than CA 3 and NIAC law. Ad hoc tribunals have sought to prosecute terrorists but with inconsistent outcomes. The ICC has also attempted the same, but terrorism was intentionally left out of the statute. Moreover, there is no international consensus as to what terrorism means. What everyone can agree on is that intentionally attacking civilians is wrong. Moreover, there needs to be laws in place which allows nations to memorialize transnational belligerents and combat them in the near term. Thus, a new treaty–based off–the–shelf approach to prosecuting this new category of belligerent is a strong means of satisfying that need in a flexible and expeditious way.

Much like Hersch Lauterpacht and Fyodor Martens observed during their time: the law must change. We have faced transnational belligerents for nearly two decades, thousands have died, and we still have no new law. A treaty is a sensible near–term answer. When it comes to updating international humanitarian law, now is our time.

Appendix A

1874 International Declaration

Project of an International Declaration concerning The Laws and Customs of War

27 August 1874

On military authority over hostile territory

Article 1. Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

Art. 2. The authority of the legitimate Power being suspended and having in fact passed into the hands of the occupants, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety.

Art. 3. With this object he shall maintain the laws which were in force in the country in time of peace, and shall not modify, suspend or replace them unless necessary.

Art. 4. The functionaries and employees of every class who consent, on his invitation, to continue their functions, shall enjoy his protection. They shall not be dismissed or subjected to disciplinary punishment unless they fall in fulfilling the obligations undertaken by them, and they shall not be prosecuted unless they betray their trust.

Art. 5. The army of occupation shall only collect the taxes, dues, duties, and tolls imposed for the benefit of the State, or their equivalent, if it is impossible to collect them, and, as far as is possible, in accordance with the existing forms and practice. It shall devote them to defraying the expenses of the administration of the country to the same extent as the legitimate Government was so obligated.

Art. 6. An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and generally, all movable property belonging to the State which may be used for the operations of the war.

Railway plant, land telegraphs, steamers and other ships, apart from cases governed by maritime law, as well as depots of arms and, generally, all kinds of war material, even if belonging to companies or to private persons, are likewise material which may serve for military operations and which cannot be left by the

army of occupation at the disposal of the enemy. Railway plant, land telegraphs, as well as steamers and other ships above mentioned shall be restored and compensation fixed when peace is made.

Art. 7. The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Art. 8. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences even when State property, shall be treated as private property.

All seizure or destruction of, or willful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities.

Who should be recognized as belligerents combatants and non-combatants

Art. 9. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognizable at a distance;
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.

In countries where militia constitute the army, or form part of it, they are included under the denomination ' army '.

Art. 10. The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 9, shall be regarded as belligerents if they respect the laws and customs of war.

Art 11. The armed forces of the belligerent parties may consist of combatants and non combatants. In case of capture by the enemy, both shall enjoy the rights of prisoners of war.

Means of injuring the enemy

Art. 12. The laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy.

Art. 13. According to this principle are especially ' forbidden ':

(a) Employment of poison or poisoned weapons;
(b) Murder by treachery of individuals belonging to the hostile nation or army;
(c) Murder of an enemy who, having laid down his arms or having no longer means of defense, has surrendered at discretion;
(d) The declaration that no quarter will be given;
(e) The employment of arms, projectiles or material calculated to cause unnecessary suffering, as well as the use of projectiles prohibited by the Declaration of St. Petersburg of 1868;
(f) Making improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
(g) Any destruction or seizure of the enemy's property that is not imperatively demanded by the necessity of war.

Art. 14. Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country (excepting the provisions of Article 36) are considered permissible.

Sieges and bombardments

Art. 15. Fortified places are alone liable to be besieged. Open towns, agglomerations of dwellings, or villages which are not defended can neither be attacked nor bombarded.

Art. 16. But if a town or fortress, agglomeration of dwellings, or village, is defended, the officer in command of an attacking force must, before commencing a bombardment, except in assault, do all in his power to warn the authorities.

Art. 17. In such cases all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, hospitals, and places where the sick and wounded are collected provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy beforehand

Art. 18. A town taken by assault ought not to be given over to pillage by the victorious troops.

Spies

Art. 19. A person can only be considered a spy when acting clandestinely or on false pretenses he obtains or endeavours to obtain information in the districts occupied by the enemy, with the intention of communicating it to the hostile party.

Art. 20. A spy taken in the act shall be tried and treated according to the laws in force in the army which captures him.

Art. 21. A spy who rejoins the army to which he belongs and who is subsequently captured by the enemy is treated as a prisoner of war and incurs no responsibility for his previous acts.

Art. 22. Soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following should not be considered spies, if they are captured by the enemy: soldiers (and also civilians, carrying out their mission openly) entrusted with the delivery of dispatches intended either for their own army or for the enemy's army. To this class belong likewise, if they are captured, persons sent in balloons for the purpose of carrying dispatches and, generally, of maintaining communications between the different parts of an army or a territory.

Prisoners of war

Art. 23. Prisoners of war are lawful and disarmed enemies.

They are in the power of the hostile Government, but not in that of the individuals or corps who captured them.
They must be humanely treated.
Any act of insubordination justifies the adoption of such measures of severity as may be necessary. All their personal belongings except arms shall remain their property.

Art. 24. Prisoners of war may be interned in a town, fortress, camp, or other place, under obligation not to go beyond certain fixed limits; but they can only be placed in confinement as an indispensable measure of safety.

Art. 25. Prisoners of war may be employed on certain public works which have no direct connection with the operations in the theatre of war and which are not excessive or humiliating to their military rank, if they belong to the army, or to their official or social position, if they do not belong to it.

They may also, subject to such regulations as may be drawn up by the military authorities, undertake private work.

Their wages shall go towards improving their position or shall be paid to them on their release. In this case the cost of maintenance may be deducted from said wages.

Art. 26. Prisoners of war cannot be compelled in any way to take any part whatever in carrying on the operations of the war.

Art. 27. The Government into whose hands prisoners of war have fallen charges itself with their maintenance.
The conditions of such maintenance may be settled by a reciprocal agreement between the belligerent parties.

In the absence of this agreement, and as a general principle, prisoners of war shall be treated as regards food and clothing, on the same footing as the troops of the Government which captured them.

Art. 28. Prisoners of war are subject to the laws and regulations in force in the army in whose power they are.

Arms may be used, after summoning, against a prisoner of war attempting to escape. If recaptured he is liable to disciplinary punishment or subject to a stricter surveillance.

If, after succeeding in escaping, he is again taken prisoner, he is not liable to punishment for his previous acts.

Art. 29. Every prisoner of war is bound to give, if questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to a curtailment of the advantages accorded to the prisoners of war of his class.

Art. 30. The exchange of prisoners of war is regulated by a mutual understanding between the belligerent parties.

Art. 31. Prisoners of war may be set at liberty on parole if the laws of their country allow it, and, in such cases, they are bound, on their personal honour, scrupulously to fulfill, both towards their own Government and the Government by which they were made prisoners, the engagements they have contracted.

In such cases their own Government ought neither to require of nor accept from them any service incompatible with the parole given.

Art. 32. A prisoner of war cannot be compelled to accept his liberty on parole; similarly the hostile Government is not obliged to accede to the request of the prisoner to be set at liberty on parole.

Art. 33. Any prisoner of war liberated on parole and recaptured bearing arms against the Government to which he had pledged his honour may be deprived of the rights accorded to prisoners of war and brought before the courts.

Art. 34. Individuals in the vicinity of armies but not directly forming part of them, such as correspondents, newspaper reporters, sutlers, contractors, etc., can also be made prisoners. These prisoners should however be in possession of a permit issued by the competent authority and of a certificate of identity.

The sick and wounded

Art. 35. The obligations of belligerents with respect to the service of the sick and wounded are governed by the Geneva Convention of 22 August 1864, save such modifications as the latter may undergo.

On the military power with respect to private persons

Art. 36. The population of occupied territory cannot be forced to take part in military operations against its own country.

Art. 37. The population of occupied territory cannot be compelled to swear allegiance to the hostile Power.

Art. 38. Family honour and rights, and the lives and property of persons, as well as their religious convictions and their practice, must be respected.

Private property cannot be confiscated.

Art. 39. Pillage is formally forbidden.

On taxes and requisitions

Art. 40. As private property should be respected, the enemy will demand from communes or inhabitants only such payments and services as are connected with the generally recognized necessities of war, in proportion to the resources of the country, and not implying, with regard to the inhabitants, the obligation of taking part in operations of war against their country.

Art. 41. The enemy in levying contributions, whether as an equivalent for taxes (see Article 5) or for payments that should be made in kind, or as fines, shall proceed, so far as possible, only in accordance with the rules for incidence and assessment in force in the territory occupied.
The civil authorities of the legitimate Government shall lend it their assistance if they have remained at their posts.

Contributions shall be imposed only on the order and on the responsibility of the commander in chief or the superior civil authority established by the enemy in the occupied territory.

For every contribution, a receipt shall be given to the person furnishing it.

Art. 42. Requisitions shall be made only with the authorization of the commander in the territory occupied.
For every requisition indemnity shall be granted or a receipt delivered.

On parlementaires

Art. 43. A person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag, accompanied by a trumpeter (bugler or drummer) or also by a flag-bearer. He shall have a right to inviolability as well as the trumpeter (bugler or drummer) and the flag-bearer who accompany him.

Art. 44. The commander to whom a parlementaire is sent is not in all cases and under all conditions obliged to receive him.

It is lawful for him to take all the necessary steps to prevent the parlementaire taking advantage of his stay within the radius of the enemy's position to the prejudice of the latter, and if the parlementaire has rendered himself guilty of such an abuse of confidence, he has the right to detain him temporarily.

He may likewise declare beforehand that he will not receive parlementaires during a certain period. Parlementaires presenting themselves after such a notification, from the side to which it has been given, forfeit the right of inviolability.

Art. 45. The parlementaire loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason.

Capitulations

Art. 46. The conditions of capitulations are discussed between the Contracting Parties. They must not be contrary to military honour. Once settled by a convention, they must be scrupulously observed by both parties.

Armistices

Art. 47. An armistice suspends military operations by mutual agreement, between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

Art. 48. The armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius.

Art. 49. An armistice must be officially and without delay notified to the competent authorities and to the troops. Hostilities are suspended immediately after the notification.

Art. 50. It rests with the Contracting Parties to settle, in the terms of the armistice, what communications may be held between the populations.

Art. 51. The violation of the armistice by one of the parties gives the other party the right of denouncing it.

Art. 52. A violation of the terms of the armistice by individuals acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary, compensation for the losses sustained.

Interned belligerents and wounded cared for by neutrals

Art. 53. A neutral State which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.
It may keep them in camps and even confine them in fortresses or in places set apart for this purpose.
It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission.

Art. 54. In the absence of a special convention, the neutral State shall supply the interned with the food, clothing and relief required by humanity.
At the conclusion of peace the expenses caused by the internment shall be made good.

Art. 55. A neutral State may authorize the passage through its territory of the wounded or sick belonging to the belligerent armies, on condition that the trains bringing them shall carry neither personnel nor material of war.
In such a case, the neutral State is bound to take whatever measures of safety and control are necessary for the purpose.

Art. 56. The Geneva Convention applies to sick and wounded interned in neutral territory.

*****http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=1253.

Appendix B

Target Charts for Organizations Seeking to establish Caliphates

Table B–1 Islamic State Activities Pie Chart:

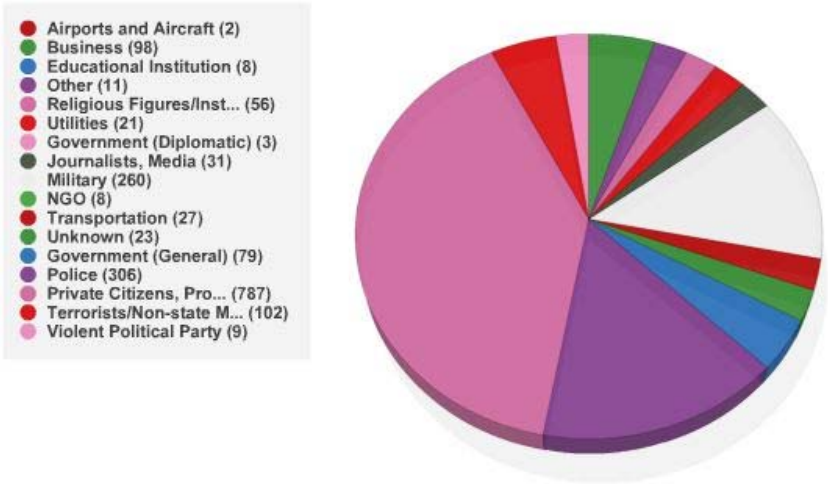


Table B–2 Al Qa'ida Activities Pie Chart:

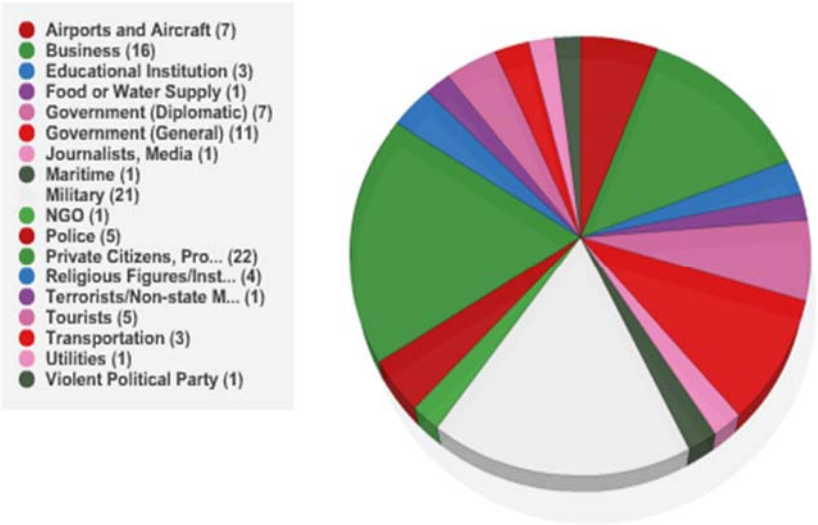
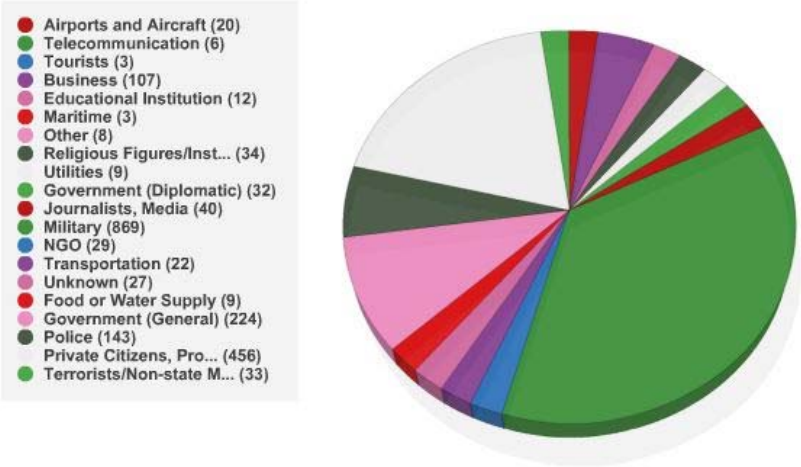
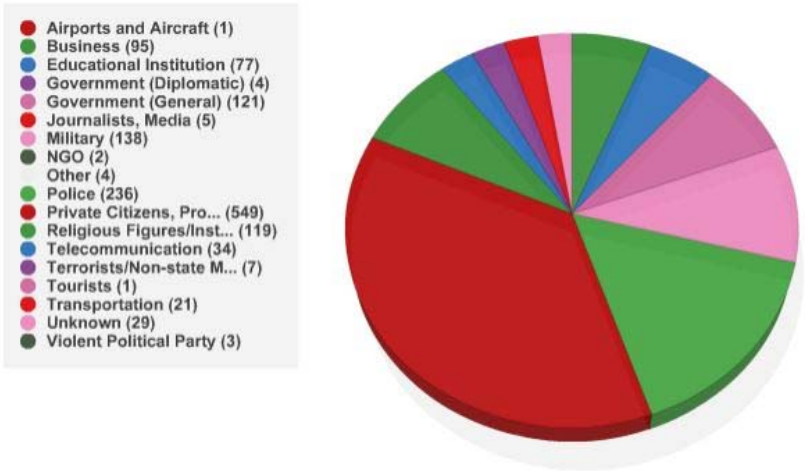


Table B–3 Al Shabaab Activities Pie Chart:Table



B–4 Boko Haram Activities Pie Chart:



HUMANITARIAN INTERVENTION IN SYRIA: IS CRISIS RESPONSE AND LIMITED CONTINGENCY OPERATIONS THE SOLUTION?

MAJOR WILLIAM D. HOOD*

> *[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?*[1]

I. Introduction

On August 21, 2013, Syrian military forces loyal to President Bashar Assad allegedly launched a poisonous "gas attack" on thousands of civilians outside Damascus.[2] In the days that followed, the United Nations Security Council (UNSC) debated potential responses, including use of force measures to prevent further blatant violations of international law. Meanwhile, the British government announced on August 29, 2013, that Syria's use of chemical weapons was a "serious crime of international concern," declaring it "a breach of customary

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[1] Kofi A. Annan, U. N. Sec'y–Gen, *We the Peoples, The Role of the United Nations in the 21st Century*, 48, U.N. Sales No. E.00.I.16 (2000), http://www.unmillenniumproject.org/documents/wethepeople.pdf.

[2] Abdulrahaman al–Masri & Louise Osborne, *Syria Opposition Claims Hundreds Dead in "Gas" Attack*, USA TODAY (Aug. 21, 2013, 6:07 PM), http://www.usatoday.com/story/news/world/2013/08/21/syria-poisonous-gas-attack/2680089.

international law" that amounted to "a war crime" against humanity.[3] The British Prime Minister outlined his legal position justifying the use of military force, arguing that "the aim is to relieve humanitarian suffering by deterring or disrupting the further use of chemical weapons."[4] Britain also announced that if the UNSC failed to approve the use of force pursuant to Chapter VII of the Charter of the United Nations (UN Charter), "the [United Kingdom] would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria . . . under the doctrine of humanitarian intervention."[5] The United States advanced a similar argument without specifically identifying humanitarian intervention as a legal basis for the use of force. President Barack Obama, noting the need to protect innocent civilians, declared in an address to the American public that it was "in the national security interest of the United States to respond to the Assad regime's use of chemical weapons through a targeted military strike."[6]

Ultimately, the UNSC stalemated on the issue of the use of force,[7] Parliament voted against it,[8] and a diplomatic settlement was reached,[9] ending the controversy before Congress considered the President's strike proposal.[10] But what if the diplomatic resolution had failed, and the Syrian government again resorted to employing chemical weapons against its own citizens? What if the international community then failed to agree on an appropriate response and did not act collectively in order to prevent further atrocities? The doctrine of humanitarian intervention represents a possible exception to the prohibition on the use of force found in Chapter 2(4) of the UN Charter, but current United States military doctrine is inadequate in the event of such a mission. Nevertheless, judge advocates should extract relevant elements from existing crisis response and limited contingency operations doctrine in order to craft a responsive legal

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[3] PRIME MINISTER'S OFFICE, *Chemical Weapon Use by Syrian Regime: UK Government Legal Position* (Aug. 29, 2013), https://www.gov.uk/government/publications/chemical-weapon-use-by-syrian-regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version.

[4] *Id.*

[5] *Id.*

[6] *Id*.

[7] *Syria Resolution Authorizing Military Force Fails in U.N. Security Council*, CBS NEWS (Aug. 28, 2013, 4:48 PM), http://www.cbsnews.com/news/syria-resolution-authorizing-military-force-fails-in-un-security-council.

[8] *Syria Crisis: Cameron Loses Commons on Vote on Syria*, BBC (Aug. 30, 2013, 6:13 PM), http://www.bbc.co.uk/news/uk-politics-23892783.

[9] Laura Smith–Spark & Tom Cohen, *U.S., Russia Agree to Framework on Syria Chemical Weapons*, CNN (Sep. 15, 2013, 10:25 AM), http://www.cnn.com/2013/09/14/politics/us-syria.

[10] *Obama Asks Congress to Delay Vote on Use of Force in Syria*, ALJAZEERA AMERICA (Sep. 10, 2013, 6:58 PM), http://america.aljazeera.com/articles/2013/9/10/president-obama-sayssomethingaboutsyria.html.

framework that addresses the legal issues arising in humanitarian intervention missions.

Humanitarian intervention is not a new concept. Hugo Grotius wrote in *De Jure Belli est Pacis*, "If a tyrant . . . practices atrocities towards his subjects, which no just man can approve, the right of human social connexion [sic] is not cut off in such a case . . . . It would not follow that others may not take up arms for them."[11] However, the role of humanitarian intervention in modern international relations is far from settled. Part I of this article examines what humanitarian intervention is, what triggers it, and its legal application in U.S. crisis response and limited contingency operations. Part II introduces key elements of the doctrine of humanitarian intervention, including the responsibility to protect doctrine and its application in international law. Part III analyzes the current U.S. doctrine of crisis response and limited contingency operations, identifies the challenges humanitarian intervention presents to that doctrine, and recommends a possible solution that addresses these challenges.

II. Humanitarian Intervention Within the United Nations Framework

A. The Charter of the United Nations

It is important to first understand several key provisions of the UN Charter and how they relate to the legal doctrine of humanitarian intervention before examining the doctrine itself. The first of these key provisions, Article 2(1), recognizes the right of state sovereignty. It states, "The organization is based on the principle of sovereign equality of all its Members."[12] Article 2(7) reinforces the principle of sovereignty, noting that "[n]othing contained in the present Charter shall authorize the United Nations (UN) to intervene in matters which are essentially within the domestic jurisdiction of any state . . . ."[13] Thus, sovereignty is recognized as the bedrock principle governing the international relations of states. Further, "the modern international system is founded on the principle that sovereign states have a right to non–intervention; to be free from unwanted external involvement in their affairs." [14] The doctrine of humanitarian intervention challenges this traditional view by elevating human rights violations above the state's claim to sovereignty.

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[11] NICHOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY 45 (2000); *and* F. KOFI ABIEW, THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION 35 (1999) (citing GROTIUS, DE JURE BELLI EST PACIS (Amsterdam 1631)).

[12] UN Charter art. 2, para.1.

[13] *Id.* para. 7.

[14] TAYLOR B. SEYBOLT, HUMANITARIAN MILITARY INTERVENTION: THE CONDITIONS FOR SUCCESS AND FAILURE 1 (2007).

However, while it is generally accepted that certain forms of interfering in a state's internal affairs in response to human rights violations and abuses is permissible, disagreement persists as to the legality of such an intervention in the absence of consent of the state or the United Nations. Proponents of humanitarian intervention suggest that Article 2(1)'s recognition of sovereignty is not an absolute bar to intervention if the underlying intent of the intervention is to prevent human atrocities because the human rights violation "raises moral concerns and questions about the very legitimacy of that sovereignty."[15] Respect for human rights becomes paramount for the international community recognizing that state's claim to sovereignty.[16] Syria's decision to employ chemical weapons against its own citizens represents a gross human rights violation that challenges its claim to sovereignty. However, Syria uses sovereignty as a shield to prevent intervention in its internal affairs, even when internal affairs justify an international response.

While not as important as the sovereignty principle, Article 1 of the UN Charter is another key provision. This provision addresses the purpose of the UN Charter and provides guidelines for international relations. Article 1(1) directs the UN to "maintain peace and security" by taking "collective measures for the prevention and removal of all threats to the peace . . . ."[17] Article 1(3) states that another purpose of the UN is to "achieve international cooperation in solving problems of a . . . humanitarian character and in promoting and encouraging respect for fundamental freedoms . . . ."[18] The obligation to maintain peace and security lies with the UNSC, as it has both the legal authority and the responsibility to undertake measures to stop and prevent large–scale violations of human rights.[19] This authority includes authorizing military enforcement measures pursuant to Chapter VII to restore the peace.[20]

However, humanitarian intervention carves out an exception to the UN Charter's general prohibition against the use of force by creating a legal obligation for members of the international community to act, even in, and perhaps especially in, those cases where the UNSC fails to do so.[21] As such, a legal

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[15] Jonah Eaton, *Note, An Emerging Norm? Determining the Meaning and Legal Status of the Responsibility to Protect*, 32 MICH. J. INT'L L. 765, 770–71 (2011).

[16] Lieutenant Commander Tahmika Ruth Jackson, *Bullets for Beans: Humanitarian Intervention and the Responsibility to Protect in Natural Disasters*, 59 NAVAL L. REV. 1, 4 (2010).

[17] UN Charter art.1, para. 1.

[18] *Id.* at para. 3.

[19] TERRY D. GILL & DIETER FLECK, THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 221 (2010).

[20] *Id.*

[21] Harold Koh, *Syria and the Law of Humanitarian Intervention (Part II: International Law and the Way Forward)*, JUST SECURITY (Oct. 2, 2013, 9:00 AM), http://justsecurity.org/2013/10/02/koh-syria-part2/ ("The [United States] and its allies could treat Syria as an avenue for lawmaking to crystallize a limited concept of humanitarian intervention,

question arises as to the legality of employing force in the absence of UNSC approval. In Syria, once the UNSC failed to authorize the use of force, the legal issue became whether a state may legally use force to prevent further human rights violations. A strict reading of the UN Charter renders such intervention illegal, but proponents of humanitarian intervention disagree.

The final consideration in this argument arises in the third set of key UN Charter provisions. Of these three sets of provisions, the use of force remains the most controversial aspect of the humanitarian intervention discussion. Article 2(4) of the UN Charter specifically states, "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN."[22] This provision combines all three of the key provisions discussed above—respect for sovereignty, conduct of international relations, and the use of force.

However, Article 2(4) also introduces a preference for peaceful resolution of disputes among or between member states. This preference for peaceful dispute resolution arises in other articles—members agree that armed force is not to be used[23] and that members will settle their disputes peacefully.[24] But Article 2 contemplates that the UN and the UN Charter are the principal references in judging member states' behavior toward one another, especially in terms of internal affairs, such as territorial integrity and political independence. Humanitarian intervention's viability as legal doctrine rests on its ability to maintain a human rights focus, and prevent ulterior political motives (i.e., a regime change) that states may have in pursuing a mandate from the UN and the UNSC.

Although these three key provisions are at the forefront of the UN Charter, one critical element to the humanitarian intervention debate—human rights—is not. While the preamble reaffirms "faith in fundamental human rights" and seeks to promote "social progress and better standards of life,"[25] it is not until Article 55 that considerable attention is directed toward enabling human rights.[26] In Article 56, UN members agree to take action to achieve the intent of Article 55.[27]

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capable of breaking a veto stranglehold in extreme circumstances, such as to prevent the deliberate use of forbidden weapons to kill civilians.").

[22] UN Charter art. 2, para. 4.

[23] *Id.* at Pmbl.

[24] *Id.* at art. 2, para. 3.

[25] *Id.* at Pmbl.

[26] *Id.* at art. 55, para. c. This article states that the United Nations (UN) "shall promote universal respect for, and observance of, human rights and fundamental freedoms for all . . . ." *Id.*

[27] *Id.* at art. 56 ("All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.").

The importance of these two provisions pales in comparison to the provisions prohibiting the use of force. Simon Chesterman analyzes those provisions and notes protection of human rights appears to be less important than the concept of state sovereignty, stating,

> The tension between sovereignty and human rights in the international legal order established after the Second World War is manifest in the opening words of the UN Charter. War is to be renounced as an instrument of national policy. Human rights are to be affirmed. But in its substantive provisions, the Charter clearly privileges peace over dignity: the threat or use of force is prohibited in Article 2(4); protection of human rights is limited to the more or less hortatory provisions of Articles 55 and 56.[28]

Proponents of humanitarian intervention counter, however, that human rights violations are a justifiable basis for using force even without UN approval, as "international protection and promotion of human rights" prevents future atrocities.[29] However, this argument fails when applied to the actual text of the UN Charter as outlined previously. The UN Charter's preference for sovereignty and collective action in the absence of peaceful resolution of disputes weighs against this unwritten basis for unilateral action in the internal affairs of a state. When applying this latter preference for sovereignty to the situation in Syria, the strict reading and application of the UN Charter prevented outside interference in what was considered an internal affair. Having described the UN Charter framework, understanding the legal doctrine of humanitarian intervention is the next step.

B. Humanitarian Intervention

The concept of humanitarian intervention arises where the text of the UN Charter and international human rights law[30] collide. Although several scholars

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[28] SIMON CHERSTERMAN, JUST WAR AND JUST PEACE: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 45 (2001).

[29] ABIEW, *supra* note 11, at 75.

[30] The essential components of international human rights law are easily identified. They exists in two forms: treaty law and customary international law. RESTATEMENT (THIRD) OF THE FOREIGN REL. LAW OF THE U.S. § 701 (1987). With treaty law, one must look to those treaties which were signed and ratified by the United States to determine their legal effect. Customary international law presents a larger problem. The United States views certain fundamental human rights as customary international law and finds that a "State violates international law when[,] as a matter of policy[,] it practices, encourages, or condones a violation" of these rights. *Id.* at § 702. The acceptance of certain human rights as customary international law has significant operational implications for U.S. military force as customary international law is considered part of the law of the United States. *Id*.

have attempted to define humanitarian intervention, reaching consensus for a universal definition has proven difficult. For example, the doctrine of humanitarian intervention is defined as the responsibility imposed on the international community "to protect nationals of another state from inhuman and cruel treatment within their state."[31] A second proposed definition focused on what it is meant to achieve: "[I]n brief, humanitarian intervention is meant to protect fundamental human rights in extreme circumstances; it is not meant directly to protect or promote civil and political rights."[32]

Yet another scholar proposed defining humanitarian intervention as "the use of armed force by a state (or states) to protect citizens of the target state from large–scale human rights violations there."[33] Nevertheless, applying any of the proposed definitions alone fails to address the heart of the issue: whether humanitarian intervention is a proper legal basis for the use of force when human rights violations are so egregious that they arguably justify another state intervening in the state's internal affairs to prevent further abuses.[34] Further, the lack of a "consensus definition" frustrates attempts by the international community to reach an agreement on the legality of intervening in the internal affairs of a sovereign state in order to prevent human rights abuses.

Despite the lack of a "consensus definition," two clearly defined sides mark the humanitarian intervention debate. The majority view finds that humanitarian intervention conflicts with the prohibition on the use of force found in Article 2(4) of the UN Charter, but it can be "morally and/or politically justified and condoned

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at § 111, § 701. It is difficult, however, to determine which human rights the United States considers fundamental human rights, such that they are considered customary international law. *Id.* at § 702.

> The Restatement gives the following examples of human rights that fall within the category of Customary International Law (CIL): prohibitions on genocide, slavery or slave trade, murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and consistent patterns of gross violations of internationally recognized human rights.

Id.

[31] ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM 114 (1993).

[32] SEYBOLT, *supra* note 14, at 6.

[33] AREND & BECK, *supra* note 31, at 113.

[34] WHEELER, *supra* note 11, at 28. "Humanitarian intervention exposes the conflict between order and justice at its starkest, and it is the archetypal case where it might be expected that international society would carve out an explicit exception to its rules. After all, what is the point of upholding these if governments are free to slaughter their citizens with impunity?" *Id.*

or excused from a legal perspective . . . ."[35] The minority view holds that humanitarian intervention does not violate Article 2(4) of the Charter.[36] Both sides agree that the issue of humanitarian intervention "arises in cases where a government has turned the machinery of the state against its own people, or where the state has collapsed into lawlessness."[37] In Syria, the doctrine of humanitarian intervention clearly applied. Nevertheless, the international community reached a stalemate when deciding whether the use of force was appropriate. The UNSC's failure to agree resulted in a diplomatic solution that did not involve the use of force, even though proponents argue that humanitarian intervention justified the use of force. Applying a strict interpretation of Article 2(4) of the UN Charter, the international community reverted to other means to resolve the issue even though a variant of humanitarian intervention—responsibility to protect—was created to address this very situation.

C. The Responsibility to Protect

The final element of the academic analysis of humanitarian intervention requires a discussion of the doctrine of responsibility to protect (R2P). Arguably, the R2P doctrine arose from the failures of humanitarian intervention to respond to several egregious human rights atrocities. The international community's inability to meaningfully and collectively resolve significant humanitarian atrocities in places like Kosovo, Rwanda, Bosnia, and Somalia so concerned then–Secretary General Kofi Annan that in his address to the 54th session of the UN General Assembly, he challenged member states to find a way to respond to future crises.[38] He called on member states to "find common ground in upholding the

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[35] GILL & FLECK, *supra* note 19, at 224-25.

[36] *Id. See also* ABIEW, *supra* note 11, at 95.

> It is argued that provided conditions and limits set out under international law are met, there would be no violation of the territorial integrity or political independence of the state. Since humanitarian intervention does not seek to challenge attributes of sovereignty, territorial integrity or political independence of a state, it will not fall within the scope of the Article 2(4) prohibition of force norm. *As to Article 2(7)*, it is now increasingly accepted that human rights issues are no longer strictly within the domestic purview of states. It is a matter of concern for the whole world community. Consequently, human rights abuses prompting humanitarian action are no longer "matters within the domestic jurisdiction of a state," and so will not amount to a violation of the non–intervention principle.

Id. at 99 (emphasis added).

[37] WHEELER, *supra* note 11, at 27.

[38] *Report of the International Commission on Intervention and State Sovereignty, The Responsibility to Protect* 2 (Dec. 2001), http://responsibilitytoprotect.org/ICISS%20Report.pdf, [hereinafter ICISS Report].

principles of the Charter, and act in defense of our common humanity."[39] He issued a similar challenge a year later in his Millennium Report to the General Assembly stating, "[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?"[40]

Canada responded to this challenge in September 2000, by establishing the International Commission on Intervention and State Sovereignty (ICISS) to identify a legal basis justifying intervention for human protection.[41] The ICISS represents a significant milestone in the evolution of humanitarian intervention because it sought to define humanitarian intervention in terms of, and consistent with, the UN Charter provisions, rather than argue that it was an exception to the Charter.

In December 2001, the ICISS released its report.[42] The report reframed the humanitarian intervention issue by shifting the debate from state sovereignty to a state's responsibility to protect its citizens.[43] Critical to the report's recommendations was the belief that states must act in accordance with accepted international norms to claim sovereignty. Specifically, the report proposed that state sovereignty includes "a responsibility for states to protect their national citizenry from crimes against humanity."[44] The report argues that when states fail to protect their own populations, it is permissible for other states to act in order to prevent violence against innocent civilians.[45] The ICISS's logic rested on the belief that

> exceptional circumstances exist in which the very interest that all states have in maintaining a stable international order requires them to react when all order within a state has broken down or when civil conflict and repression are so violent that civilians are threatened with massacre, genocide, or ethnic cleansing on a large scale.[46]

If a state fails to respect the human rights of its citizens and engages in conduct towards its own population that causes widespread death of its own people, the state forfeits its claim of sovereignty.

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[39] *Id*.
[40] Annan, *supra* note 1.
[41] ICISS Report, *supra* note 38.
[42] *Id.*
[43] Sari Bernstein, *The Responsibility to Protect After Libya: Humanitarian Prevention as Customary International Law*, 38 BROOK. J. INT'L L. 305, 314 (2012).
[44] *Id.*
[45] *Id.* at 305, 314.
[46] ICISS Report, *supra* note 38.

Following the ICISS Report, the 60th session of the UN General Assembly unanimously endorsed the concept of R2P.[47] With that endorsement, states were no longer able to rely on a claim of sovereignty in order to prohibit other states from interfering in their internal affairs in response to a humanitarian crisis. Syria presented the perfect opportunity for application of the R2P doctrine as it met the criteria justifying intervention.

To understand why the R2P failed to gain traction in Syria, one must understand that the concept of responsibility, as applied by the R2P, is two–fold. It includes both the responsibility of a state to protect its citizens from massive human rights abuses, as well as the responsibility of the international community to prevent massive human rights abuses.[48] Pursuant to the R2P, "intervention within a state that fails to protect its citizens from massive human rights violations does not constitute an intrusion into that state's sovereignty, but rather appears as the realization of a responsibility which is shared by the state and by the international community."[49] As such, the international community has a greater responsibility to prevent humanitarian atrocities than it does to prevent breaches of state sovereignty.

Following this logic, a state may not rely on its claim to sovereignty as a shield to prevent against outside intervention. Further, human rights violations become a sufficient legal basis for the international community to act in order to prevent humanitarian atrocities, even in the absence of the host state's approval. In Syria, the state failed to protect its citizens when it launched a chemical attack against them; however, the international community did not agree that it had a responsibility to use force to intervene and prevent further atrocities. In the case of Syria, the R2P could not overcome the perceived prohibition on the use of force to intervene in the internal affairs of a state.

Ultimately, the focus of the humanitarian intervention debate returns to the authority of the UN and the UNSC to act. The development of the R2P doctrine

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[47] 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

> [W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case–by–case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

Id.

[48] Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT'L L. 469, 470–71 (2010).

[49] *Id.*

may have reinforced the UNSC and the international community's "responsibility to undertake and support measures of protection, including . . . military enforcement measures . . . in response to large–scale and systematic human rights violations . . . ."[50] However, "there is no guarantee that the Council will invariably be able to come to a decision to undertake measures that are likely to end such violations."[51] Therefore, the R2P doctrine remains flawed. As identified by one author, "any understanding of 'responsibility to protect' as a very broad–based doctrine, which would open up at least the possibility of military action in a whole variety of policy contexts, is bound to give the concept a bad name."[52] Two recent historical examples illustrate this unintended effect, discussed next.

D. Humanitarian Intervention and Contemporary Military Operations

Interventions in Kosovo and Libya illustrate the evolution of humanitarian intervention and the R2P in international relations. Their outcomes had a direct effect on the decisions of members of the international community regarding whether or not to use force in Syria. Kosovo was a multilateral operation undertaken in 1999 by the North Atlantic Treaty Organization (NATO) after the UN failed to authorize the use of force.[53] The permanent members of the UNSC failed to agree on a collective response (i.e., authorizing an intervening force) to the ethnic cleansing taking place, despite the fact that twelve of the fifteen UNSC members supported the use of force to prevent further atrocities.[54] Further complicating the Kosovo morass was the fact that none of the proponents for the use of force could agree on a legal basis to intervene.[55] Of the four factors the United States relied upon, two resembled humanitarian intervention—the humanitarian catastrophe in Srebrenica and the serious violations of international human rights law that occurred in Kosovo.[56] However, the United States did not assert humanitarian intervention as a legal basis for intervention at that time.[57] Despite the fact that it was not explicitly asserted, humanitarian intervention dominated the post–Kosovo conflict discussion.

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[50] GILL & FLECK, *supra* note 19, at 222.
[51] *Id.* at 222–23.
[52] Gareth Evans, *The Responsibility to Protect in Environmental Emergencies*, 103 AM. SOC'Y INT'L L. PROC. 27, 29 (2009).
[53] Lieutenant Colonel Michael E. Smith, *North Atlantic Treaty Organization (NATO), the Kosovo Liberation Army, and the War for an Independent Kosovo: Unlawful Aggression or Legitimate Exercise of Self-Determination?*, ARMY LAW., Feb. 2001, at 1 (providing an excellent discussion of the events and circumstances leading to the NATO intervention in Kosovo); *See also* James P. Terry, *Rethinking Humanitarian Intervention After Kosovo: Legal Reality and Political Pragmatism*, ARMY LAW., Aug. 2004, at 4.
[54] Terry, *supra* note 53, at 4.
[55] JAMES E. BAKER, IN THE COMMON DEFENSE 211 (2007) (suggesting "Nineteen NATO allies found nineteen different paths to lawfully justify NATO air operations").
[56] *Id*.
[57] *Id.*

Following the conclusion of hostilities, Kosovo led many scholars to re–examine humanitarian intervention. For many, Kosovo presented a contradiction as it related to "UN Charter values on the one hand, and required UN procedures on the other."[58] One scholar writes, "When the UN Security Council is unable to act because of a potential veto, humanitarian intervention by a group of concerned states, as in Kosovo, thus it becomes critical to upholding the UN Charter principles."[59] In the end, multilateral action was undertaken in Kosovo to prevent further humanitarian violations that were a threat to international peace and security—not to challenge Yugoslavia's political independence or territorial integrity.[60] The intent of the intervention remained humanitarian and not political. This intent was significantly different than the intent of proposed intervention in Syria.[61] Before fully examining the situation in Syria, the recent operations in Libya merit examination.

While Kosovo represented progress in humanitarian intervention's evolution as a viable legal basis for the use of force, recent intervention in Libya in 2011 resulted in a step backward. The decision by the UN to intervene in Libya was in response to a civil war wherein rebels sought to overthrow the regime of Muammar Gaddafi.[62] While a humanitarian intervention in name, the purpose for intervention in Libya appeared to shift from humanitarian intervention to regime change as it progressed. This shift in purpose helps explain Russia's reluctance to authorize the use of force in Syria. To understand why, the analysis must start with the UNSC Resolution authorizing the use of force in Libya.

On March 17, 2011, the UNSC issued Resolution 1973 (UNSCR 1973), which demanded a "complete end to violence and all attacks against, and abuses, of civilians."[63] Further, this resolution authorized "all necessary measures" to protect civilians, in addition to enforcement of a no–fly zone and an arms embargo.[64] The resolution served a humanitarian purpose, as it noted the "heavy

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[58] Terry, *supra* note 53, at 36, 45 (arguing that Kosovo "is especially appropriate for consideration since it presumably met all the requirements for humanitarian intervention under pre–UN Charter law". While not the purpose of this article, Terry's argument is significant as the debate on humanitarian intervention and responsibility to protect evolves.

[59] *Id.* at 36, 38.

[60] *Id.* at 36, 45. *See also* S.C. Res. 1239, U.N. Doc. S/RES/1239 (May 14, 1999); S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 24, 1998); S.C. Res. 1160, U.N. Doc. S/RES/1160 (Mar. 31, 1998); S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998).

[61] Michael Pearson, Elise Labott & Saad Adebine, *Syria Defiant at Conference; Kerry Rules out al–Assad*, CNN (Jan. 22, 2014), http://www.cnn.com/2014/01/22/world/europe/syria-geneva-talks/ 2/21/2014. Many in the international community continued to demand a regime change in Syria as a pretext to ending the conflict. *Id.*

[62] *See Libya Profile-Timeline*, BBC, http://www.bbc.co.uk/news/world-africa-13755445 (last visited Nov. 23, 2015).

[63] S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

[64] *Id.*

civilian casualties, condemned the "gross and systematic violation of human rights," and labeled certain "widespread and systematic attacks" against civilians as "crimes against humanity."[65] Clearly, the UNSCR contemplated humanitarian intervention as the legal basis to authorize use of force.[66] However, what began as a humanitarian mission to protect civilians "quickly morphed into close–air support for the Libyan rebels and the bombing of no less than forty static targets throughout the country."[67] Having shifted from a humanitarian mission to a political one (regime change), the Libya intervention lost its humanitarian intent as defined in the UNSCR.

Closer examination of the UNSCR's passage explains that the military intervention in Libya was not the result of a unanimous agreement in the UNSC. Russia and China abstained from UNSCR 1973.[68] As NATO's bombing campaign progressed, Russia and China both objected, stating that NATO was exceeding the UNSCR's humanitarian mandate and subsequently pursuing an unauthorized regime change.[69] This belief that the mandate had been exceeded appears to have caused Russia and China to rethink their position on humanitarian intervention, and its application in future crises such as the Syria conflict. Regarding Syria, China specifically stated that it "regretted" its "abstention" on the Libya UNSCR and "pledged not to permit UN measures that could lead to similar action[s] . . . ."[70] Ultimately, Russia and China's veto of the use of force in Syria signaled their frustration with the UNSC's use of humanitarian intervention to interfere in the internal matters of other states.[71] As such, the lasting impact of the Kosovo and Libya interventions on the humanitarian intervention debate remains that an intervention's intent must fulfill a legitimate humanitarian purpose and not a political or military one. Otherwise, humanitarian intervention in places like Syria will remain an aspiration, rather than a realistic option.

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[65] *Id.*

[66] Jamie Herron, *Responsibility to Protect: Moral Triumph or Gateway to Allowing Powerful States to Invade Weaker States in Violation of the U.N. Charter?*, 26 TEMP. INT'L & COMP. L.J. 367, 368 (2012) (citing Vivienne Walt, *Why Syria Won't Get the Libya Treatment from the West*, TIME (Mar. 18, 2012), http://www.time.com/time/world/article/0,8599,2109372,00.html.).

[67] *Id.* at 367, 379–80.

[68] C.J. Chivers & Eric Schmitt, *Libya's Civilian Toll, Denied by NATO*, N.Y. TIMES A-1 (Dec. 18, 2011), http://fib.se/utrikes/item/835-libya's-civilian-toll-from-strikes-denied-by-nato?tmpl=component&print=1; *see also* CNN Wire Staff, *NATO Ends Libya Mission*, CNN (Nov. 5, 2012), http://www.cnn.com/2011/10/31/world/africa/libya-nato-mission/index.html.

[69] *China Says It Was Forced to Veto UN Measure on Syria*, FOXNEWS.COM (Feb. 6, 2012), http://www.foxnews.com/world/2012/02/06/china-defends-its-veto-un-measure-on-syria/.

[70] *Id.*

[71] Major Matthew E. Dunham, *Sacrificing the Law of Armed Conflict in the Name of Peace: A Problem of Politics*, 69 A.F. L. REV. 155, 163–64 (2013). This is an excellent law review article for those seeking additional information on Libya and the ramifications of NATO's actions on later decisions made in response to Syria.

III. Crisis Response and Limited Contingency Operations

Having explored what humanitarian intervention is and what triggers it, the attention of this article now shifts to humanitarian intervention's legal application within existing United States military doctrine. As discussed, the doctrines of humanitarian intervention and responsibility to protect [72] are legitimate possibilities as legal bases for multilateral and unilateral military intervention to remedy widespread humanitarian abuses such as those that occurred in Syria. United States military doctrine contains three distinct types of operations that comprise the range of military operations.[73] Of these three types of operations, Crisis Response and Limited Contingency (CRLC) operations is the doctrine best–suited for application to humanitarian intervention operations as both CRLC and humanitarian intervention share the desired end state of protecting the civilian population.

Whereas humanitarian intervention recognizes the need for the international community to use force to prevent human rights violations that are a threat to international peace and security,[74] CRLC operations provide a force protection capability to address those instances where human rights violations are a threat to U.S. interests. In terms of humanitarian intervention and U.S. CRLC operations, the human rights violations must represent a significant concern to both the United States and to the international community. From a doctrinal standpoint, this is important because CRLC achieves a legitimate humanitarian purpose while avoiding potential political ramifications that may arise in Major Operations and Campaigns, and Military Engagement, Security Cooperation and Deterrence operations.

Another important characteristic of CRLC operations is their size and duration. They are "small–scale, limited–duration operations such as strikes, raids, and peace enforcement, which might include combat depending on the circumstances."[75] They are employed with limited strategic and operational objectives, such as to "protect U.S. interests and/or prevent surprise attack or

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[72] In the interest of brevity and so as not to confuse the two, this article refers to both humanitarian intervention and responsibility to protect doctrines as humanitarian intervention.

[73] JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS I-5 (11 Aug. 2011) [hereinafter JP 3-0]. The three distinct types of military operations that make up the range of military operations are: Major Operations and Campaigns; Crisis Response and Limited Contingency Operations; Military Engagement, Security Cooperation, and Deterrence. *Id.*

[74] ABIEW, *supra* note 11, at 82. It is important to remember that humanitarian intervention requires the "gross systematic violations" of human rights that are a "concern to the whole international community." *Id.*

[75] JP 3-0, *supra* note 73, at I-5.

further conflict."[76] Typical CRLC operations include non–combatant evacuation operations (NEOs), foreign humanitarian assistance (FHA), and peace operations.[77] Extracting and then combining applicable elements from these three CRLC operations provides a responsive framework for a humanitarian intervention mission.

A. Noncombatant Evacuation Operations

Noncombatant Evacuation Operations (NEO) evacuate noncombatants "from foreign countries when their lives are endangered by war, civil unrest, or natural disasters to safe havens as designated by the Department of State."[78] Thus, NEOs alone do not qualify as a comprehensive U.S. response mechanism to humanitarian rights violations, such as the use of chemical weapons on civilians in Syria. But, consistent with humanitarian intervention, current NEO doctrine contemplates the need to evacuate noncombatants under conditions that "range from civil disorder, to terrorist action, to full scale combat."[79] Further, the expected operational environment for these missions may include areas where the host nation may or may not be receptive to a NEO.[80] As an additional key consideration, NEO doctrine permits the evacuation of non–citizens from threatening situations using military force.[81]

All these elements were present in Syria. However, although NEOs appear to apply to the situation in Syria, most NEOs are limited in capability by the transportation resources available. As the number of noncombatants requiring evacuation increases, the demand for limited transportation assets increases. In Syria, the availability of U.S. transportation assets is a significant limitation on a NEO mission's capability to effectively respond to the crisis.

Despite their inherent limitations, NEOs have proven to be an effective part of small–scale humanitarian intervention–type operations. For example, in Somalia in 1991, U.S. military forces rescued 281 people from thirty different countries in approximately twenty–four hours during Operation Eastern Exit.[82] Based on the success of Operation Eastern Exit, larger–scale NEO missions are supportable under the right circumstances. Significantly, the discussion of rules

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[76] *Id.* at I-5 and V-20.
[77] *Id.* at V-20 to V-29.
[78] JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-68, NONCOMBATANT EVACUATION OPERATIONS GL-8 (23 Dec. 2010) [hereinafter JP 3-68].
[79] *Id.* at I-4.
[80] *Id.*
[81] U.S. MARINE CORPS, MCDP 1-0, MARINE CORPS OPERATIONS 5-5 (Aug. 9, 2011) [hereinafter MCDP 1-0); U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS 2-7 (Feb. 2008) [hereinafter FM 3-0].
[82] JP 3-0, *supra* note 73, at V-21.

of engagement found in current NEO doctrine provides a potential starting point for planning humanitarian intervention missions.

Joint Publication 3–0, *Joint Operations*, provides specific guidance regarding rules of engagement addressing operational concerns, starting with receipt of the warning order, [83] and includes a discussion about non–lethal weapons employment.[84] However, much of the rules of engagement discussion remains a pro forma recounting of the four principles of the law of armed conflict and provides few specifics. Despite its shortcomings, the rules of engagement (ROE) appendix[85] is an excellent starting point for developing mission–specific rules of engagement because it provides key elements for consideration by the staff preparing for a mission such as Syria. From these key elements, judge advocates can develop responsive rules of engagement to meet the specific nuances of the humanitarian intervention mission.

B. Foreign Humanitarian Assistance

In addition to NEOs, a second type of CRLC operations, Foreign Humanitarian Assistance (FHA) operations, provides a significant capability to protect civilians. The function of FHA operations is to "relieve or reduce human suffering, disease, hunger, or privation."[86] They often occur on short notice and provide aid and assistance in a specific crisis "rather than as more deliberate programs to promote long term stability." Foreign Humanitarian Assistance efforts can supplement or complement efforts of other entities, to include the efforts of the host nation and non–governmental organizations, which have the primary responsibility of providing aid.[87] The larger concern arises when the host nation is the source of the need for the humanitarian intervention, as was the case in Syria. The inability of the host government to provide aid or assistance complicates the application of FHA operations, doctrinally.

While current U.S. FHA doctrine considers host state failure as a possibility, it is more of an afterthought. For example, the Marine Corps specifically identifies three "basic types of foreign humanitarian assistance operations" that may require U.S. military forces—"UN–led, United States action in concert with

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[83] JP 3-68, *supra* note 78, at A-1 to A-3.
[84] *Id.* at A-2.
[85] JOINT CHIEFS OF STAFF, JOINT PUB. 3-29, FOREIGN HUMANITARIAN ASSISTANCE IV-15 (17 Mar. 2009) [hereinafter JP 3-29].
[86] JOINT CHIEFS OF STAFF, JOINT PUB. 3-07, STABILITY OPERATIONS I-4 (29 Sept. 2011) [hereinafter JP 3-07]; *see also* MCDP 1-0, *supra* note 81, at 5-4; U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS Appendix E-1 (Oct. 2008) [hereinafter FM 3-07].
[87] JP 3-0, *supra* note 73, at V-25. *See also* MCDP 1-0, *supra* note 81, at 5-4; FM 3-07, *supra* note 86, at E-1.

other multinational forces, and United States unilateral action."[88] The remainder of the doctrinal publication focuses on the two former possibilities rather than the latter. Significantly, current joint doctrine describes FHA missions as limited in scope and in duration and viable only in those cases where the assistance needed is in excess of that which can be provided by the host nation or the normal relief agencies.[89] The Army publication contemplates a higher degree of UN involvement and does not mention the possibility of unilateral action.[90] As such, FHA doctrine would not apply in places like Syria where the government is prohibiting any form of assistance.

Despite this apparent shortcoming, FHA doctrine addresses ROE more fully than NEO doctrine. Joint Publication 3-29 (JP 3-29), *Foreign Humanitarian Assistance*, discusses ROE in two sections and includes a sample ROE card. The first section discusses its development and application to both U.S. forces and multi–national partners.[91] The ROE card provides a valuable template that a judge advocate could modify in order to meet the requirements of a humanitarian intervention mission. In addition, Appendix A, JP 3-29 identifies several other concerns regarding humanitarian intervention missions such as civilian criminal conduct, fires, riot control agents, and the need for the rules to evolve as the mission evolves.[92] All of these elements of existing joint doctrine provide valuable considerations and application for situations like that found in Syria, especially when combined with NEO and Peace Operations.

C. Peace Operations

Peace enforcement operations provide the best doctrinal framework for conducting military operations pursuant to a humanitarian intervention justification, of the aforementioned three elements of CRLC doctrines. When combined with key elements of the two other CRLC operations discussed above, a viable doctrinal framework can be applied to humanitarian intervention missions. Joint Publication 3-07, *Stability Operations*, explains that peace operations

> [e]ncompass multiagency and multinational crisis response and limited contingency operations involving all instruments of national power with military missions to contain conflict, redress the peace, and shape the environment to support

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88 JP 3-0, *supra* note 73, at V-25; MCDP 1-0, *supra* note 81, at 5-4.
89 MCDP 1-0, *supra* note 81, at 5-4.
90 FM 3-07, *supra* note 86, at Appendix E-1.
91 JP 3-29, *supra* note 85.
92 *Id.* at A-7 to A-8.

> reconciliation and rebuilding and facilitate the transition to legitimate governance.[93]

Current peace operations such as peacekeeping,[94] peace enforcement,[95] and peace building[96] involve the use of military force to enforce peace agreements and prevent further conflict.[97] Peace operations require the consent of all parties to the dispute and are typically authorized pursuant to Chapter VI of the UN Charter.[98] In Syria, the Syrian government withheld consent to peacekeeping measures, frustrating international efforts to assist victims of chemical attack.

However, as discussed in Part I, consent is no longer an issue because humanitarian intervention focuses on those instances when the subject state fails to protect its citizens, thus justifying a need for the international community to act in the absence of consent. Of greater importance, peace enforcement operations serve the primary purpose of maintaining peace and restoring order pursuant to a mandate.[99] While humanitarian intervention contemplates a mandate from the UN, it does not preclude the possibility of a unilateral U.S. mandate as long as its primary purpose is to maintain or restore peace.

Assuming a unilateral U.S. mandate to intervene in Syria is authorized, the analysis then shifts to the potential actions to support the mandate. Doctrinally, the permissible actions in furtherance of peace enforcement operations include "enforcement of exclusion zones, protection of personnel providing foreign humanitarian assistance, restoration of order, and forcible separation of belligerent parties."[100] As with any humanitarian intervention, the intent of the unilateral action must be to seek peace, and the actions taken in furtherance of peace must remain within the mandate authorizing the use of military force. At present, this possibility fails in Syria because one of the United States' stated policy goals remains regime change.[101] However, removing this condition in

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[93] JP 3-07, *supra* note 86, at VIII.

[94] MCDP 1-0, *supra* note 81, at 5-8. Peacekeeping operations "monitor and facilitate implementation of an agreement, such as cease fire or truce, and support diplomatic efforts to reach a long term political settlement." *Id. See also* FM 3-0, note 81, at 2-8.

[95] MCDP 1-0, *supra* note 81, at 5-8. Peace enforcement operations employ military forces to maintain or restore peace and order as contemplated in resolutions or through sanctions. *Id. See also* FM 3-0, *supra* note 81, at 2-9.

[96] MCDP 1-0, *supra* note 81, at 5-9. Peace building operations are diplomatic and economic efforts to strengthen governments, in order to prevent a return to conflict. *Id. See also* FM 3-0, *supra* note 81, at 2-9.

[97] JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.3, PEACE OPERATIONS 3-1 (1 Aug. 2012) [hereinafter JP 3-07.3]. *See also* MCDP 1-0, *supra* note 81, at 5-8; FM 3-0, *supra* note 81, at 2-8.

[98] JP 3-07.3, *supra* note 97.

[99] *Id.*

[100] *Id.*

[101] *Kerry Calls for Regime Change*, PRESSTV (Mar. 13, 2014, 2:45 PM), http://www.

furtherance of purely peaceful intentions would alleviate this issue, and therefore peace operations remain a viable option.

Unlike NEO and FHA doctrinal publications, peace operations doctrine contains little in the way of express rules of engagement; however, JP 3-07 contains sections on detainee handling procedures, interaction with the International Committee of the Red Cross,[102] and an excellent commentary on detention standards as well as the need for a well–trained guard force.[103] These sections on detention operations are relatively substantial and help to lay a useful doctrinal framework; judge advocates should incorporate this portion of the doctrine because it offers a relatively solid foundation for responding to detention operations in a humanitarian intervention mission.

IV. Conclusion

The potential for military operations with a humanitarian intervention legal basis challenges current U.S. military doctrine because it does not explicitly address humanitarian intervention. Nevertheless, judge advocates should combine elements of existing CRLC operations doctrine to create a viable legal framework should such a mission arise. Within the evolving threat environment, CRLC operations provide the most responsive doctrine for overcoming the challenge of responding to humanitarian crises.

As demonstrated in Syria, innocent people continue to suffer and die at the hands of their government. In these humanitarian intervention situations, the decision to act becomes the focal point of the debate.[104] The events in Syria have solidified humanitarian intervention as a new legal basis to act, which in turn presents unique possibilities for judge advocates. While U.S. humanitarian intervention doctrine is currently inadequate to fully address humanitarian intervention, the basics of military operations remain the same and judge advocates must find confidence in their similarities and solutions where they differ.

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presstv.com/detail/2014/ 01/22/347096/kerry-calls-for-regime-change-in-syria.

[102] JP 3-07, *supra* note 86, at E-3, 5.

[103] *Id.*

[104] ANNE ORFORD, READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW 15 (2003).

THE CODE INDICTED: WHY THE TIME IS RIGHT TO IMPLEMENT A GRAND JURY PROCEEDING IN THE MILITARY

MAJOR JOHN G. DOYLE*

The grand jury gets to say—without any review, oversight, or second–guessing—whether probable cause exists to think that a person committed a crime.[1]

I. Introduction

On August 9, 2014, onlookers attending a sprint car race in Canandaigua, New York, watched in horror as NASCAR driver Tony Stewart, while operating a dirt–track sprint car, struck and killed fellow racer Kevin Ward Jr. who was walking along the track.[2] Ward Jr. had "exited his car after he and Stewart were involved in a racing incident that left Ward's car wrecked near the top wall of the track . . . ."[3] Video of the incident shows that as cars continued to round the track under caution, Ward began to walk near the path of the vehicles as Stewart came around.[4] Ultimately, the rear of Stewart's car struck Ward, who subsequently died

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[1] Kaley v. United States, 134 U.S. 1090, 1098 (2014).

[2] Joe Sutton & Steve Almasy, *NASCAR's Tony Stewart Hits, Kills Driver at Dirt-Track Race in New York*, CNN, http://www.cnn.com/2014/08/10/justice/tony-stewart-hits-driver/index.html?iref=allsearch (last updated Aug. 11, 2014, 12:00 PM).

[3] Steve Almasy, *Tony Stewart Won't Face Charges in Kevin Ward Jr.'s Death*, CNN, http://www.cnn.com/2014/09/24/us/tony-stewart-no-charges/index.html?iref=allsearch (last updated Sept. 25, 2014, 9:18 AM).

[4] *Cops: Tony Stewart Hit and Killed Driver*, CNN (Aug. 10, 2014), http://www.cnn.com/video/data/2.0/video/ us/ 2014/08/10/newday-cops-tony-stewart-hit-and-killed-driver.cnn.html.

of his injuries.[5] As with any death, local authorities quickly began an investigation amidst the media frenzy and public debate about whether Stewart intended to harm Ward. The investigation eventually led to the presentation of evidence before a twenty–three member Ontario County grand jury who reviewed the photographic and video evidence and heard testimony "from more than two dozen witnesses" before determining that "there is no evidence to charge Tony Stewart with any crimes."[6] Though Ward's family voiced disagreement with the finding, no charges would be filed against Tony Stewart, and he would eventually return to the race track.[7]

In many cases, especially those receiving national attention, it is inevitable that legal critics, analysts, and the public have opinions about what occurred, whether justice was served, and what should have been done. The debate is often unending. Sometimes, however, during the quest for justice, the outcome resulting from the judicial process or the very process used to achieve that result is so abhorrent, so appalling, that it shocks the conscience and forces a change in the system—for better or for worse.

Take the 2014 events of Ferguson, Missouri, for example. Ferguson was the epicenter of public unrest after officer Darren Wilson, a white Ferguson police officer, shot and killed Mr. Michael Brown, an unarmed black teenager in August 2014.[8] A grand jury reviewed the events surrounding the shooting in November 2014, and chose not to indict Wilson.[9] A separate Department of Justice report cleared Wilson of "any federal civil rights charges."[10] However, this did not end the problems for the town of Ferguson, but instead signaled the beginning.

A "federal investigation into Ferguson's broader justice system found systemic problems in the local police department, court and jail systems" and the fall–out from this report promptly began.[11] In addition to Mr. Wilson leaving the police department, the Ferguson city manager, John Shaw; a municipal judge, Judge Ronald Brock; and two police supervisors, Captain Rick Henke and Sergeant William Mudd, have since resigned.[12] Thereafter, Ferguson Police Chief Thomas Jackson resigned on Wednesday, March 11, 2015, and several

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[5] Sutton & Almasy, *supra* note 2.
[6] Almasy, *supra* note 3.
[7] Tony Stewart executed NASCAR's first 200 mile per hour qualifying lap on an intermediate track Friday, Oct. 31, 2014. *See Tony Stewart Hits 200 mph at Texas*, ESPN.COM, http://espn.go.com/racing/nascar/story/_/id/11799103/tony-stewart-hits-200-mph-matt-kenseth-takes-pole-texas (last updated Oct. 31, 2014, 11:49 PM).
[8] *See* Tierney Sneed, *Ferguson Report Prompts Resignations, Court Takeover*, U.S. NEWS & WORLD REPORT (Mar. 11, 2015), http://www.usnews.com/news/articles/2015/03/11/doj-ferguson-report-prompts-resignations-court-takeover.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

hours later two police officers were shot standing guard outside of the police station.[13] The city was forced to begin a "nationwide search for a permanent replacement" for Chief Jackson while the public demanded justice in Ferguson amidst calls for the resignation of Mayor James Knowles.[14] Cataclysmic events like those in Ferguson are not limited to the confines of the civilian world, and have recently erupted in the realm of the U.S. military justice system.

No better recent example of public scrutiny and outcry resulting in change exists than that of the "sweeping changes" made to the Uniform Code of Military Justice (UCMJ), [15] through the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA).[16] The FY14 NDAA made a number of substantive and procedural changes to the UCMJ, specifically for the purposes of improving the military system in cases of sexual assault and sex–related violence.[17] There were a number of factors that contributed to the movement, resulting in change. These factors included the May 2013 release of the Department of Defense Annual Report on Sexual Assault in the Military for Fiscal Year 2012[18] and a series of high–profile criminal cases that garnered considerable public attention and congressional scrutiny.[19]

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[13] *See* Michael Pearson, *The Tough Task Ahead for Ferguson's Next Police Chief*, CNN (Mar. 13, 2015, 8:22 PM), http://www.cnn.com/2015/03/13/us/ferguson-next-police-chief/index.html.

[14] *Id.*

[15] The Uniform Code of Military Justice (UCMJ) is codified at 10 U.S.C. §§ 801–946, it "establishes a military member's rights and the procedures for military prosecutions." Allen v. United States Air Force, 603 F.3d 423, 425-26 (8th Cir. 2010).

[16] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1701–1753, 127 Stat. 672 (2013) [hereinafter FY14 NDAA]. *See also* David Vergun, *New Law Brings Changes to Uniform Code of Military Justice*, DOD NEWS (Jan. 8, 2014), http://www.defense.gov/news/newsarticle.aspx?id=12144 4 ("The [FY14 NDAA] passed last month requires sweeping changes to the Uniform Code of Military Justice, particularly in cases of rape and sexual assault.").

[17] *Id.*

[18] Dep't of Def. Sexual Assault Prevention & Response Office (SAPRO), DEP'T OF DEF. ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012 (2013), http://www.sapr.mil/index.php/ annual-reports. The report indicates that approximately 26,000 active duty servicemembers may have experienced some form of unwanted sexual contact in fiscal year 2012 and only 3374 of those individuals reported the assaults. *Id*. at 18, 25.

[19] *See generally* Timothy Williams, *General Charged with Sexual Misconduct*, NY TIMES (Sept. 27, 2012), http://www.nytimes.com/2012/09/28/us/decorated-general-charged-with-violations-of-military-law.html?_r=0 (detailing the charges levied in September 2012 against Brig. Gen. Jeffrey Sinclair, former Deputy Commanding General–Support at the 82d Airborne Division, for alleged forcible sodomy and wrongful sexual conduct); *Jeffrey Krusinski, Air Force Officer in Charge of Sexual Assault Prevention Program, Arrested for Alleged Sexual Assault*, HUFFINGTON POST (May 6, 2013), http://www.huffingtonpost.com/2013/05/06/jeffrey-krusinski-arrested_n_3225155.html (announcing the May 6, 2013, arrest of Air Force Lieutenant Colonel Jeffrey Krusinski, "the chief of the Air Force Sexual Assault Prevention and Response program" for sexual battery). *Id.*

Another change–producing event was the investigation into rape allegations levied against Naval Academy Midshipmen and football players Joshua Tate, Eric Graham, and Tra'ves Bush in April of 2012.[20] Aside from the growing public interest due to the nature of the alleged offenses, the parties involved, and the institution to which the accused belonged, the Naval Academy case was truly thrust into the spotlight during the pre–trial Article 32, UCMJ investigation that was conducted in August 2013. It was there, news agencies reported, that the victim endured "withering cross–examination" for "roughly [thirty] hours over several days," and was subjected to a number of purportedly inappropriate questions, some of which concerned her oral sex technique and whether or not she "wore a bra" on the night she was allegedly raped.[21] Critics, scholars, and the public were quick to react to the treatment this victim received during the proceeding and voiced their strong disapproval.[22] What resulted has set the stage for further change to the military justice system, and underscores the reason why the time is right to implement a grand jury proceeding in the military.

The public's dissatisfaction with the perceived treatment of the victim in the Naval Academy rape case went beyond mere rhetoric. The victim's attorney, Susan Burke,[23] subsequently spoke with Representative Jackie Speier (Democrat,

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[20] Ali Weinberg, *Naval Academy Rape Case Could Prompt Changes to Military Hearings*, NBC NEWS (Dec. 12, 2013), http://www.nbcnews.com/news/other/naval-academy-rape-case-could-prompt-changes-military-hearings-f2D11732125.

[21] Jennifer Steinhauer, *Navy Hearing in Rape Case Raises Alarm*, N. Y. TIMES (Sept. 20, 2013), http://www.nytimes.com/2013/09/21/us/intrusive-grilling-in-rape-case-raises-alarm-on-military-hearings.html?pagewanted=all&_r=0 (stating "[f]or roughly [thirty] hours over several days, defense lawyers . . . grilled [the victim] about her sexual habits. . . . [t]hey asked the woman . . . whether she wore a bra, how wide she opened her mouth during oral sex and whether she had apologized to another midshipman with whom she had intercourse 'for being a ho [sic].'"). *See also* Melinda Henneberger & Annys Shin, *Military's Handling of Sex Assault Cases on Trial at Naval Academy Rape Hearing*, WASH. POST (Aug. 31, 2013), http://www.washingtonpost.com/local/militarys-handling-of-sex-assault-cases-is-on-trial-at-naval-academy-rape-hearing/2013/08/31/5700c9de-10d3-11e3-b4cb-fd7ce041d814_story.html (describing the questioning of the victim as "withering cross–examination" and detailing the types of questions asked of the victim).

[22] *See* Steinhauer, *supra* note 21 ("If this is what Article 32 has come to be, then it is time to either get rid of it or put real restrictions on the conduct during them.") (quoting Jonathan Lurie, professor emeritus of legal history at Rutgers University); Henneberger & Shin, *supra* note 21 (quoting the opinion of Lisae Jordan (the executive director of the Maryland Coalition Against Sexual Assault) that the questions asked "probably would not be allowed in a Maryland courtroom" and would "likely be deemed irrelevant").

[23] By her own account, Ms. Burke "spearheads a nationwide series of lawsuits designed to reform the manner in which the military prosecutes rape and sexual assault." SUSAN L. BURKE, http://burkepllc.com /attorneys/susan-l-burke/ (last visited July 29, 2015). Her work is "the subject of a documentary called The Invisible War." *Id.* Indeed, Ms. Burke has been the attorney of record in several lawsuits filed against Department of Defense (DoD) officials by former and current servicemembers concerning allegations of sexual

California), to discuss the mistreatment of Burke's client during the Article 32 hearing, and similar clients' mistreatment in the past.[24] The result was a change to Article 32, a provision that had been relatively unchanged for more than fifty years.[25] Representative Speier succinctly summarized Susan Burke's role (and by necessary implication, the role of the victims who were maligned by the procedures used in the military justice process) in the pending changes: "She is a significant reason why all of this is happening."[26]

On December 26, 2014, the changes to Article 32 took effect.[27] On that date, the Article 32 "pre–trial investigation" ceased to be, and officially became a "preliminary hearing" for the purposes of: determining whether probable cause exists to believe an offense was committed by the accused; determining whether jurisdiction over the accused and the offenses exists; to examine the form of the charges; and to issue recommendations concerning the disposition of the case.[28] Another significant change prevents the compulsory testimony of the victim at the preliminary hearing if he or she declines to participate.[29] Only time will tell whether these and the other changes made by the FY 14 NDAA will prevent the abuses of the system it seeks to cure. Regardless of these efforts, Congress and legal practitioners must ask the question: Have we done enough to restore faith in the military justice system? The answer is: more can be done.

The systemic attack against the UCMJ by the media and politicians is relentless and obvious. At its core is the charge that commanders are not doing enough to maintain good order and discipline and have too much authority with respect to the administration of justice, especially where it concerns felony offenses.[30] Senator Kirsten Gillibrand's Testimony to the Response Systems

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assault that were allegedly mishandled or wrongfully disposed of by the chain of command. *Id*. *See generally* Cioca v. Rumsfeld, 720 F.3d 505 (4th Cir. 2013); Klay v. Panetta, 924 F.Supp.2d 8 (D.D.C. 2013).

[24] Weinberg, *supra* note 20.

[25] The issues surrounding the Naval Academy case were not the only reason for the changes that went before Congress in the form of the FY14 NDAA, but did, however, shine a "spotlight" on them. *Id.*

[26] *Id.*

[27] Fiscal Year 2014, *supra* note 16, § 1702; *See also* Carl Levin and Howard P. "Buck" McKeon, National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 531(g)(1) (2014) [hereinafter FY15 NDAA] (amending the effective date of the FY14 NDAA amendments to Article 32 to the "later of December 26, 2014, or the date of enactment of the [FY15 NDAA]" and establishing the applicability of those amendments to preliminary hearings conducted on or after the effective date).

[28] 10 U.S.C.S. § 832(a)(2) (2015).

[29] *Id.* at § 832(d)(3) ("A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing.").

[30] *Response Systems to Adult Sexual Assault Crimes Panel (RSP): Public Meeting, Transcript of Testimony* 296–343 (Sept. 24, 2013) [hereinafter *Transcript of Testimony*] (statement of Senator Kirsten Gillibrand), http://140.185.104.231/.public/docs/meetings/

Panel [31] concerning the Military Justice Improvement Act [32] adequately summarizes her, and fifty–four other senators' feelings regarding the commander's authority and the role that these Senators believe commanders should play in the administration of justice within our military:

> Our carefully crafted common sense proposal, written in direct response to the experiences of those who have gone through a system rife with bias and conflict of interest, is not Democratic. It's not Republican. Senators from both sides of the aisle have listened to the victims' voices and agreed that what's right is not just tweaking the status quo, but a real transformational change required to give victims the hope of a fair shot at justice so that they are willing to come forward and report the heinous crimes committed against them . . . . It's time to move the sole decision making power over whether serious crimes akin to a felony go to trial from the chain of command into the hands of non–biased, professionally trained military prosecutors where it belongs.[33]

Though the March 6, 2014 cloture motion concerning the Military Justice Improvement Act (MJIA) was rejected by a vote of fifty–five to forty–five,[34] the fact remains that those in support of removing commanders from the decision–making process continue to lobby for these changes.[35] If there was any doubt that such removal of power and authority was possible, one must look no further than some of the additional changes made by the FY 14 NDAA that severely limit the convening authority's ability to grant post–trial relief when taking action on the sentence of a court–martial.[36]

20130924/24_Sep_13_Day1_Final.pdf.

[31] Established by Section 576(a)(1) of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, the Response Systems Panel was charged with the responsibility of conducting "an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses . . . for the purpose of developing recommendations regarding how to improve the effectiveness of such systems." *See* Charter, Response Systems Panel, http://responsesystemspanel.whs.mil/public/docs/Response_Systems_Panel_Charter_(2013-2015).pdf.

[32] Military Justice Improvement Act of 2013, S. 1752, 113th Cong. (2013).

[33] *Transcript of Testimony*, *supra* note 30, at 297-98.

[34] 160 CONG. REC. S1348–49 (daily ed. Mar. 6, 2014).

[35] *See, e.g.*, *Comprehensive Resource Center for the Military Justice Improvement Act*, THE OFFICE OF KIRSTEN GILLIBRAND, http://www.gillibrand.senate.gov/mjia (last visited July 29, 2015) (stating that the Military Justice Improvement Act (MJIA) was "unfortunately filibustered again[,] meaning the fight to pass this critically needed reform will continue").

[36] FY14 NDAA, *supra* note 16, § 1702(b). This section of the FY14 NDAA amended 10 U.S.C. § 860 (Article 60, UCMJ) and curtailed the convening authority's ability to disapprove, commute, or suspend sentences in those cases where the maximum sentence

Commanders should play a role in the military justice process. There is some credence, however, to the question of how much of a role the commander should play when it comes to the disposition of offenses which are truly criminal in nature and not just military specific offenses.[37] The commission of offenses such as rape, murder, and sexual assault go beyond the mere disruption of good order and discipline; they have victims that often suffer devastating and sometimes lethal consequences. In these circumstances, it is the command's responsibility to look beyond the focused parameters of command and control, to properly execute their responsibilities as enforcers of the laws and norms of society as a whole. To do this, military justice practitioners and Congress must examine the military justice system, look at the weaknesses and failures that have been identified through the recent onslaught of public scrutiny and senior leader misconduct, and correct them. Only then will commanders truly be able to maintain good order and discipline within the Armed Forces and restore the faith in the service and the justice system that has been eroded by the failure of others to exercise sound judgment.

Piece–meal changes to the military justice system will not be effective where those changes are narrowly made without sufficient forethought into the second and third order effects of those changes on our system as a whole—the changes cannot be made to simply eliminate one possible outcome from a trial, but must be made in light of the system as a whole.[38] The current changes to Article 32 may work for the short term, but they treat the symptoms; they do not provide a cure.

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of confinement that may be adjudged does not exceed two years and the sentence adjudged does not include a punitive discharge or confinement for more than six months, except in limited circumstances when the accused has entered into a pre–trial agreement or has substantially assisted "in the investigation or prosecution of another person who has committed an offense . . . ." *Id.*

> However, even where an exception applies, if the case involves a mandatory minimum sentence of a dishonorable discharge, the convening authority may only commute the sentence to a bad conduct discharge. With respect to other mandatory minimum sentences, they may only be altered by the convening authority when the accused both enters into a pretrial agreement and substantially assists in investigating or prosecuting another offender.

Id.

[37] The author uses the phrase "truly criminal in nature" in reference to traditionally common–law crimes frequently found in the civilian justice system, such as rape, murder, larceny, etc.

[38] For example, the changes made by the FY14 NDAA now permit a victim to refuse to testify at an Article 32 investigation. FY14 NDAA, *supra* note 16, § 1702.

It is time to eliminate the Article 32 proceeding and institute the use of a military grand jury, whose determination regarding whether or not to indict an accused for an offense would be binding on the command and the convening authority. This article will examine the role of Article 32, UMCJ, will trace its history and evolution to what it has become today, and will address the need for further change to pre–trial procedures through the imposition of a grand jury system. Finally, this article will explore the means by which a military grand jury should be implemented, and the manner in which it should be utilized.

II. The Uniform Code of Military Justice

"The fundamental function of the armed forces is 'to fight or be ready to fight wars.'"[39] Because of this unique function and the commander's need to maintain good order and discipline within the ranks, a separate system to administer military justice was created.[40] Today, this system is embodied in what is known as the Uniform Code of Military Justice (UCMJ).[41] The UCMJ, together with the Manual for Courts–Martial[42] (MCM), which, in addition to containing the provisions of the UCMJ, also contains the Military Rules of Evidence (MRE) and the Rules for Courts–Martial (RCM), "establish a military member's rights and the procedures for military prosecutions."[43] Over the years, the UCMJ and the MCM have undergone a number of revisions, and the code today is not the code of years past.

A. Origins of Article 32 and the Uniform Code of Military Justice

Prior to the establishment of the uniform code in May of 1950, the conduct of servicemembers was governed by acts known as the Articles of War.[44] First established by the Second Continental Congress on June 30, 1775, the Articles of War underwent several revisions in 1776, 1806, 1874, 1916, and 1920.[45] It was through these revisions that concern for fairness in the military justice process

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[39] Curry v. Sec'y of Army, 595 F.2d 873, 877 (D.C. Cir. 1979) (citing Toth v. Quarles, 350 U.S. 11, 17 (1955)).

[40] Burns v. Wilson, 346 U.S. 137, 140 (1953) (explaining that Congress established a "Uniform Code of Military Justice applicable to all members of the military establishment" because "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment").

[41] 10 U.S.C. §§ 801–946.

[42] MANUAL FOR COURTS–MARTIAL, UNITED STATES (2012) [hereinafter MCM].

[43] Allen v. United States Air Force, 603 F.3d 423, 425–26 (8th Cir. 2010).

[44] THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE 5–9 (May 20, 1970) [hereinafter BACKGROUND OF THE UCMJ].

[45] *Id.* at 5–7.

was evident, shifting focus from the commander's authority to swiftly administer punishment, to ensuring that those accused of committing offenses were only subjected to fair and just proceedings.

1. The Articles of War of 1920

After the end of World War I, the military justice system was the subject of several studies and discussions based on a proposed revision to the Articles of War of 1916.[46] In August of 1919, the United States Senate, Subcommittee of the Committee on Military Affairs began hearings on bill S. 64, A Bill to Establish Military Justice.[47] During those hearings, emphasis was placed on how to improve the Articles of War of 1916, the lack of a comprehensive body of law, the lack of courts of review to establish *stare decisis*, and the "arbitrary power of the commanding officer" when it came to establishing and executing courts–martial.[48] Ultimately, the Articles of War of 1920 were passed into law as "Chapter II of the Army Reorganization Act" on June 4, 1920.[49]

The new articles contained significant changes to military justice procedures that were more favorable to the accused, including a new prohibition on the reconsideration by a court of an acquittal or a finding of not guilty of any specification.[50] The changes that specifically addressed an accused's rights during pre–trial procedures included the addition of the accused's right to cross–examine witnesses against him at the preliminary investigation,[51] the criminalization of unnecessary delay by the investigating officer or in bringing a case to trial,[52] and the placement of defense counsel on equal footing as prosecutors.[53] With respect to pre–trial investigation of offenses, the 1920 Articles of War prohibited any charge from being referred for trial "until after a thorough and impartial investigation" had occurred.[54]

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[46] *Id.* at 4.

[47] *Establishment of Military Justice: Hearings on S. 64 Before the Subcomm. of the S. Comm. on Military Affairs*, 66th Cong. (1919) [hereinafter *S.64 Hearings*].

[48] *Id.* at 49 (statement of Major (Retired) J.E. Runcie, U.S. Army, United States Military Academy (USMA) Instructor of Law from 1880 to 1884 and judge advocate).

[49] BACKGROUND OF THE UCMJ, *supra* note 44, at 4.

[50] *Id.* at 5 (¶ 11).

[51] *Id.* at 5 (¶ 2).

[52] *Id.* at 5 (¶ 4).

[53] *Id.* at 5 (¶ 7).

[54] Army Reorganization Act, ch. 227, 41 Stat. 759, 802 (1920). In the proposed revisions to the Articles of War of 1916, the provisions concerning pre–trial investigation were found in Article 19. *S.64 Hearings*, *supra* note 47, at 8. However, in the final version of the 1920 Articles of War, passed into law on June 4, 1920, in Chapter II of the Army Reorganization Act, the provisions would be found in Article 70. 41 Stat. 759, 802. Article 70 provided the following:

2. The Articles of War of 1948

After the conclusion of World War II, the Articles of War again underwent significant revision in 1948. In light of studies and reviews of the military justice system after the war, the 1948 changes came about in order to "improve the administration of military justice, to provide for more effective appellate review, to ensure the equalization of sentences, and for other purposes."[55] Under the new articles, pre–trial investigation became governed by Article 46b, which limited the requirement to conduct a pre–trial investigation to those charges that would be referred to a general court–martial[56] for trial.[57] The purpose of the investigation remained: "[T]o inquire into the truth of the matters set forth in the charges, to review the form of the charges, and to make recommendations on how to dispose of a case."[58] In addition, unlawful command influence of courts–martial or the members of a court–martial was prohibited, and accused were now permitted to have counsel present at their pre–trial investigation if they so desired.[59]

> No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross–examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Id.

[55] H.R. REP. NO. 80-1034, at 1 (1947).

[56] Under the UCMJ, there are three levels of court–martial: general, special, and summary. MCM, *supra* note 42, R.C.M. 201(f). A general court–martial is the most severe form of courts–martial, has jurisdiction over all persons in the military for offenses committed under the UCMJ, and can impose all lawful sentences including dishonorable discharge and death. 10 U.S.C.S. §§ 816, 818 (2014). Special courts–martial have jurisdiction to try all persons subject to the code for any noncapital offenses; however, the severity of punishment is limited. 10 U.S.C.S. §§ 816, 819 (2014). The maximum punishment authorized at a special courts–martial is a bad conduct discharge, confinement for one year, forfeiture of two–thirds pay per month for up twelve months, and reduction to E–1 (if an enlisted accused). 10 U.S.C.S. § 819 (2014). Unlike general and special courts–martial, a summary court–martial only has jurisdiction over enlisted servicemembers, consists of only one commissioned officer, may only try those who consent to trial by summary court–martial, and is utilized for minor offenses. 10 U.S.C.S. §§ 816(3), 820 (2014).

[57] Selective Service Act of 1948, ch. 625, § 222, 62 Stat. 604, 633 (1948).

[58] *Id.*

[59] *Id.*

3. Unifying the Code

Despite the changes implemented in the 1948 Articles of War, the Department of Defense (DoD) continued to examine the military justice system. In May of 1948, then Secretary of Defense (SecDef) James Forrestal appointed a committee to examine "the possibility of developing a uniform system of military justice" that would apply to all of the services.[60] The committee sought to create a code that "integrate[d] the military justice systems of the" services; "modernize[d] the existing systems" by protecting "the rights of those subject to the code and increasing public confidence in military justice without impairing" the function or performance of the military; and sought to improve the readability of the code through revision and re–arrangement of the articles.[61] Ultimately, what resulted from this committee's work was the establishment of a Uniform Code of Military Justice (UCMJ) on May 5, 1950.[62]

Codified within the initial version of the UCMJ was what is known to many modern–day military practitioners as the "Article 32 Investigation."[63] Though it had been re–numbered, the substantive provisions are largely the same as they were in the Articles of War of 1948.[64] The provisions of the newly unified code were eventually incorporated into the 1951 Manual for Courts–Martial (1951 MCM).[65] Over the next sixty years, the MCM underwent a number of changes and revisions, each incorporating various changes in the law. The pre–trial investigation of charges required by Article 32, however, remained relatively

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[60] Letter from James Forrestal, Secretary of Defense, to Chan Gurney, Chairman, U.S. Senate Committee on Armed Services (May 14, 1948), http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-I_correspondence.pdf.

[61] Committee on a Uniform Code of Military Justice, Minutes of Meeting, Aug. 18, 1948, at 9, http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-I_memoranda-minutes.pdf.

[62] On this date, the President signed into law H.R. 4080, an act to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard and to enact and establish a Uniform Code of Military Justice. 96 Cong. Rec. 6640 (1950), http://www.loc.gov/rr/frd/Military_Law/pdf/congr-floor-debate.pdf (appearing on page 321).

[63] *See* UCMJ art. 32 (1949), http://www.loc.gov/rr/frd/Military_Law/pdf/morgan.pdf.

[64] *Id.* (Commentary).

[65] MANUAL FOR COURTS–MARTIAL, UNITED STATES (1951) [hereinafter 1951 MCM]. The provisions concerning pre–trial investigation of charges were found in Chapter VII of the 1951 MCM. *Id.* at ¶ 34.

unchanged.[66] Even the guidance found in the 1951 MCM also remained a part of the 2012 MCM, albeit appearing now in the RCM.[67]

B. Article 32, UCMJ Prior to the FY 14 NDAA—The Pre–Trial Investigation

Prior to the FY14 NDAA amendments to Article 32, the proceeding conducted by the Article 32 officer was appropriately called an "investigation."[68] On its face, Article 32 required that the investigating officer inquire into the facts surrounding the allegations specified in the charges, that he ensure the charges were properly written, and that he make a non–binding recommendation to the convening authority on how he believed the convening authority should dispose of the case.[69] In addition to these statutory purposes, the Article 32 investigation also served as a means of discovery for the defense.[70] Though the purpose of the investigation was not to "perfect a case against the accused," it was designed "to secure information on which to determine what disposition should be made of the case."[71]

Titled as an investigation, the procedures employed in the proceeding resembled more of a condensed, loosely–governed trial than an inquiry. The robust investigation that has been utilized over the last fifty plus years was developed to protect the neutrality of the system and to ensure fairness to the accused in response to the many criticisms of the procedures in use during World War II.[72] As described by the U.S. War Department's Advisory Committee on Military Justice, two of the top criticisms of the military justice system were that

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[66] *Compare* 1951 MCM, *supra* note 65, ¶ 34 (mandating pre–trial investigation of charges in accordance with Article 32, UCMJ and providing guidance to the manner in which the investigation should be conducted), *with* UCMJ art. 32 (2012) (requiring that "no charge or specification be referred to a general court–martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made").

[67] MCM, *supra* note 42, R.C.M. 405 (2012).

[68] UCMJ art. 32 (2012).

[69] *Id.* at 32(a).

[70] MCM, *supra* note 42, R.C.M. 405(a), discussion ("The investigation also serves as a means of discovery. The function of the investigation is to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations, not to perfect a case against the accused."). *See also* United States v. Samuels, 27 C.M.R. 280, 286 (1959) (citations omitted) ("It is apparent that [Article 32, UCMJ] serves a twofold purpose. It operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges.").

[71] *Id.*

[72] During World War II approximately 1.7 million courts–martial took place, amounting to "one third of all criminal cases tried in the nation during the same period." THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 191–92 (1975). Because a "large number of civilians" who had been drafted into the war were subjected to these courts–martials, "a loud public clamor was made for a revision of the systems of military justice . . . ." BACKGROUND OF THE UCMJ, *supra* note 44, at 6.

the "command frequently dominated the courts in the rendition of their judgment," and that the pre–trial investigations "were frequently inefficient or inadequate."[73] The committee subsequently made recommendations on how to improve the system, including that of making mandatory the appointment of defense counsel who were actually lawyers.[74] This recommendation, along with a number of others, eventually became law and made its way into the Articles of War of 1948, and the Uniform Code of Military Justice.[75]

Accordingly, a system was born wherein an officer, commonly without any legal experience,[76] was appointed to serve in a judicial capacity[77] to investigate allegations of criminal misconduct and to preside over an investigative proceeding wherein a trained prosecutor and defense counsel might square off against each other: calling witnesses; presenting evidence; making objections; and making arguments all in the hope of swaying the investigating officer to find in their favor.[78] Though mandatory prior to referring a case to general court–martial, the investigator's findings were not binding on the convening authority. Although an important step in the quest for justice, the proceeding and resulting report were sometimes nothing more than a mock trial for the government, defense, and their witnesses—and an additional piece of data for the convening authority to consider in making his final decision on whether or not to refer the case to trial. Regardless

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[73] STAFF OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE, REP.OF ADVISORY COMMITTEE ON MILITARY JUSTICE 4 (Comm. Print Dec. 13, 1946), http://www.loc.gov/rr/frd/Military_Law/pdf/ report-war-dept-advisory-committee.pdf).

[74] *Id.* at 11.

[75] Selective Service Act of 1948, *supra* note 57, at 629. It was in the 1948 Articles of War where the military justice proceedings became more judicial in nature and less of a purely command–focused tool. *Id.* In addition to the mandatory appointment of lawyer defense counsel when lawyer trial counsel were appointed to represent the government, it was made mandatory that the military judge be a judge advocate, the Judge Advocate General was given the authority to assign its officers, counsel were prohibited from acting in conflicting capacities on the same cases, and a prohibition was emplaced on reprimanding of members of a court–martial for the exercise of their duties. *Id.* at 629, 634, 639. *See also* BACKGROUND OF THE UCMJ, *supra* note 44, at 6–9.

[76] MCM, *supra* note 42, R.C.M. 405(d)(1) ("The commander . . . shall detail a commissioned officer not the accuser . . . who shall conduct the investigation and make a report of conclusions and recommendations.").

[77] United States v. Reynolds, 24 M.J. 261, 263 (C.M.A. 1987) ("As we have stated, the appointed Article 32 officer must be impartial and, as a quasi–judicial officer, is held to similar standards set for a military judge." (citing United States v. Collins, 6 M.J. 256 (C.M.A. 1979)). *See Samuels*, 27 C.M.R. at 286 (citations omitted) (stating that the Article 32 "is judicial in nature").

[78] *See generally* MCM, *supra* note 42, R.C.M. 405; U.S. DEP'T OF ARMY, PAM. 27–17, PROCEDURAL GUIDE FOR ARTICLE 32(B) INVESTIGATING OFFICER (24 July 2014) [hereinafter 2014 DA PAM. 27-17] (describing the procedures for the investigating officer to open the proceedings, take testimony, and examine evidence).

of whether or not the investigating officer found that reasonable grounds[79] existed to believe that the accused committed the alleged offenses, the convening authority was free to independently decide whether or not to refer the case to trial.[80]

The usefulness counsel make of the Article 32 investigation in preparation for trial is entirely dependent on the counsel's choice in how to use it. In some cases, the Article 32 investigation is used as a discovery tool that may help counsel involved in the case identify weaknesses and strengths for their arguments. Defense counsel may glean the government's posture from questions, and perhaps its plans to prove certain elements of the charged offenses. More importantly, the investigation gives counsel the ability and opportunity to evaluate witnesses. The outcome of the investigation may even influence the way each party approaches the future proceedings or pre–trial negotiations. An investigation that goes poorly for the government may result in the dismissal of charges, or the acceptance of an offer to plead guilty with a sentencing agreement that otherwise would not have been accepted. Conversely, an investigation that goes well for the government could result in the inducement of a guilty plea in a case that might otherwise have gone to trial and cost the military more money and time to try in front of a panel. In either event, the varying goals of the defense and trial counsel shape the way counsel approach the proceeding.

If a defense counsel believes, notwithstanding his presentation, that sufficient evidence exists for the investigating officer to reach the reasonable grounds standard, he may choose to keep his strategy close–hold and forego cross–examination, or decline to present any evidence during the investigative proceeding. On the other hand, if the defense counsel believes that he has an opportunity to portray a witness or evidence in a poor light or believes that the government lacks sufficient evidence to establish the reasonable grounds standard, he may choose to vigorously cross–examine witnesses and present his case as if he were at trial.

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[79] MCM, *supra* note 42, R.C.M. 405(j)(2)(H). The investigating officer's report of investigation must include "[t]he investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged." *Id.* As defined in the Manual for Courts–Martial (MCM), "reasonable grounds" is that "kind of reliable information that a reasonable, prudent person would rely on which makes it more likely than not that something is true . . . . A person who determines probable cause may rely on the reports of others." MCM, *supra* note 42 discussion; R.C.M. 302(c).

[80] MCM, *supra* note 42, R.C.M. 601. Once a convening authority finds that reasonable grounds exist to believe an accused has committed an offense, and he has received a charge sheet with specifications that allege the offense(s), the convening authority is only required to "ha[ve] received" the advice of the staff judge advocate regarding the charges before he refers them to trial. *Id.* at 601(d)(1)-(2). The convening authority's findings "may be based on hearsay in whole or in part" and he may consider information from "any source." *Id.* at 601(d)(1).

It is this latter strategy that was observed during the midshipmen's trial concerning the Naval Academy rape case. Without specific knowledge of the defense's strategy at this particular investigation, what is clear from the media coverage of the Article 32 investigation is that counsel in that case vigorously attacked the foundations of the allegations by zealously asking questions of the victim.[81] It was ultimately the midshipmen's counsels' zealous representation that cast a brighter light on the military justice system and the manner in which pre–trial investigations were conducted, and members in Congress called for change.[82]

C. Article 32, UCMJ Post FY 14 NDAA—The Preliminary Hearing

Unlike the post–World War II changes to the UCMJ that were made to protect servicemembers' and accuseds' rights, the FY14 NDAA changes to the UCMJ and the military justice process were made with an increased focus on the protection of victims and their rights. These changes occurred in the wake of the DoD's renewed focus on sexual assault and the handling of sex–related crimes in the military. One example is the recent change to Article 32. On December 26, 2014, Article 32 officially became a "preliminary hearing" rather than an "investigation," in accordance with the FY14 NDAA.[83] More than a change in title, the new article substantively altered the way military justice practitioners process pre–trial actions.

The new Article 32 no longer calls for an investigation into "the truth of the matter set forth in the charges," but rather, a "preliminary hearing's" purpose is to determine "whether there is probable cause to believe an offense has been committed and the accused committed the offense."[84] No changes were made to the preliminary hearing officer's (PHO) requirements to consider the form of the charges and to make a recommendation as to the proposed disposition of the case; however, the PHO must also make a determination as to "whether the convening authority has court–martial jurisdiction over the offense and the accused."[85]

In addition to the substantive changes to the purpose of the preliminary hearing, the new article also made procedural changes to the manner in which the hearing is conducted. These changes included a renewed emphasis on the requirement that the PHO be an impartial judge advocate certified under Article 27(b), UCMJ "whenever practicable."[86] Appointment of a non–judge advocate PHO is authorized, but only under "exceptional circumstances in which the

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[81] *See infra* p. 3; *see* FY14 NDAA, *supra* note 16.
[82] *See* FY14 NDAA, *supra* note 16.
[83] *Id.*; 10 U.S.C.S. § 832 (2014).
[84] 10 U.S.C.S. § 832(a)(2)(A) (2015).
[85] 10 U.S.C.S. § 832(a)(2)(B)-(D) (2015).
[86] 10 U.S.C.S. § 832(b)(1) (2015).

interests of justice warrant."[87] This exception does not apply when the government is prosecuting a case involving sexual assault, in which case the Article 32 PHO must be a judge advocate.[88]

Another change to the proceeding is the limitation of evidence and examination of witnesses to only that which is necessary to determine the existence, or lack thereof, of probable cause and to answer the question of jurisdiction over the offenses and the accused.[89] The accused is still permitted to present evidence in defense and mitigation and to cross–examine witnesses; however, that presentation and cross–examination is limited to the aforementioned purposes of the hearing[90] and is further limited should any military victim exercise their newly conferred right to refuse to testify at the preliminary hearing.[91] In short, the newly implemented rules were designed to eliminate the use of the preliminary hearing as a discovery tool.[92]

While the scope of the preliminary hearing was narrowed, the authority given to the PHO was expanded.[93] Under the new paradigm, the PHO has the authority to direct government counsel, over their objection, to issue *subpoenas duces tecum* to secure evidence not under the control of the government when the PHO determines that "the evidence is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing."[94] In addition, the PHO

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[87] *Id.*

[88] Memorandum from SecDef to Sec'ys of the Military Dep'ts et al., subject: Sexual Assault Prevention and Response (Aug. 14, 2013), http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_ Initiatives_20130814.pdf.

[89] 10 U.S.C.S. § 832(d)(4) (2015).

[90] 10 U.S.C.S. § 832(d)(2) (2015).

[91] 10 U.S.C.S. § 832(d)(3) (2015). Pursuant to this provision, "[a] victim may not be required to testify at the preliminary hearing." *Id.*

[92] *See* U.S. Dep't of Def., Report to the President of the United States on Sexual Assault Prevention and Response, Annex 4 at 19 (Nov. 25, 2014), http://www.sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Annex_4_OGC.pdf) (stating that defense counsel's use of the Article 32 hearings "to gather evidence by calling witnesses whom they would question about a broad range of topics . . . will no longer be an authorized purpose" of the hearing).

[93] Exec. Order. No. 13,696, 80 Fed. Reg. 35,783 (June 17, 2015) [hereinafter Exec. Order. 13,696] (amending Rules for Courts-Martial (RCM) 405 and 703).

[94] *Id.* at 35, 794–96 (amending RCM 405(g)). In addition to the listed determinations, the PHO must also find that the issuance of the subpoena would not cause undue delay to the preliminary hearing. *Id.* at 35, 795. While this amendment to RCM 405 provides the PHO with considerable authority, this recent change eliminated the PHO's prior authority to issue subpoenas. *See* Exec. Order. No. 13,669, 79 Fed. Reg. 34,999, 35,002 (June 18, 2014) [hereinafter Exec. Order. 13,669] (amending RCM 703(e)(2)(C)) (granting authority to issue a subpoena to either the investigating officer or "detailed counsel representing the United States at" the preliminary hearing). Though a subpoena issued by the PHO or detailed counsel may compel the production of books, papers, documents, and other data,

must use the procedures a military judge would use at trial to evaluate testimony and evidence in accordance with Military Rule of Evidence 412.[95]

These changes to the Article 32 procedures demonstrate that the pendulum has swung from a focus on protecting an accused and ensuring fairness of the system, to focusing on protecting victims and demonstrating sensitivities toward them during the process. Article 32 was initially developed as a tool to check the power of commanders, and to prevent the unfair levying of charges against an accused servicemember. The current system has become more like a federal grand jury procedure.[96]

III. The Federal Criminal Justice System and the Grand Jury

A. Constitutional Requirements

1. The Fifth Amendment

When the federal judiciary was established in 1789, there was no mention of a grand jury before which allegations of criminal misconduct would be brought to determine whether a case should proceed to trial.[97] It was not until 1791 when the Fifth Amendment to the Constitution was ratified and adopted in the Bill of Rights that the grand jury was established.[98] The Fifth Amendment provides,

> No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger; nor shall any person be subject, for the same

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it "shall not command any person to attend or give testimony at" the preliminary hearing. Exec. Order. 13,696, *supra* note 93, at 35,803 (amending RCM 703(e)(2)(B)).

[95] Exec. Order. 13,696, *supra* note 93, at 35,796 (amending RCM 405(h)). Military Rule of Evidence (MRE) 412 concerns the general inadmissibility of evidence of a victim's sexual behavior or predisposition in sex offense cases, except under limited circumstances. MCM, *supra* note 42, MIL. R. EVID. 412 (Supp. 2014).

[96] Article 32 proceedings have frequently been likened to grand jury proceedings. *See, e.g.*, Morgan v. Perry, 142 F.3d 670, 677 (3d Cir. 1998) (stating that the Article 32 investigation is "the military counterpart to a civilian grand jury"); United States v. MacDonald, 531 F.2d 196, 209 (4th Cir. 1976) (Craven, dissenting) (referring to Appellant's Article 32 investigation as "the substantial equivalent of an open grand jury proceeding resulting in the failure to return a true bill"), *rev'd*, 435 U.S. 850 (1978); Umphreyville v. Gittins, 662 F.Supp.2d 501, 504 n.2 (W.D. Va. 2009) (noting that the Article 32 investigation is similar to the civilian grand jury). However, as discussed *infra*, in Part III, the recent changes truly do re–align the proceedings to be more like those used in the federal court system.

[97] Judiciary Act of 1789, 1 Stat. 73 (1789).

[98] U.S. CONST. amend. V.

> offence, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[99]

Adopted from the grand jury system developed in England between the twelfth and seventeenth centuries,[100] the grand jury system instituted by the American colonies was to serve as a guardian against prosecution motivated by "malice," "ill will," or the like.[101] Accordingly, a system was established wherein a jury would be assembled, not to determine guilt or innocence, but to determine whether sufficient evidence existed to believe a crime had occurred.

2. The Sixth Amendment

In addition to the requirements of the Fifth Amendment, criminal proceedings must comply with the Sixth Amendment's guarantees, including that the accused "be informed of the nature and cause of the accusation."[102]

B. Initiating a Criminal Case in the Federal Court System

Though the provisions of the Fifth Amendment specifically provide that an accused may only be held to answer for his capital or felony[103] offenses upon a "presentment or indictment of a grand jury,"[104] grand jury proceedings are not the only route that a prosecutor may take to bring a case to trial.

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[99] U.S. CONST. amend. V.

[100] Costello v. United States, 350 U.S. 359, 362 (1956) ("The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders.").

[101] Wood v. Georgia, 370 U.S. 375, 390 (1962) (citations omitted) ("Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.").

[102] U.S. CONST. amend. VI.

[103] The term "infamous" rather than "felony" appears in the Fifth Amendment. U.S. CONST. amend. V. However, in accordance with case law examining the term "infamous," the term "felony" has been incorporated into Rule 7 of the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 7(a)(1). *See also* FED. R. CRIM. P. 7(a)(1), Notes to Subdivision (a).1 (explaining the definition of an infamous crime); DIAMOND, FEDERAL GRAND JURY PRACTICE AND PROCEDURE 49 (4th ed. 2001) (citing Green v. United States, 356 U.S. 165, 183 (1958) ("Courts have ruled that an 'infamous' crime is one punishable by more than one year imprisonment.").

[104] U.S. CONST. amend. V.

In the federal system, a criminal case generally begins when a formal accusation, usually in the form of an indictment or information,[105] is brought against a person alleging that he has committed an illegal act.[106] The Federal Rules of Criminal Procedure require in felony cases (those punishable by death or imprisonment for more than one year), that the offense be prosecuted by an indictment or information.[107] In misdemeanor and petty offense cases, trial may also proceed by complaint or, with respect to petty offenses, on a citation or violation notice.[108] An accused may waive prosecution by indictment and be prosecuted by information for offenses punishable by more than one year of imprisonment after being advised of the nature of the charge and of his rights.[109] However, an accused may not waive prosecution by indictment for a capital offense.[110]

Regardless of the method of prosecution, "the indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offenses charged and must be signed by an attorney for the government."[111] In addition, "[f]or each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated."[112] Once a prosecutor determines that a case must be heard by the grand jury, he proceeds by submitting and presenting his case to the impaneled jury in accordance with the responsible court's rules.[113]

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[105] An "information" is a formal charge brought by the prosecutor alone without leave of court. *See* DIAMOND, *supra* note 103, at 50.

[106] United States v. Allied Asphalt Paving Co., 451 F.Supp. 804 (N.D. Ill. 1978) "The basic purpose of an indictment or information is to clearly apprise a defendant of the charges and what he must be prepared to meet." *Id.*

[107] FED. R. CRIM. P. 7(a)(1).

[108] FED. R. CRIM. P. 7(a)(2), 58(b)(1).

[109] FED. R. CRIM. P. 7(a)(2).

[110] FED. R. CRIM. P. 7(b). *See also* United States v. Hartwell, 448 F.3d 707, 716 (4th Cir. 2006) (holding that noncompliance with the provision of FED. R. CRIM. P. 7(b) which "does not permit a defendant charged with a capital crime to waive indictment" did not deprive the court of subject–matter jurisdiction); Matthews v. United States, 622 F.3d 99 (2d Cir. 2010) (holding that an un–waivable right to indictment by a grand jury "exists only where the charging instrument exposes the defendant to the risk of capital punishment"), *cert. denied*, 2011 U.S. LEXIS 1138 (2011).

[111] FED. R. CRIM. P. 7(c)(1).

[112] *Id.*

[113] In accordance with Federal Rule of Criminal Procedure 6(a)(1), the district courts have the authority to summon "one or more grand juries" as "the public interest requires," FED. R. CRIM. P. 6(a)(1); *See also* Petition of A & H Transportation, Inc., 319 F.2d 69, 71 (4th Cir. 1963), holding,

> The authority to convene or discharge a grand jury is vested in the District Court. Its exercise of discretion to convene, or not to convene,

C. The Grand Jury

1. Impanelment

When a grand jury is seated, it must have at least sixteen, but no more than twenty–three members.[114] During selection, "the court may also select alternate jurors."[115] The selection of the grand jury members must comply with The Jury Selection and Service Act,[116] which requires that the juries be "selected at random from a fair cross section of the community in the district or division wherein the court convenes."[117] The exclusion of grand jurors on the basis of "race, color, religion, sex, national origin, or economic status" is prohibited.[118] Generally, individuals are qualified to serve on a grand jury provided they are citizens of the United States; are eighteen years old; have resided in the judicial district for which the jury is being impaneled for a period of one year; can sufficiently read, write, speak, and understand the English language; are mentally and physically able to "render satisfactory jury service" and do not have state or federal charges pending against them for a crime punishable by more than one year of imprisonment or have not been convicted of the same for which their civil rights have not been restored.[119] Challenges to the composition of the jury may be made by "[e]ither the government or a defendant . . . on the ground that it was not lawfully drawn, summoned, or selected, and [either] may challenge an individual juror on the ground that the juror is not legally qualified."[120]

2. Procedures

> a special grand jury, or to discharge a grand jury, is not reviewable on appeal, and a Court of Appeal cannot by mandamus, or any other extraordinary writ, inject itself into the discretionary area reserved to the District Court.

Cert. denied, 375 U.S. 924 (1963); *See generally* 18 U.S.C. § 3331 (giving authority to the district courts to summon and impanel special grand juries); DIAMOND, *supra* note 103, at 10–11 (noting that "the court" referenced in Federal Rule of Criminal Procedure 6(a)(1) "is the federal district court, which has virtually unreviewable discretion respecting grand jury impanelment").

[114] FED. R. CRIM. P. 6(a)(1).

[115] *Id.*

[116] 28 U.S.C. §§ 1861–1878.

[117] 18 U.S.C. § 1861.

[118] 18 U.S.C. § 1862. *See also* Vasquez v. Hillery, 474 U.S. 254, 264 (1986) (affirming the grant of *habeas corpus* relief where an accused was convicted in lawfully conducted state court proceedings, but only after indictment by a grand jury which was selected through the improper use of racial discrimination).

[119] 18 U.S.C. § 1865.

[120] FED. R. CRIM. P. 6(b)(1).

Once impaneled, the court will appoint a foreperson (and a deputy foreperson to act in the foreperson's absence) who is responsible for recording the number of jurors concurring in every indictment and filing the record with the clerk when the court so orders.[121] In addition, the foreperson may administer oaths and affirmations and sign all indictments.[122] Jurors are then sworn, usually by the clerk of the court, and take an oath to "inquire diligently and objectively into all federal crimes committed within the district about which they have or may obtain evidence, and to conduct such inquiry without malice, fear, ill will, or other emotion."[123] The judge then provides instructions to the jurors and advises them of their obligations and duties.[124]

It is the grand jury's task to "determine whether the person being investigated by the government shall be tried for" whatever crime it is he is suspected of committing.[125] To do so, the grand jury receives evidence and information, usually presented by the "attorney for the government."[126] In order to take evidence, a quorum of sixteen members of the grand jury must be present.[127] When quorum is met, the attorney for the government usually presents the evidence, in whatever form it may be, to the grand jury.[128] If the grand jury believes additional information is necessary, it may call more witnesses.[129] Witnesses that are called are sworn to their testimony and both the government attorney and the grand jurors are able to ask questions.[130]

During the presentation of evidence, the only personnel allowed to be present are the "attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device."[131]

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121 FED. R. CRIM. P. 6(c).
122 *Id.*
123 Admin. Office of the U.S. Courts, *Handbook for Federal Grand Jurors* 7, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/FederalCourts/Jury/grand-handbook.pdf (last visited July 29, 2015) [hereinafter Handbook].
124 *Id.* This is also known as the "Charge to the Grand Jury." *Id.* at 16.
125 *Id.* at 4.
126 FED. R. CRIM. P. 6(d). "Attorney for the government" is the attorney general, an authorized assistant of the attorney general, a U.S. attorney, an authorized assistant U.S. attorney, and certain other persons. FED. R. CRIM. P. 1(b). *See also* 28 U.S.C. § 547 (giving U.S. attorneys the responsibility to "prosecute for all offenses against the United States"); 28 U.S.C. § 542 (giving assistant U.S. attorneys the authority to conduct proceedings in the district of their appointment).
127 Handbook, *supra* note 123, at 7.
128 *Id.* at 8.
129 *Id.*
130 *Id.*
131 FED. R. CRIM. P. 6(d).

Notably, the accused is not present during the grand jury proceedings[132] unless called to testify, but has no right to present testimony.[133]

Grand juries are not bound by the rules of evidence, with the exception of privileges, [134] and an indictment may be issued based solely on hearsay evidence.[135] However, hearsay evidence may not be presented in a manner that "misleads the grand jury into thinking it is receiving firsthand testimony when it is in fact receiving hearsay" nor may hearsay evidence be solely relied upon "if there is a high probability that the defendant would not have been indicted had only nonhearsay evidence been used."[136]

During deliberations and voting, "[n]o person other than the jurors, and any interpreter" may be present.[137] Upon assembly for deliberation, and after all unauthorized personnel have vacated the room,

> [t]he foreperson will ask the grand jury members to discuss and vote upon the question of whether the evidence persuades the grand jury that a crime has probably been committed by the person being investigated by the government and that an indictment should be returned. Every grand juror has the right to express his or her view of the matter under consideration, and grand jurors should listen to the comments of all their fellow grand jurors before making up their minds. Only after each

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[132] Handbook, *supra* note 123, at 10 ("Normally, neither the person being investigated by the government nor any witness on behalf of that person will testify before the grand jury.").

[133] United States v. Smith, 552 F.2d 257 (8th Cir. 1977); United States v. Gardner, 516 F.2d 334 (7th Cir. 1975), *cert. denied*, 423 U.S. 861 (1975); United States v. Niedelman, 356 F. Supp. 979 (S.D.N.Y. 1973). *See also* U.S. Department of Justice, *U.S. Attorney's Manual*, Offices of the U.S. Attorneys 9-11.152, http://www.justice.gov /usao/eousa /foia_reading_room/usam/title9/11mcrm.htm#, 9-11.152 (stating that the U.S. attorney has "no legal obligation to permit such witnesses to testify" but a "refusal to do so can create the appearance of unfairness").

[134] FED. R. EVID. 1101(d)(2); United States v. Calandra, 414 U.S. 338 (1974); United States v. Ortiz, 687 F.3d 660 (5th Cir. 2012).

[135] United States v. Bowie, 618 F.3d 802 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 954 (2011); United States v. Steele, 685 F.2d 793, 806 (3rd Cir. 1982) (citation omitted) ("We have held that an indictment may be based upon hearsay evidence."); Costello v. United States, 350 U.S. 359, 362-63 (1956) (holding that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act" and that indictment based entirely on hearsay evidence was not in violation of Fifth Amendment protections).

[136] United States v. Restrepo, 547 Fed. Appx. 34, 44 (2d. Cir. 2013) (quoting United States v. Ruggiero, 934 F.2d 440, 447 (2d Cir. 1991)).

[137] FED. R. CRIM. P. 6(d)(2).

> grand juror has been given the opportunity to be heard will the vote be taken.[138]

In order to indict, at least twelve jurors must concur.[139] This is also known as a "true bill."[140] If twelve jurors do not concur, then "the grand jury vote a 'no bill,' or 'not a true bill.'"[141] As previously discussed, the determination of whether the grand jurors vote a "true bill" or "no true bill" depends on whether they are convinced that probable cause exists to believe the person being investigated has committed the crime.[142]

The indictment must contain a "plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government."[143] When reviewing an indictment for sufficiency, the court will evaluate it by "reading it as a whole, giving practical effect to its language."[144] An indictment is sufficient if it:

> contains the elements of the charged offense in sufficient detail (1) to enable the defendant to prepare this defense; (2) to ensure him that he is being prosecuted on the basis of the facts presented to the grand jury; (3) to enable him to plead double jeopardy; and (4) to inform the court of the alleged facts so that it can determine the sufficiency of the charge.[145]

"The return of an indictment formally commences a criminal prosecution."[146] Because the indictment acts as a charging instrument, it has two purposes: "to apprise the accused of the charges against him and to describe the crime with which he is charged with sufficient specificity to enable him to protect against

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138 Handbook, *supra* note 123, at 12.
139 FED. R. CRIM. P. 6(f).
140 Handbook, *supra* note 123, at 5.
141 *Id.*
142 United States v. Marcucci, 299 F.3d 1156 (9th Cir. 2002) (citations omitted) ("The Supreme Court has repeatedly emphasized that the grand jury protects the individual by requiring probable cause to indict."); Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972) ("[T]he ancient role of the grand jury . . . has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions."). *See also* Admin. Office of the U.S. Courts, *Model Grand Jury Charge*, US COURTS, http://www.uscourts.gov/FederalCourts/JuryService/ModelGrandJuryCharge.aspx (2005) [hereinafter Model Charge]; Handbook, *supra* note 123, at 18 (establishing the probable cause standard as "finding necessary in order to return an indictment against the person being investigated" for the alleged crime).
143 FED. R. CRIM. P. 7(c).
144 DIAMOND, *supra* note 103, at 52 (citing United States v. McNeese, 901 F.2d 585, 602 (7th Cir. 1990) (additional citations omitted)).
145 United States v. Bernhardt, 840 F.2d 1441, 1445 (9th Cir. 1988) (citation omitted), *cert. denied sub nom.* McCarthy v. United States, 484 U.S. 954 (1988).
146 DIAMOND, *supra* note 103, at 49.

future jeopardy for the same offense."[147] Provided the indictment (or information for that matter) complies with the sufficiency requirements discussed *infra*, it will fulfill the Sixth Amendment's requirement that the defendant be informed of the nature of the charges levied against him.[148]

IV. The Right Time to Change

A. Dynamic Military Justice and Uncertain Times

On May 3, 2013, the DoD gave notice that it was establishing the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel or RSP).[149] The RSP was given the task of providing "recommendations on the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses" covered by Article 120, UCMJ, 10 U.S.C. § 920.[150] One of the required tasks was to compare the "military and civilian systems for the investigation, prosecution, and adjudication" of these crimes.[151]

Throughout the twelve months following its establishment, "the RSP held [fourteen] days of public meetings," and along with its subcommittees conducted an additional sixty–five "subcommittee meetings and preparatory sessions."[152] On June 27, 2014, the RSP submitted its report to the SecDef and the members of both the Senate and House Armed Services Committees.[153] The panel made 132

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147 United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976) (citing Hamling v. United States, 418 U.S. 87, 117 (1974), *rehearing denied*, 419 U.S. 885 (1975)); Russell v. United States, 369 U.S. 749, 763-64 (1962); United States v. Debrow, 346 U.S. 374, 377-78 (1953)).

148 *Russell*, 369 U.S. at 761. *Accord* United States v. Higgs, 353 F.3d 281, 296 (4th Cir. 2003) ("In conjunction with the notice requirement of the Sixth Amendment, the Indictment Clause provides two additional protections: the right of a defendant to be notified of the charges against him through a recitation of the elements, and the right to a description of the charges that is sufficiently detailed to allow the defendant to argue that future proceedings are precluded by a previous acquittal or conviction."), *cert. denied*, 2004 U.S. LEXIS 7689 (2004).

149 Notice of Establishment of the Response Systems to Adult Sexual Crimes Panel, 78 Fed. Reg. 25, 972 (May 3, 2013) [hereinafter RSP]. The RSP was established pursuant to the National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA). *See* FY13 NDAA, PUB L. NO. 112-239, § 576, 126 Stat. 1632 (2013).

150 Notice of Establishment of the Response Systems to Adult Sexual Crimes Panel, 78 Fed. Reg. 25, 972 (May 3, 2013).

151 *Id.*

152 REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL at 1 (June 27, 2014) [hereinafter RSP REPORT], http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/00_ Report_Final_20140627.pdf.

153 *Id.*

recommendations.[154] One such recommendation asked the SecDef to consider directing "the Military Justice Review Group or Joint Service Committee to evaluate if there are circumstances when a general court–martial convening authority should not have authority to override an Article 32 investigating officer's recommendation against referral of an investigated charge for trial by court–martial."[155] In other words, the RSP recommended that consideration be given to whether the convening authority should be bound by the Article 32 officer's decision under certain circumstances. On December 15, 2014, the SecDef issued his decision concerning the various recommendations made by the RSP.[156] He approved the RSP's recommendation to evaluate the possibility of a binding Article 32 officer's recommendation, and alteration of the plea–bargaining process.[157]

The review of the military justice system did not end with the RSP, and the examination of the military justice system continues in earnest. On June 27, 2014, the DoD established the Judicial Proceedings Panel (JPP) to "conduct an independent review and assessment of judicial proceedings conducted under the [UCMJ] involving adult sexual assault and related offenses since the amendments made by section 541 of the [FY12 NDAA] for the purpose of developing recommendations for improvements to such proceedings."[158] Among the many issues up for the panel's review, one included a review and assessment of "those instances in which prior sexual conduct of [an alleged sexual assault victim] was considered" during an Article 32, UCMJ investigation and "any instances in which prior sexual conduct was determined to be inadmissible."[159] Since its establishment, the JPP has held thirteen public meetings with various officials, including DoD counsel, active and retired military law practitioners, civilian experts, numerous professors, and other legal scholars.[160]

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[154] *Id.*

[155] RSP REPORT, *supra* note 152, at 49 (listing RSP Recommendation 116). Among the multitude of other recommendations, the RSP recommended that the military plea–bargaining process be reviewed (at Recommendation 117) and requested that the possibility and ramifications of involving a military judge earlier in the proceedings be evaluated (at Recommendation 118). *Id.*

[156] Memorandum from SecDef, to Sec'ys of the Military Dep'ts. et al., subject: DoD Implementation of the Recommendations of the Response Systems to Adult Sexual Assault Crimes Panel (Dec. 15, 2014) [hereinafter RSP Recommendation Implementation], http://jpp.whs.mil/Public/docs/03_TopicAreas/01General_Information/05_DoDResponse RSPRecommendations_20141215.pdf.

[157] *Id.* at enclosure 2.

[158] Notice of Establishment of the Judicial Proceedings Panel, 79 Fed. Reg. 36,480 (June 27, 2014) [hereinafter JPP].

[159] *Id.*

[160] Judicial Proceedings Panel, http://jpp.whs.mil/ (Meetings; Transcripts) (last visited Sept. 16, 2015).

In addition to the RSP and the JPP, the SecDef directed the DoD General Counsel to conduct a "comprehensive review of the [UCMJ] and the military justice system."[161] In turn, the General Counsel established the Military Justice Review Group (MJRG) to carry out this task.[162] At the time of this article, this group continues to evaluate the military justice system. The General Counsel's report is expected to include an analysis of the UCMJ, the MCM, and recommendations for "any appropriate amendments."[163]

Though the RSP and JPP were established to review the DoD's procedures when processing sexual assault cases (and the treatment of victims of sexual assault), the changes resulting from their recommendations will have a much broader effect. The recommended changes are only a starting point, and may affect how *all* military justice cases are processed and tried. Accordingly, the time is ripe to implement and enact further change and correction to the system. To be sure, one only need review the recent and wide–ranging changes to the UCMJ and the MCM that have forced counsel to reacquaint themselves with the law, adjust their tactics, and modify their procedures.

The FY14 NDAA enacted thirty–six provisions concerning sexual assault.[164] As described by the RSP, "[c]ollectively, the thirty–six sexual assault related provisions included in the FY14 NDAA represent the most comprehensive modification of the military justice system in decades."[165] The proposed and instituted changes to the U.S. Code and the MCM have been extensive and challenging for all involved in the process. The time is ripe for further change, considering that the MJRG and Joint Service Committee are now evaluating whether binding decisions by Article 32 officers have a place within military judicial process, and whether it is feasible and advisable to allow military judges to take a more expansive and earlier interest in the proceedings. Congress and the DoD have a rare opportunity to make a number of changes at once. Making the changes all at one time will avoid repeated changes in the future. It will also meet both the requirement to improve the manner in which the military investigates and

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[161] Memorandum from Sec'y of Def., to Sec'ys of the Military Dep'ts et. al., subject: Comprehensive Review of the Uniform Code of Military Justice (Oct. 18, 2013).

[162] Notice of Comprehensive Review of the Military Justice System, Establishment of Military Justice Review Group, 79 Fed. Reg. 28,688 (May 19, 2014) [hereinafter MJRG].

[163] Memorandum from Sec'y of Def., to Sec'ys of the Military Dep'ts et. al., subject: Comprehensive Review of the Uniform Code of Military Justice (Oct. 18, 2013) [hereinafter Comprehensive Review of the UCMJ]. The Military Justice Review Group's (MJRGs) report for recommending changes to the UCMJ was due on March 25, 2015, and the report recommending changes to the MCM was due on September 21, 2015. *See* Notice of Revision to MJRG, *supra* note 162, 79 Fed. Reg. 52,306 (Sept. 3, 2014). The legislative proposal report on the UCMJ was submitted to the General Counsel on March 25, 2015 and is undergoing "internal DoD and Executive Branch review." MJRG, http://www.dod.gov /dodgc/mjrg.html (last visited Sept. 16, 2015).

[164] FY14 NDAA, *supra* note 16.

[165] RSP REPORT, *supra* note 152, at 58.

prosecutes offenses (not just those pertaining to sexual assault), and the need to maintain impartiality and fairness toward those accused of offenses. Additionally, it will fulfill the mandate to improve our treatment of victims, with respect to privacy, assistance, and the demand for justice.

B. The Article 32 Preliminary Hearing and the Grand Jury: A Comparison

The evolution of the Article 32 to a preliminary hearing rather than an investigation has aligned the proceeding, to some extent, with the federal grand jury system. The most similar function between the two proceedings is their established purpose: to determine whether or not probable cause exists to believe an accused committed an offense.[166] Of course, the processes used by each are vastly different. In a federal grand jury, the accused does not have the right to be present at the proceeding,[167] as compared with Article 32, where the accused not only has the right to be present, but to be present with counsel, to make a statement, to hear witness testimony, and to cross–examine witnesses.[168] Some of these procedural differences can be attributed to the posture of the case with respect to timing. Unlike a subject in a federal grand jury proceeding, a subject is charged or placed under indictment only after the grand jury returns a true bill, whereas the servicemember–accused has already been charged when he is brought before the Article 32 PHO.[169]

While there are a number of differences, such as the absence of the accused and the requirement for secrecy during the grand jury proceeding, [170] substantively, the two proceedings are generally the same. In both forums, evidence must be presented to the jurors or PHO to determine the existence, or lack thereof, of probable cause; the rules of evidence are generally inapplicable;[171]

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[166] *Compare* 10 U.S.C.S. § 832(a)(2)(A) (2015) *with* Model Charge, *supra* note 142, *and Kaley*, 134 U.S. at 1098.

[167] Handbook, *supra* note 123, at 10.

[168] 10 U.S.C.S. § 832(d) (2015).

[169] MCM, *supra* note 42, R.C.M. 403–404. Within the military, the authority to dispose of charges rests with those authorized to convene courts–martial or to administer non–judicial punishment under Article 15, UCMJ. MCM, *supra* note 42, R.C.M. 401. Once a commander authorized to convene courts–martial has received the charges, he may direct a pre–trial investigation under RCM 405. MCM, *supra* note 42, R.C.M. 403–404.

[170] FED. R. CRIM. P. 6(e). For a complete history and the purpose, relevance, and concern regarding a grand jury's entitlement to secrecy, *see* Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U.L. REV. 1 (1996).

[171] *Compare* Exec. Order. 13,696, *supra* note 93 (amending RCM 405(h)) (providing that the "Military Rules of Evidence do not apply" to the preliminary hearing with the exceptions of privilege and MRE 412), *with* FED. R. EVID. 1101(d)(2) (rules of evidence do not apply "except for those on privilege" to grand–jury proceedings), *and* United States v. Calandra, 414 U.S. 338, 353 (1974) (citations omitted) (stating that "absent some recognized privilege of confidentiality, every man owes his testimony" at a grand jury

the jurors or PHO may rely on hearsay evidence; and evidence may be obtained in both forums by subpoena.[172] With only a few substantive differences, the issue then becomes how to establish the military grand jury (MGJ) and how to fit it into the military justice system.

V. The Military Grand Jury

The Fifth Amendment does not require the use of a grand jury to indict servicemembers for offenses, but it also does not prohibit it. As stated by the Court of Appeals for the Armed Forces, "[t]he Fifth Amendment expressly excludes 'cases arising in the land or naval forces' from the requirement for indictment by grand jury. Nevertheless, Article 32, UCMJ, 10 USC § 832 was intended to provide a substitute for the grand jury."[173] Though the grand jury is not required in military proceedings, the substitution of an MGJ for the Article 32 will be more beneficial for the command, and fairer to accused and victims alike. Proper procedural and functional implementation of the MGJ is the key to its success.

A. Procedural Posture

1. The Military Grand Jury's Function

Like the current Article 32 preliminary hearing, the MGJ will determine whether or not probable cause exists to believe an accused committed an offense.[174] Unlike the PHO, however, the MGJ will not have the requirements to make a recommendation as to the proposed disposition of the case or to make a determination as to "whether the convening authority has court–martial jurisdiction over the offense and the accused."[175] The assessment of whether a convening authority has jurisdiction over an offense or an accused, as well as the recommendations concerning the proper disposition of offenses, are matters more properly within the purview of the legal advisor to the respective commander, not the MGJ or a PHO.[176] Moreover, court–martial jurisdiction is challengeable

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proceedings), *and* United States v. Ortiz, 687 F.3d 660 (5th Cir. 2012) (discussing the applicability of FED. R. EVID. 1101(d)(2) and explaining that the "rule against hearsay does not apply in grand–jury proceedings").

[172] *See* discussion *infra* Parts II.C. and note 94; GRAND JURY 2.0—MODERN PERSPECTIVES ON THE GRAND JURY 5 (Roger A. Fairfax, Jr. ed., 2011) ("[A] grand jury can subpoena the owner of records or other evidence without showing of probable cause and—absent a valid claim of privilege—the evidence must be produced.") (citations omitted).

[173] United States v. Loving, 41 M.J. 213, 296-97 (C.A.A.F. 1994).

[174] 10 U.S.C.S. § 832(a)(2)(A) (2015).

[175] 10 U.S.C.S. § 832(a)(2)(B)–(D) (2015).

[176] *See generally* 10 U.S.C.S. § 3037(d) (2014) (providing that officers and DoD employees may not interfere with "the ability of judge advocates of the Army" assigned to

regardless of the assessment made prior to trial and can continue to be litigated during the court–martial process, both at trial and on appeal.[177] Thus, any determination made by the MGJ regarding jurisdiction is functionally irrelevant.

2. The Military Grand Jury's Place in the Process

Having defined the purpose of the MGJ, the next issue is *where* the MGJ will fit in the military justice process. Given that the MGJ would replace the Article 32, it is a natural consequence that the MGJ will be utilized in the post–preferral process, procedurally situated where the preliminary hearing is now. To do otherwise would involve a number of substantive changes to the military justice process that are unnecessary and would likely not be well–received.

For instance, under the current pre–trial model utilized in the military, the preliminary hearing does not occur until after an accused has been charged.[178] Once charged, the case is only presented to a PHO if the case is likely to be referred to a general court–martial.[179] If the entire federal charging system were to be adopted, then a command wishing to bring charges against an accused for a felony offense would need to present the allegations through the trial counsel to

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military units to give "independent legal advice" to those commanders); U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 5-2 (18 Mar. 2013) [hereinafter FM 1-04] ("The SJA advises commanders concerning administrative boards, the administration of justice, the disposition of alleged offenses . . . and action on courts–martial findings and sentences.").

[177] *See, e.g.*, Hennis v. Hemlick, 666 F.3d 270 (4th Cir. 2012). *Hennis* presented a number of unique jurisdictional issues that are illustrative of this point. In *Hennis*, the servicemember–accused was on active duty in the Army when he faced civilian trial on three separate occasions for the rape and murder of a woman and two of her children. *Id.* Hennis was acquitted of the charges at the third trial. *Id.* Ultimately, Hennis returned to military service and retired, but was subsequently court–martialed for the offenses after being involuntarily placed on active duty. *Id.* Prior to the commencement of the trial, Hennis's case was presented to an Article 32 investigating officer who recommended that the case proceed to trial. *See Trial Recommended in 1985 Triple Murder Case*, MILITARY TIMES (Jun. 10, 2007), http://archive.militarytimes.com/article/20070610/NEWS/706100311/Trial-recommended-1985-triple-murder-case. Despite the Article 32 review, the issue concerning jurisdiction continued to be litigated pre–trial, during trial, and post–trial. *Hennis*, 666 F.3d 270.

[178] A person is not "charged" in the military until an accuser signs a charge sheet containing the charges and specifications describing the offenses the accused is alleged to have committed. MCM, *supra* note 42, R.C.M. 307. An "accuser" is defined in the UCMJ as "a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused." 10 U.S.C. § 801.

[179] 10 U.S.C.S. § 832(a)(1) (2015).

the grand jury, which would then determine whether to indict the accused for the offense.[180]

Adopting such an approach would not simply change the vehicle through which the accused is protected from the levying of unwarranted criminal charges, it would completely alter the road on which that vehicle travels. This is because the implementation of the grand jury system in the military as either the charging mechanism or a procedural check after charges are preferred would not displace the current process utilized for charging offenses. By necessity then, the implementation of the MGJ as the charging body would create a second charging system running parallel with that utilized for non–MGJ offenses. Creating such additional hurdles is unnecessary because the end result (a grand jury determination concerning probable cause) would be reached regardless of when the grand jury proceeding is held. To adopt an entirely new charging process would create new logistical issues, leading to additional opportunities for error and the introduction of unnecessary appellate issues.

Allowing the MGJ to be the charging vehicle would impact the command's ability to plea bargain (or at least change the manner in which it is done).[181] By initially charging an accused based on the command's determination that sufficient evidence exists to believe the accused committed an offense, a commander is able to notify the accused of the alleged offenses, afford him the opportunity to seek legal counsel, and to negotiate with said counsel concerning possible courses of action. Utilizing the MGJ as the charging instrument would consume valuable time that is currently utilized by commanders to negotiate pleas. This translates into a waste of time and money for the government, and interferes with prompt closure for victims. In addition, such a process has the potential to be prejudicial to good order and discipline because delay in taking action against an accused while awaiting an MGJ's decision may appear to be a lack of concern (or action) by the commander of the unit.[182] This would send the

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[180] FED. R. CRIM. P. 6.

[181] The author takes no position on the fairness of utilizing a procedural right as a bargaining tool during military justice proceedings, nor is it the focus of this article. However, the fact remains that plea bargaining has its place in the military justice process, so much so that the right of an accused to waive his Article 32 preliminary hearing is plainly stated in the MCM, as is the ability to include that waiver as part of a pre–trial agreement. *See* 10 U.S.C.S. § 832(a)(1) (2015); MCM, *supra* note 42, R.C.M. 705(c)(2)(E) (providing that a pre–trial agreement may include a promise to waive, among other things, the Article 32 investigation); *See also* Major Michael E. Klein, *The Bargained Waiver of Unlawful Command Influence Motions: Common Sense or Heresy?* 3, *in* ARMY LAW., (Feb. 1998), (discussing the role of plea bargaining).

[182] "Ensuring the proper conduct of soldiers is a function of command." U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-4a. (6 Nov. 2014) [hereinafter AR 600-20]. In order to maintain good order and discipline, when exercising their authority, commanders must do so "promptly, firmly, courteously and fairly." *Id.* para. 4-6a.

wrong message to other servicemembers and observers.[183] Such a result would be unacceptable, would be detrimental to the command, and would be an injustice to victims. By placing the MGJ in the same procedural position as the Article 32, these additional problems would be avoided.

For these procedural reasons, and for the preservation of good order and discipline, commanders must retain their authority to impose punishment and convene courts–martial, especially where it concerns military–specific offenses.[184] The purpose of the proposed implementation of the grand jury proceeding is not to remove authority from commanders, but to remove burdens. At its core, the commander's authority to convene general and special courts–martial must remain in place because only certain offenses would be subject to MGJ review. The remainder of the offenses, including those concerning strictly military infractions such as disrespect, absence without leave, or adultery, would still need a venue and procedure under which commanders can adjudicate and dispose of offenses. Furthermore, a convening authority would still be necessary under the proposed system to appoint the members of the MGJ.

3. Jurisdictional Attributes—When the Grand Jury Procedures Apply

The mechanics of implementing a grand jury in the military depends on the span of offenses that require MGJ review. Under current court–martial procedures, "[n]o charge or specification may be referred to a general court–martial for trial until completion of a preliminary hearing, unless such hearing is waived by the accused."[185] Because the MGJ would take the place of the Article 32, the implementation of the MGJ would have no effect on this procedural requirement and any offense for which the command wished to proceed to general court–martial would have the same requirement.

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[183] The use of the Military Grand Jury (MGJ) in this manner could also be viewed by some as usurping the commander's authority to charge a person with a crime. However, such an argument fails to account for the purpose of the MGJ, or even the preliminary hearing for that matter—to ensure that probable cause exists for an alleged offense, and to relieve commanders of shouldering the moral burden of having to determine if a weak or baseless case should proceed to trial based on an allegation alone. Moreover, regardless of who charges the accused, the MGJ would still review the case, and only one of two outcomes would occur; a true bill or no true bill.

[184] *See, e.g.*, *RSP Role of the Commander Subcommittee, Report to the Response Systems Panel*, WHS.MIL, Slide 12 (May 6, 2014), http://responsesystemspanel.whs.mil/Public/docs/Reports/02_RoC/ROC_Report_Slides_20140506_Final.pdf (recommending against further modification to the authority vested in commanders also designated as court–martial convening authorities); Jim Garamone, *Commanders Should Retain Prosecution Authority, Leaders Say*, U.S. DEP'T OF DEF. (July 18, 2013), http://www.defense.gov/News/NewsArticle.aspx?ID=120476.

[185] 10 U.S.C.S. § 832(a)(1) (2015).

As previously discussed, grand jury proceedings are not the only route a U.S. attorney takes when bringing charges to the courthouse doors. The Fifth Amendment does not require that every crime be taken to a grand jury for indictment before an accused is tried for offenses.[186] Instead, only offenses punishable by death or imprisonment for more than one year must be prosecuted by indictment.[187] Even then, an accused can waive prosecution for indictment and a prosecutor can proceed to trial by information, provided the case is not a capital one.[188] This is similar to the current statute governing military process that, although requiring that every charge and specification proceeding to trial by general court–martial be reviewed at a preliminary hearing, allows the accused to waive his right to an Article 32 hearing.[189]

Accordingly, the MGJ should be instituted in a similar manner to that imposed by Rule 7 of the Federal Rules of Criminal Procedure.[190] At present, there are over 100 offenses, or variations thereof, listed in the MCM with a possible punishment of more than one year of imprisonment.[191] The majority of these offenses concern serious criminal misconduct including: desertion in time of war;[192] assault consummated by a battery;[193] wrongful use of controlled substances;[194] murder and related offenses;[195] rape;[196] sexual assault;[197] and robbery.[198] This may initially appear to increase the number of offenses that are required to go before a grand jury, thereby adding to the burden on potential grand jurors and potentially hampering the speed with which a command could prosecute crimes. However, additional implementations and changes to the code, discussed below, would remedy these potential issues with little effect on the commander's ability to maintain good order and discipline.

First, as previously discussed, an accused would still be able to waive his appearance at a grand jury. Second, to minimize the number of offenses required to go before the grand jury, a substantive review of the offenses and their maximum punishments should be conducted. Those offenses that do not warrant lengthy prison sentences, or those for which extended prison sentences are rarely, if ever, adjudged should have their maximum punishment reduced.

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186 U.S. CONST. amend. V.
187 FED. R. CRIM. P. 7(a).
188 FED. R. CRIM. P. 7(b).
189 MCM, *supra* note 42, R.C.M. 405(k), *amended by* Exec. Order. 13,696, *supra* note 93.
190 FED. R. CRIM. P. 7.
191 MCM, *supra* note 42, Appendix 12.
192 MCM, *supra* note 42, pt. IV, ¶ 9 (2012), *amended by* Exec. Order. 13,696, *supra* note 93.
193 MCM, *supra* note 42, pt. IV, ¶ 54 (2012).
194 MCM, *supra* note 42, pt. IV, ¶ 37 (2012).
195 MCM, *supra* note 42, pt. IV, ¶ 43 (2012).
196 MCM, *supra* note 42, pt. IV, ¶ 45 (2012).
197 MCM, *supra* note 42, pt. IV, ¶ 45 (2012).
198 MCM, *supra* note 42, pt. IV, ¶ 47 (2012).

Second, in conjunction with reducing the maximum punishment for certain offenses, the definition of "felony," for purposes of establishing which offenses would require MGJ review, should be defined in a manner that would reduce the number of offenses subject to MGJ review. For example, the offense of willfully disobeying the lawful order of a superior commissioned officer carries a possible punishment of up to five years in confinement.[199] Certainly, this offense is a serious one, but the offense itself, without other aggravating factors (such as in time of war, etc.) does not generally warrant confinement for five years. If imposed, such a sentence might even trigger appellate review.[200] In order to keep offenses, particularly those concerning good order and discipline, within the commander's immediate purview, the maximum punishment for an applicable offense might be lowered to two years, for instance. Then, the MGJ rule can be drafted so as to require that only offenses punishable by *more than two years of imprisonment* undergo MGJ proceedings, thereby removing the requirement for an MGJ.

Third, to further limit offenses subject to the MGJ, congressional action could be taken to specifically exempt offenses from the MGJ requirement, or alternatively impose mandatory minimum sentences for offenses, thereby indirectly affecting whether they are subject to a MGJ proceeding.[201]

B. Mechanics of the Military Grand Jury

1. Selection of Jurors

In the civilian federal court system, "[t]he authority to convene or discharge a grand jury is vested in the District Court."[202] The district court may order "one

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[199] MCM, *supra* note 42, pt. IV, ¶ 14 (2012).

[200] The author does not discount that a commander may encounter conduct that warrants harsher penalties; however, in the author's experience, such circumstances are usually accompanied with the commission of other serious misconduct for which enhanced penalties are normally applicable. The author simply suggests that under normal circumstances, disobedience of a lawful order alone would not warrant the imposition of a punishment of five years imprisonment. This assertion is based on the author's experience as a military magistrate, trial counsel, and administrative law attorney at Fort Bragg, North Carolina from 2006-2010 and as the Deputy Regimental Judge Advocate for the 75th Ranger Regiment at Fort Benning, Georgia from 2012-2014.

[201] *See, e.g.*, FY14 NDAA, *supra* note 16, § 1705 (amending 10 U.S.C. § 856 to require that individuals convicted of certain listed offenses receive a dismissal or dishonorable discharge and amending 10 U.S.C. § 818, requiring that the only forum to try those charged with rape, sexual assault, sexual assault of a child, forcible sodomy, or attempts thereof, is that of the general court–martial).

[202] Petition of A & H Transportation, Inc., 319 F.2d 69, 71 (4th Cir. 1963), *cert. denied*, 375 U.S. 924 (1963).

or more grand juries to be summoned at such time as the public interest requires."[203] The Jury Selection and Service Act (Jury Act)[204] outlines the manner in which grand jurors are summoned. Once the impanelment order is issued by the district court, "the clerk or jury commission or their duly designated deputies shall issue summonses for the required number of jurors."[205] Each district court is required to make and execute a written plan for random selection of grand jurors.[206] That plan must, among other things, either establish a jury commission or authorize the clerk of court to manage the jury selection process, must specify where the names of prospective jurors will be selected from, must specify the procedures to be utilized by the jury commission or clerk in selecting names from the prospective juror list, and must provide for a master jury wheel,[207] or similar device, into which the names of those randomly selected shall be placed.

When the time comes to impanel a grand jury, the clerk or jury commission will randomly draw names from the master jury wheel to establish the potential juror pool.[208] Once potential jurors are identified, the clerk or jury commission mails a juror qualification form to the prospective juror.[209] Based upon the responses to the juror qualification form, the chief judge, designated district court judge, or the clerk under supervision of the court determines whether a person is unqualified, exempt, or excused from service.[210] A qualified jury wheel is then maintained, and random names are drawn to serve for grand and petit jury panels.[211]

Much like district court judges vested with the authority to establish procedures to impanel their juries, convening authorities in the military are vested with the power to appoint courts–martial and detail members of a court–martial panel.[212] Of course, no such system for appointing a grand jury exists in the military because the Fifth Amendment grand jury requirement does not apply to courts–martial.[213] The Jury Act is informative, however, for purposes of developing an MGJ scheme, despite the lack of feasibility to implement all of its requirements because of the unique aspects of military service and the small

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[203] FED. R. CRIM. PROC. 6(a).
[204] 28 U.S.C. §§ 1861–1878.
[205] 28 U.S.C. § 1866(b).
[206] 28 U.S.C. § 1863.
[207] The term "jury wheel" includes "any device or system similar in purpose or function, such as a properly programmed electronic data processing system or device." 28 U.S.C. § 1869(g).
[208] 28 U.S.C. § 1864(a).
[209] *Id.*
[210] 28 U.S.C. § 1865(a).
[211] 28 U.S.C. § 1866(a).
[212] UCMJ art. 25 (2012). *See also* United States v. Dowty, 60 M.J. 163, 169 (C.A.A.F. 2004) ("It is blackletter law that the [convening authority] must personally select the court–martial members.") (citing United States v. Allen, 5 C.M.A. 626 (1955)).
[213] U.S. CONST. amend. V.

cross–section of personnel serving in any given command. Rigid implementation of the requirements of the Jury Act is not required to properly establish the MGJ,[214] nor is it necessary, because the foundation and systems for instituting the MGJ already exist in those procedures used by convening authorities to appoint military court–martial panel members.[215]

The current procedures to select court–martial panel members can be altered to identify a pool of possible grand jurors. At present, when an accused servicemember elects trial by members, the convening authority appoints a panel to try the servicemember.[216] The convening authority appoints those members who, in his opinion, "are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament."[217] The convening authority must personally appoint panel members, but he is permitted to rely on his staff to nominate them.[218] In this respect, a convening authority's reliance on his staff to nominate members is not unlike a district court judge relying on the court clerk or jury commission to randomly draw names from the master jury wheel to establish the potential juror pool.[219] The military system differs slightly from the federal system, in that the military uses a system similar to that known as a "key man system," [220] or one where commanders are given the

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[214] The U.S. Constitution gives Congress the authority to "make rules for the government and regulation of the land and naval forces." U.S. Const. art. I, § 8, cl. 14. Article 36, UCMJ gives the President the authority to prescribe rules governing the "[p]retrial, trial, and post–trial procedures . . . for cases . . . triable in courts–martial . . . ." UCMJ art. 36 (2012). Article 36 further provides that when making those rules, the President should, as far as "he considers practicable" conform those laws and rules to those which are "generally recognized in the trial of criminal cases in the United States district courts," but the rules may not be contrary to other provisions of the UCMJ. *Id.* Courts have interpreted this to mean that "[t]he implication is that Congress intended that, to the extent 'practicable,' trial by court–martial should resemble a criminal trial in federal district court." United States v. Valigura, 54 M.J. 187, 191 (C.A.A.F. 2000). As previously discussed, however, grand jury requirements do not apply to trial by courts–martial. U.S. CONST. amend. V.

[215] Rigid application of the Jury Act is also not required because of the unique jurisdiction of courts–martial where the Sixth Amendment right to trial by jury does not wholly apply. *See* United States v. Kemp, 46 C.M.R. 152, 154 (C.M.A. 1973) ("[T]he Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courts–martial."); Dowty, 60 M.J. at 169 (citations omitted) ("A servicemember has no right to have a court–martial be a jury of peers, a representative cross–section of the community, or [be] randomly chosen."). However, the servicemember does have "a right to members who are fair and impartial." United States v. Roland, 50 M.J. 66, 68 (C.A.A.F. 1999).

[216] MCM, *supra* note 42, R.C.M. 504(d).

[217] MCM, *supra* note 42, R.C.M. 502(a).

[218] United States v. Benedict, 55 M.J. 451, 455 (C.A.A.F. 2001); United States v. Kemp, 46 C.M.R. 152, 155 (C.M.A. 1973).

[219] 28 U.S.C. § 1864(a).

[220] *See* 1 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 4:05 (1986) (describing the "key man system" as that "in which a small group of judges or jury

discretion to select those individuals they believe are best qualified to serve as jurors. The system would be sufficient for the selection and nomination of grand juror members, with one alteration: once the convening authority issued an impanelment order and the members are appointed as grand jurors, the authority to excuse, summon, and assign a case to the grand jury should be delegated to the command's Staff Judge Advocate (SJA).[221]

2. The Authority to Excuse Grand Jurors and to Refer Cases to Grand Jury Panels

In federal practice, "the methods of issuing orders for the summoning of a grand jury and similar provisions, are intramural internal regulations for the benefit of the Court and in the interest of efficiency in the transaction of the public business."[222] In the interest of efficiency and fairness, and to insulate the process from actual or perceived unlawful command influence, the authority to assign members to the MGJ panel should be delegated to the legal office responsible for advising the general court–martial convening authority. By delegating authority, but not responsibility, the convening authority can reduce the chance of unlawfully influencing his subordinate commanders or the panel members. Such a system would not be a significant departure from that which is already utilized in selecting members for a court–martial.[223]

At present, when a convening authority details members to a court–martial, he is permitted to change the members without cause prior to their assembly.[224] The convening authority may, however, delegate this authority to his SJA or legal officer.[225] This delegation is not unfettered, and when so delegated, the SJA's authority to excuse is limited to "no more than one–third of the total number of members detailed by the convening authority."[226] However, the implementation of a grand jury rule authorizing the SJA to exercise excusal authority need not conform to the one–third rule. Just as the clerk under supervision of the district court may determine whether a person is unqualified, exempt, or excused from service,[227] so too should the SJA. By allowing the SJA to rule on excusals, efficiency in the process would be preserved with little effect on the command.

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commissioners—often called 'key men'—are given discretion to select qualified individuals").

[221] MCM, *supra* note 42, R.C.M. 505(c)(1)(B) (permitting the convening authority to delegate to his Staff Judge Advocate his authority to change the composition of a court–martial panel prior to the members' assembly).

[222] United States v. Brown, 36 F.R.D 204, 207 (D.D.C. 1964).

[223] MCM, *supra* note 42, R.C.M. 505(c)(1)(B).

[224] MCM, *supra* note 42, R.C.M. 505(c)(1)(A).

[225] MCM, *supra* note 42, R.C.M. 505(c)(1)(B).

[226] *Id.*

[227] 28 U.S.C. § 1865(a). *See also* United States v. Maskeny, 609 F2d 183, 193 (5th Cir. 1980) *cert. denied*, 447 U.S. 921 (1980) (refusing to reverse appellants' convictions where

Similarly, assignment authority to a specific MGJ panel should be delegated to the SJA as well. This process would be unique to the military because unlike civilian jurisdictions, there is no standing court to which a case is automatically assigned, because convening authorities refer cases to court–martial. Under MGJ procedures, once a convening authority impaneled the grand jury, (or in some cases, more than one grand jury) and a case was ready to be presented, the SJA would assign the case to the next available MGJ panel. As the manager of the panels, the SJA would bear the responsibility of ensuring that an adequate number of panels are established and that cases continually flow through the MGJ process. At present, it is the convening authority who determines what officer will be assigned as the PHO to hear a case.[228] By allowing the SJA to randomly refer cases to the selected panels, less opportunity exists for bias to enter the process, because the convening authority will not know which panel is to review the case. This process would align with the federal system where "[a]s a practical matter . . . the grand jury is under the prosecutor's virtually complete control."[229]

3. Rules Pertaining to Grand Jury Sessions and the Presentation of Evidence

The current rules of evidence applicable to the Article 32 preliminary hearing are similar in nature to those applicable to the federal grand jury. Accordingly, the MGJ's evidentiary proceedings should continue to be governed by RCM 405(h).[230] In both forums the rules of evidence are generally inapplicable;[231] the jurors or the PHO may rely on hearsay evidence; and evidence may be obtained in both forums by subpoena.[232] More specifically, the current rules concerning

court clerks decided grand juror excuses in violation of a statute requiring the judge to make the determinations because defendant failed to show that the clerks' decisions were erroneous).

[228] MCM, *supra* note 42, R.C.M. 404 (e) (providing that a special court–martial convening authority may direct a pre–trial investigation under RCM 405).

[229] HARRY I. SUBIN ET AL., THE CRIMINAL PROCESS, PROSECUTION AND DEFENSE FUNCTIONS § 12.3 (1993).

[230] Exec. Order. 13,696, *supra* note 93, at 35, 796 (amending RCM 405(h)).

[231] *Compare* Exec. Order. 13,696, *supra* note 93 (amending RCM 405(h)) (providing that the "Military Rules of Evidence do not apply in preliminary hearings" with the exceptions of privilege and MRE 412), *with* FED. R. EVID. 1101(d)(2) (rules of evidence do not apply "except for those on privilege" to grand–jury proceedings), *and* United States v. Calandra, 414 U.S. 338, 353 (1974) (citations omitted) (stating that "absent some recognized privilege of confidentiality, every man owes his testimony" at a grand jury proceeding), *and* United States v. Ortiz, 687 F.3d 660 (5th Cir. 2012) (discussing the applicability of Federal Rule of Evidence 1101(d)(2) and explaining that the "rule against hearsay does not apply in grand–jury proceedings").

[232] *See* discussion *infra* Parts II.C. and note 94; GRAND JURY 2.0—MODERN PERSPECTIVES ON THE GRAND JURY 5 (Roger A. Fairfax, Jr. ed., 2011) (citations omitted) (stating that "a grand jury can subpoena the owner of records or other evidence without showing of probable cause and—absent a valid claim of privilege—the evidence must be produced").

the inapplicability of the military rules of evidence to the preliminary hearing would apply to MGJ proceedings.[233] The exceptions to that general rule make MRE 412 applicable to the preliminary hearing,[234] and apply rules concerning the privilege against self–incrimination, [235] privileges concerning mental examinations of the accused, [236] the prohibition on degrading questions, [237] warnings about rights,[238] and applicable rules of Section V of the MRE.[239]

Applying the rules of evidence currently utilized in the preliminary hearing to MGJ proceedings would not require significant change to a counsel's presentation of the evidence. What would be significantly different, however, is the manner in which evidence is presented at federal grand jury proceedings, compared to that of an Article 32 preliminary hearing. The implementation of the MGJ would require changes to the procedural rules, particularly with respect to the accused's right to be present during the investigation. However, because discovery has been eliminated as a purpose of the preliminary hearing (and likewise will not be a purpose of the MGJ proceeding), and victims are no longer required to testify at preliminary hearings, there are fewer due process concerns with an accused's absence at a MGJ proceeding. Nevertheless, a procedural change would be required under the rules.

In order to protect and preserve the fairness of the process, grand jury proceedings should be held in "secret."[240] *Secrecy*, however, is a term of art that is slightly dissimilar to that of the secret grand juries held in federal or state courts. Unlike civilian grand jury proceedings, the military is a unique environment composed of smaller communities of servicemembers organized into distinct commands that are further broken down into smaller individual units. Because of the military's unique composition, convening authorities do not have the luxury of drawing jurors randomly from lists of names created from voting registration or licensed driver databases. Instead, the convening authority is usually required to draw his jurors from individuals under his command. Because of this, unlike a civilian suspect who will likely never know or cross paths with the grand jurors who reviewed the evidence surrounding his alleged crimes, a servicemember–

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233 Exec. Order. 13,696, *supra* note 93, at 35,796 (amending RCM 405(h)).

234 *Id. See also* MCM, *supra* note 42, MIL. R. EVID. 412 (Supp. 2014), *as amended by* Exec. Order 13,696, *supra* note 93, at 35,818.

235 MCM, *supra* note 42, MIL. R. EVID. 301 (Supp. 2014).

236 MCM, *supra* note 42, MIL. R. EVID. 302 (Supp. 2014).

237 MCM, *supra* note 42, MIL. R. EVID. 303 (Supp. 2014).

238 MCM, *supra* note 42, MIL. R. EVID. 305 (Supp. 2014).

239 Exec. Order. 13,696, *supra* note 93, at 35,796 (amending RCM 405(h)) (providing that "Section V, Privileges, shall apply, except that Mil. R. Evid. 505(f)-(h) and (j); 506(f)-(h), (j), (k), and (m); and 514(d)(6) shall not apply").

240 "Secrecy in Grand Jury Proceedings" is one of the provisions that would govern the MGJ proceedings and the styling of this proposed section is taken from the Commonwealth of Virginia's Annotated Code. *See* VA. CODE ANN. § 19.2-192 (LEXIS through 2015 Sess.).

accused is faced with the very real possibility that at some point in his career, he may very well work with or for someone who sat on his grand jury. More importantly, because the grand jurors would return to the very same work force that the accused is also employed in, the provisions concerning grand jury secrecy are of paramount importance.

Accordingly, additional code provisions would need to be implemented to require secrecy on the part of witnesses and grand jurors, among others, in order to preserve an environment that is "conducive to maximum productivity"[241] and is free of intimidating, hostile, or offensive working conditions.[242] The secrecy provision would require "every attorney for the Government, special counsel, sworn investigator, and member of the military grand jury to keep secret all proceedings which occurred during sessions of the grand jury."[243]

C. The Binding Indictment

In order to have the effect and purpose of insulating the commander from external scrutiny and ridicule, and to prevent bias or ill–will in the decision to prosecute or to refrain from prosecuting an alleged offender, the commander should be bound by the decision of the MGJ in the probable cause finding.[244] To

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[241] AR 600-20, *supra* note 182, para. 7-3.

[242] *Id.* para. 7-4. This article does not specifically address sexual harassment; however, the philosophy behind preventing sexual harassment in the workplace is equally applicable to fostering an environment free of intimidation and retribution where it concerns the judicial process.

[243] This proposed secrecy provision is a modified version of the Commonwealth of Virginia's code concerning secrecy in grand jury proceedings. That provision provides,

> Except as otherwise provided in this chapter, every attorney for the Commonwealth, special counsel, sworn investigator, and member of a regular special, or multi–jurisdiction grand jury shall keep secret all proceedings which occurred during sessions of the grand jury; provided, however, in a prosecution for perjury of a witness examined before a regular grand jury, a regular grand juror may be required by the court to testify as to the testimony given by such witness before the regular grand jury.

VA. CODE ANN. § 19.2-192 (LEXIS through 2015 Sess.).

[244] Adopting a binding system would be a minority approach as compared to the majority of state–implemented grand jury systems and the federal system. *See* 1 SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 6:41 (1986 & Supp. 1996) ("The traditional view that the prosecutor has discretion to resubmit charges either to the same grand jury or to a subsequent grand jury is recognized by statute, court rule, or judicial decision in the federal courts and in a large number of states."). *But see, e.g.*, GA. CODE ANN. § 17-7-53 (LEXIS through 2015 Sess.) (barring the future prosecution of a person for the same offense after

do otherwise simply places the final decision back on the convening authority and the commander to independently evaluate the evidence and to make a decision—the very problem the MGJ seeks to remedy. Essentially, as the system currently exists, convening authorities are the final arbiter on whether a case proceeds to trial. This makes the convening authority ultimately responsible in both the public's and the victim's eyes for a decision to not prosecute a case. The issue of convening authority bias and sufficiency of the evidence become irrelevant if the perception portrayed in the media or to the public is one of failure to act or a failure to treat victims with respect and dignity. By binding commanders via the MGJ, they are relieved of that liability. Any blame, deserved or not, would lie with the many (the MGJ) instead of the few (the commander).

D. Portability of the System

Changes to the military justice system must take into account the unique responsibilities and related requirements that commanders and servicemembers face each day. The system must be portable in the event of a deployment. Notably, the proposed MGJ system could be easily employed in a deployed environment. While additional manpower would be necessary to carry out MGJ responsibilities, that manpower would be limited based on the composition of the MGJ. Under the current federal system, the grand jury must be composed of sixteen to twenty–three members.[245] However, the military is not governed by the requirements of Rule 7. Accordingly, the MGJ can be developed to require fewer members, but should, at a minimum, contain a sufficient number of members so that a quorum could still be achieved in the absence of some members, such that a reasonable person viewing the proceedings would have confidence that the decision was just and fair. To that end, the MGJ should be composed of seven grand jurors and three alternate grand jurors. Thus, the presence of only five members should constitute a quorum for a military grand jury session.

The concept of altering the size of the grand jury is far from novel. To be sure, a brief comparison of state jurisdictions that utilize grand juries demonstrates that there is no singular method for establishing a functional grand jury system. Across the United States, the number of grand jurors required to constitute a quorum in a criminal proceeding varies greatly from state to state. For example, Massachusetts[246] and Pennsylvania[247] each require twenty–three jurors. Kansas

two returns of "no bill" unless the returns were procured by fraud or new evidence is found and the judge approves).

[245] FED. R. CRIM. P. 6(a).

[246] MASS. GEN. LAWS ch. 277, § 2 (LEXIS through 2015 Sess.).

[247] PA. R. CRIM. P. 222. Pennsylvania utilizes an investigating grand jury, not an indicting grand jury, and requires that twenty–three jurors and a minimum of seven alternates be impaneled. *Id*. Only fifteen jurors are required to constitute a quorum. *Id.* Pennsylvania utilized indicting grand juries until the Pennsylvania Constitution was amended on November 6, 1973, to allow the courts of the common pleas "with approval of the Supreme

requires that the grand jury "consist of [fifteen] members" but only requires the presence of twelve to constitute a quorum.[248] In a number of states, including Ohio,[249] Oregon,[250] and Wyoming,[251] the number of grand jurors required is less than ten. In addition, some states, such as California, determine the number of jurors required based on the size of the county in which the grand jury is seated.[252]

It is clear from the varying forms of grand juries that it is not the size of the grand jury that is important, but rather, the function that the grand jury carries out. Despite the lack of any consistent form of grand jury composition, the current procedures used in courts–martial suggest that a requirement of a minimum of five grand jurors to create a quorum would be sufficient to establish the MGJ and satisfy scrutiny concerning fairness.

At present, with the exception of capital cases, those servicemembers whose cases are referred to a general court–martial and who subsequently elect to be tried by members must have a general court–martial composed of no fewer than five members.[253] As a starting point, this tried–and–true method of trial by court–martial suggests that at a minimum, the MGJ should be composed of at least five members. This is especially so under the proposed system because the MGJ would only concern severe cases, which would normally warrant trial by general court–martial. Should such a system be adopted, the MGJ would find itself in good company. The Commonwealth of Virginia currently permits the use of a

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Court" to provide for "initiation of criminal proceedings therein by information . . . ." PA. CONST. art. I § 10. The Pennsylvania legislature subsequently enacted law which prohibited the impanelment of an indicting grand jury in any judicial district in which the state supreme court had approved the initiation of criminal proceedings through information. 42 PA. CONS. STAT. § 8931(f) (1976). By 1992, all Pennsylvania counties had abolished the indicting grand jury system. 22 Pa. Bull. 3826 (1992). *See also* Commonwealth v. Weigle, 997 A.2d 306, 312 (Pa. 2010) (explaining that the criminal information replaced the indictment because the indicting grand jury was abolished).

[248] KAN. STAT. ANN. § 22-3001 (LEXIS through 2015 Sess.).

[249] OHIO R. CRIM. P. 6(A) ("The grand jury shall consist of nine members, including the foreman, plus not more than five alternates.").

[250] OR. REV. STAT. § 132.010 (LEXIS through 2015 Sess.) (explaining that a grand jury consists of "a body of seven persons").

[251] In Wyoming, a grand jury must consist of twelve persons, but only nine are required in order to constitute a quorum. WYO. STAT. ANN. § 7–5–103(a) (2015) (requiring the grand jury to consist of twelve persons); WYO. R. CRIM. P. 6(a)(4)(B) (providing that "not less than nine jurors may act as the grand jury"). In those cases where only nine members of the grand jury are present, all must concur in finding an indictment. WYO. STAT. ANN. § 7–5–104(b) (2015).

[252] CAL. PENAL CODE § 888.2 (Deering, LEXIS through 2015 Sess.) (requiring twenty–three grand jurors for counties with a population exceeding 4,000,000; eleven for counties having a population of 20,000 or less; and nineteen in all other counties).

[253] MCM, *supra* note 42, R.C.M. 501(a)(1)(A).

grand jury that can consist of as few as five persons.[254] Similarly, South Dakota[255] and Indiana[256] require that a grand jury consist of six members. By adopting a seven–member system, but requiring only five to constitute a quorum, commands could readily execute MGJ proceedings with limited negative impact on manpower. Furthermore, absence of members due to military duties or other exigent circumstances would not unduly delay the proceeding for lack of quorum, because additional alternate members could be appointed.

VI. Conclusion—The Military Grand Jury Better Serves the Command and the Military Justice Process

For the past three years, there has been intense focus on the military justice system and the manner in which the military, its commanders, and, by implication, its legal advisors, dispose of the misconduct of its servicemembers. At present, the MJRG continues its tireless efforts at evaluating the processes and procedures utilized to prosecute servicemembers and the group's first report was submitted on March 25, 2015.[257] As discussed throughout this article, the role of command influence continues to play a large part in the discussions regarding how effective the military's command–driven system can be and what changes should ultimately be made to the system in order to limit the commander's authority to dispose of cases, or alter judgments rendered by a court–martial panel. Unfortunately, these are some of the same discussions that have gone on for more than half a century, dating back to the initial creation of the Uniform Code, post–World War II, and extending through those periods when the Articles of War governed the conduct of servicemembers.[258]

The simple fact remains that while the military requires a different set of standards and rules in order to maintain good order and discipline and to prevent discredit to the service, non–military–specific criminal offenses are just that: crimes. In the civilian world, criminal behavior is dealt with through law enforcement agencies and the district attorney's office, in some form or another. While an offender's supervisor or employer may have the opportunity to write a letter, make a phone call, or otherwise vouch for the good character of the accused in an effort to minimize the ramifications of the offender's actions, they do not get to decide what punishment is fitting of the crime.[259] Yet, the UCMJ still

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[254] VA. CODE ANN. § 19.2-195 (LEXIS through 2015 Sess.).

[255] S.D. CODIFIED LAWS § 23A-5-1 (LEXIS through 2015 legis.). South Dakota further limits the number of grand jurors to a maximum of ten members. *Id.*

[256] IND. CODE ANN. § 35-34-2-2 (LEXIS through 2015 First Reg. Sess.). Indiana also requires that one alternate member be impaneled. *Id.*

[257] *See* Comprehensive Review of the UCMJ, *supra* note 163.

[258] *See supra* Part II.

[259] Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) (explaining that in the federal system "so long as the prosecutor has probable cause to believe that the accused committed an

permits commanders to make decisions regarding what should happen in purely criminal offenses. For more than fifty years, this system has remained in place, with enormous power and responsibility placed on the shoulders of commanders to not only fight and win wars, but to also play the role of sheriff and district attorney. Now, under the high–powered lens of congressional and public scrutiny, flaws in the military justice system have been exposed, resulting in opportunity for change that could both improve the process, and the lives it affects.

The proposed elimination of the Article 32 preliminary hearing and the establishment of the military grand jury would eliminate some of the burden on commanders. Each would retain responsibility for maintaining good order and discipline within their unit, and they would continue to have authority to dispose of military offenses as they choose. What the proposed change would avoid is the commander's sole responsibility to evaluate whether a servicemember's alleged felony misconduct, such as rape, sexual assault, or child abuse, should proceed to court–martial based on allegations alone, or weak evidence.

By allowing the judge advocate to execute his statutory mission in shepherding evidence of offenses through the military justice system, and to present evidence of those offenses to an independent panel of individuals charged with the responsibility of evaluating whether probable cause exists, the commander is no longer "pinned with the rose" for whatever action or inaction takes place. If the MGJ returns with a finding of probable cause, then the process moves forward, just as it has in civilian criminal jurisdictions for more than a century. If the MGJ finds that no probable cause exists, critics would be hard–pressed to blame commanders or convening authorities for the result. Not only would such a process insulate commanders from these burdens, the proposed process also promotes fairness in the military justice system.

By creating a binding system, outside influences that could possibly affect the decision of a preliminary hearing officer, commander, or convening authority would no longer be as prevalent. A commander would no longer bear the burden of having to decide whether he should disregard an Article 32 investigating officer's recommendation to dismiss charges and proceed to trial, nor would an accused be subjected to unwarranted prosecution based on political pressure upon one person, or the desire to avoid a negative perception. While no system is perfect, the implementation of a military grand jury is a step in the right direction toward a fully established system providing justice and vindication for victims, while simultaneously maintaining fundamental fairness and due process protections to an accused.

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offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion").

JUS IN BELLO FUTURA IGNOTUS: THE UNITED STATES, THE INTERNATIONAL CRIMINAL COURT, AND THE UNCERTAIN FUTURE OF THE LAW OF ARMED CONFLICT

LIEUTENANT COLONEL JAMES T. HILL*

The great uncertainty of all data in war is a peculiar difficulty, because all action must, to a certain extent, be planned in a mere twilight, which in addition not infrequently—like the effect of a fog or moonshine—gives to things exaggerated dimensions and unnatural appearance.[1]

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[1] CARL VON CLAUSEWITZ, ON WAR (1832).

I. Introduction

In describing the future threat environment, the United States (U.S.) Army's recently published "Operating Concept" asserts, "The enemy is unknown, the location is unknown, and the coalitions involved are unknown."[2] Not mentioned, however, is the fact that the Law of Armed Conflict (LOAC)—the body of law that will govern how the fight is conducted—has a similarly uncertain future. That uncertainty resides in the rapidity with which the LOAC is changing—as one commentator asserts, between 1991 and 1998 alone, the LOAC developed more than in the previous forty–five years.[3] This rapid change coincided with the growing influence of international tribunals in developing the LOAC,[4] prominently among them the International Criminal Tribunal for the Former Yugoslavia (ICTY).[5] Since its inception in 1993,[6] the ICTY has effectuated a "fundamental transformation in the laws of war."[7] Most significantly, in *Prosecutor v. Tadić*, the ICTY articulated the LOAC's triggering mechanism,[8] extended universal jurisdiction to war crimes committed in non–international armed conflicts (NIACs),[9] and applied Geneva Convention Common Article (CA)

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[2] U.S. DEP'T OF ARMY, PAM. 525-3-1, WIN IN A COMPLEX WORLD 2020-2040 iii (7 Oct. 2014) [hereinafter OPERATING CONCEPT].

[3] Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT'L L. 462, 463 (1998).

[4] *See generally* Michael Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 816–37 (2010) (discussing the growing influence of non–state actors (NSAs) and international tribunals on the development of the Law of Armed Conflict (LOAC) in the two previous decades).

[5] *See* Allison Marston Danner, *When Courts Make Law: How The International Criminal Tribunals Recast the Laws of War*, 39 VAND. L. REV. 1, 23-33 (2006).

[6] S.C. Res. 808, para. 13, U.N. Doc. S/RES/808 (Feb. 22, 1993) (establishing an "international tribunal" for serious violations of the LOAC "occurring in the territory of the former Yugoslavia since 1991").

[7] Danner, *supra* note 5, at 23.

[8] *See* Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995) (asserting "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state").

[9] *Id.* ¶¶ 140–42. Though the *Tadić* court determined that international law allowed for universal jurisdiction over war crimes in a non–international armed conflict (NIAC), *id.* (determining that the court's jurisdiction over crimes is not limited by a conflict's classification), that position is not established in the *lex scripta*. For example, Additional Protocol I to the 1949 Geneva Conventions (API), which applies only to an International Armed Conflict (IAC), uses the term "grave breach" to describe violations of the LOAC over which universal jurisdiction can be asserted. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 2(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]. Specifically, the "grave breach" phraseology in API was apparently borrowed from the 1949 Geneva

3[10] to International Armed Conflicts (IAC).[11] This later determination was made in the face of CA3's textual limitation to NIACs,[12] and was nonetheless followed by the U.S. Supreme Court in *Hamdan v. Rumsfeld*.[13] These developments were not contained in the *lex scripta*,[14] and the *Tadić* court offered scant support for them in state practice.[15]

Conventions, which uses the term to describe offenses which must be prosecuted by the accused's State, or the offenders must be extradited to another State for prosecution. *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 2, 49, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded Sick and Ship–wrecked Members of Armed Forces at Sea arts. 2, 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War arts. 2, 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Conventions Relative to the Protection of Civilian Persons in Time of War arts. 2,146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. Similarly, Additional Protocol II to the 1949 Geneva Conventions, which applies only to NIACs, does not contain the terms "war crimes" or "grave breaches," which, therefore, indicates the concept that universal jurisdiction does not apply to that protocol. *See generally* Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non–International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 608 [hereinafter APII]. Consequently, there is no support in the *lex scripta* for the concept of universal jurisdiction over war crimes in a NIAC.

[10] Common Article 3 (CA3) is so called because it is common to each of the four 1949 Geneva Conventions. *See, e.g.*, GC I, *supra* note 9, art. 3; GC II, *supra* note 9, art. 3; GC III, *supra* note 9, art. 3; GC IV, *supra* note 9, art. 3.

[11] *Tadić*, Case No. IT-94-1-I at ¶ 102 (explaining that under customary international law "with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant").

[12] The CA3 explicitly limits its application to "armed conflict not of an international character." GC I, *supra* note 9, art. 3; GC II, *supra* note 9, art. 3; GC III, *supra* note 9, art. 3; GC IV, *supra* note 9, art. 3. By contrast, Common Article 2 (CA2) restricts application of all other provisions of the 1949 Geneva Conventions only to an "armed conflict which may arise between two or more of the High Contracting Parties." *See* GC I, *supra* note 9, art. 2; GC II, *supra* note 9, art. 2; GC III, *supra* note 9, art. 2; GC IV, *supra* note 9, art. 2. A CA2 conflict is also referred to as an "international armed conflict" (IAC) in API. API, *supra* note 9, Art. 2(3).

[13] Hamdan v. Rumsfeld, 548 U.S. 557, 631 n.63 (2006) (citing *Tadić* in support of its conclusion that CA3 is applicable in all armed conflicts, no matter the characterization).

[14] *See, supra* notes 8–9, 11–12, and accompanying text.

[15] *See, e.g.*, *Tadić*, Case No. IT-94-1-I ¶¶ 66–70 (asserting the triggering mechanism articulated by the court is the product of a logical interpretation of the 1949 Geneva Conventions and their 1977 Additional Protocols); *id.* ¶ 137 (conducting no assessment of state practice in determining whether the concept of war crimes applies in NIACs); *id.* ¶¶ 100-07 (implying that selected political speeches, proclamations by wartime leaders, and the policy of a small handful of States constitutes sufficient state practice to support expanding CA3 to IACs).

The *Tadić* court asserted these interpretations were international law,[16] thereby demonstrating how tribunals can insert themselves into the process of customary international law formation—a process which is by definition State–centric. That is, customary law forms only when state practice and *opinio juris* coincide—when States generally and consistently conduct their affairs in a certain manner because of the belief that the practice is required by international law.[17] That formal process, though, is difficult to reconcile with the following statement by Judge Antonio Cassese, the president of the ICTY at the time of the *Tadić* decision: "[I] pushed so much and we exploited the *Tadić* case to draw as much as possible from a minor defendant to launch new ideas and be creative."[18] There can be no doubt that the influence of *Tadić* was far–reaching. Any such doubt was laid to rest on July 1, 2002 when, after its 60th ratification, the Treaty of the International Criminal Court (Rome Statute) came into force,[19] permanently cementing the *Tadić* revolution within its provisions.[20]

The ICTY's influence, in turn, has been amplified by a non–state actor (NSA)—the International Committee of the Red Cross (ICRC). In particular, in 2005, the ICRC published what it considered to be 161 rules of customary

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[16] *See, supra* notes 9, 11 and accompanying text.

[17] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (c)(2) (1987) [hereinafter FOREIGN RELATIONS LAW RESTATEMENT] ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."). *See also* Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993 ("The Court . . . shall apply . . . international custom, as evidence of a general practice accepted as law . . . .").

[18] Joseph Weiler, *Nino–In His Own Words*; *The Last Page and Roaming Charges*, 22 EUR. J. INT LAW 931, 942 (2011).

[19] Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/9 (2002) [hereinafter Rome Statute]. Article 126 of the Rome Statute specifies in pertinent part that the statute will "enter into force on the first day of the month after the 60th day following the date on which the 60th nation submits its instrument for ratification to the United Nations (UN)." *Id.* The 60th ratification occurred on April 11, 2002 and the statute, therefore, went into effect on July 1, 2002. Benjamin B. Ferencz, *Misguided Fears About the International Criminal Court*, 15 PACE INT'L L. REV. 223, 241 (2003).

[20] For example, the LOAC triggering mechanism developed in *Tadić* is substantially identical to Article 8.2(f) of the Rome Statute. *Compare* Rome Statute, *supra* note 19, art. 8(f), *with Tadić*, Case No. IT-94-1-I at ¶ 70. Further, the Rome Statute, like the *Tadić* decision, extends universal jurisdiction over war crimes committed in a NIAC. *Compare* Rome Statute Statute, *supra* note 19, art. 8.2(f), *with Tadić*, Case No. IT-94-1-I ¶¶140–42.

international law[21] which relied heavily on ICTY jurisprudence,[22] and even on the ICC Statute (Rome Statute).[23] United States officials criticized the study shortly after its release, asserting among other issues that only "positive evidence . . . that States consider themselves legally obligated" can amount to *opinio juris*.[24] Nonetheless, the study has had far–reaching influence, and has been frequently cited by state and national tribunals alike, including the International Criminal Court (ICC) and the U.S. Supreme Court.[25] Interestingly, the study actually refers to tribunal decisions as "persuasive" evidence of state practice,[26] which, paradoxically, the ICRC acknowledges may not have been developed based on state practice when it stated, "It appears that international courts and tribunals on occasion conclude that a rule of customary international law exists when that rule is a desirable one for international peace and security or for the protection of the human person, *provided that there is no important contrary opinio juris*."[27]

The phrase "provided there is no important contrary *opinio juris*" understates the willingness of some tribunals to subordinate the interests of States to effectuate change they term "desirable."[28] In *Prosecutor v. Krupreskić*, for example, the ICTY paid more heed to ICRC views than State national security concerns in determining that a prohibition on belligerent reprisals had crystalized

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[21] 1 INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, (Jean–Marie Henckaerts & Louise Doswald–Beck eds. 2005) [hereinafter ICRC STUDY VOLUME I]; 2 INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, (Jean–Marie Henckaerts & Louise Doswald–Beck eds. 2005) [hereinafter ICRC STUDY VOLUME II].

[22] For example, a word search of Volume I and Volume II of the International Committee of the Red Cross (ICRC) Study reveals the abbreviation "ICTY" mentioned over 1100 times. *See generally* ICRC STUDY VOLUME I, *supra* note 21; ICRC STUDY VOLUME II, *supra* note 21.

[23] For example, a word search of Volume I and Volume II of the International Committee of the Red Cross (ICRC) Study reveals the abbreviation for International Criminal Court, "ICC," is mentioned over 1400 times. *See generally* ICRC STUDY VOLUME I, *supra* note 21; ICRC STUDY VOLUME II, *supra* note 21.

[24] John B. Bellinger & William J. Haynes, *A U.S. Government Response to the International Committee of the Red Cross's Customary International Humanitarian Law Study*, 89 INT'L REV. RED CROSS 443, 447 (2007).

[25] *See, e.g.*, Joined cases of Serdar Mohammed v. Ministry of Defence and Qasim et al. v. Secretary of State for Defence, [2014] 1369 QB 1, 74 (U.K.) (on the customary international law authority to detain in NIACs); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment, n.1641 (April 20, 2009) (on the applicability of the LOAC to both NIACs and IACs); Janowiec v. Russia, App. 55508/08, 58 H.R. Rep. 30 ¶ 126 (2013) (on the duty to investigate war crimes); Hamdan v. Rumsfeld, 548 U.S. 557, 632 (2006) (on the definition of "regularly constituted court").

[26] ICRC STUDY VOLUME I, *supra* note 21, at x1.

[27] *Id.* at xlviii (emphasis added).

[28] *Id.*

into customary international law.[29] In doing so, the court ignored that both the U.S. and the United Kingdom authorized belligerent reprisals.[30] Consequently, neither country changed its position[31] and ultimately the ICTY reversed course.[32]

Thus, the *Krupreskić* decision also illustrates the limits of the ICTY's influence. The ICTY was a temporary ad hoc tribunal with limited jurisdiction[33] and its decisions, including *Tadić*, could not have resonated had States not been willing to accept them. However, Professor Allison Danner posits that a State's willingness to accept tribunal decisions does not require those decisions be perfectly aligned with State's interests.[34] She explains that tribunal decisions can become "focal points, which States then adopt as authoritative, even if they would have preferred an alternative rule."[35] The utility of a focal point from a State perspective is that they improve coordination by resolving "ambiguities" in international relations.[36] A focal point therefore might be described as the proverbial "carrot" that incentivizes a State to comply with the rulings of international tribunals. A "stick" analogy may likewise explain an additional mechanism that ICC decisions have to gain adherents—even non–ICC member States like the U.S.,[37] who fail to adhere to its interpretations of the LOAC, risk their servicemembers being charged with war crimes.[38]

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[29] *See* Prosecutor v. Kupreskić, Case No. IT-95-16-T, Judgment, ¶¶ 527–33, n. 788 (Int'l Crim. Trib. For the Former Yugoslavia Jan. 14, 2000) (acknowledging scant state practice to support its determination that belligerent reprisals are prohibited by customary international law and citing among other sources an ICRC memorandum in support of its determination).

[30] *See* The War Office, THE LAW OF WAR ON LAND 184 (1958) (authorizing reprisals); U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, CHANGE NO. 1 1976, 177 (July 1956) [hereinafter U.S. LAW OF WAR MANUAL 1956] (authorizing reprisals). *See also* U.K. MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT iii (2004) [hereinafter BRITISH LAW OF WAR MANUAL 2004] (addressing the *Kupreskić* decision by stating, "The court's reasoning is unconvincing and the assertion that there is a prohibition in customary law flies in the face of most of the state practice that exists.").

[31] *See* BRITISH LAW OF WAR MANUAL 2004, *supra* note 30, at 423; U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 177.

[32] Prosecutor v. Martić, Case No. IT-95-11-T, Judgment, ¶¶ 465-67 (Int'l Crim. Trib. For the Former Yugoslavia Jun. 12, 2007) (explaining that belligerent reprisals are permitted in some circumstances).

[33] *See* S.C. Res. 808, *supra* note 6, para. 13.

[34] Danner, *supra* note 5, at 50.

[35] *Id.*

[36] Tom Ginsberg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WILL. & MARY L. REV. 1229, 1245 (2004).

[37] THE INTERNATIONAL CRIMINAL COURT, http://www.icc-i.int/EN_Menus/icc/Pages/default.aspx (follow "About the Court"; then follow "ICC at a glance"; then follow "123 countries") (last visited May 1, 2015) (listing all ICC member States, among which the United States is not listed).

[38] *See infra* discussion Part II.

The "stick" incentive in a world with more than 120 ICC member States[39] suggests that even decisions like *Kruprešić*, in the context of the ICC, create a danger of crystallizing into customary international law. Therefore, the ICC's broad jurisdictional reach and statutory framework position the court to fundamentally transform the LOAC without regard to the interests of States. Part II of this article will explain how the Rome Statute elevates its provisions, and ICC judicial interpretations thereof, above conflicting national law, rendering servicemembers vulnerable to charges of war crimes arising out of a legitimate use of force under domestic law. Part III analyzes two subject areas where conflicts between the Rome Statute and U.S. law may already render U.S. commanders vulnerable to ICC war crimes charges. Part IV offers the ICC Pre–Trial Chambers decision in *Prosecutor v. Jean–Pierre Bemba Gombo*[40] as a case study of how the ICC, acting in concert with NSAs, can transform the LOAC. Finally, Part V explains why the ICC's development of the LOAC will inevitably run afoul of the interests of States generally, and the implications thereof for the battlefield.

II. The ICC as Lawmaker

A. The Supremacy of the International Criminal Court

In assessing the extent to which the ICC is poised to develop the LOAC, it is useful to think of its statutory regime as establishing a "supreme court"[41] and a "legislature,"[42] albeit ones which exercise their jurisdiction supra–nationally.[43] As a legislative function, the statute establishes a procedure to enact "Elements of

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[39] THE INTERNATIONAL CRIMINAL COURT, http://www.icccpi.int/EN_Menus/icc/Pages/default.aspx (last visited May 1, 2015).

[40] *See* Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor (June 15, 2009).

[41] *See* Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT LAW 543, 558 (2010) ("Unlike international criminal law generally, the Rome Statute regime could be said to have a supreme court . . . and a legislature . . .). *See also Is a U.N. International Criminal Court in the U.S. National Interest?*, *Hearing Before the Subcomm. On Int'l Operations of the Comm. On Foreign Relations U.S.S.*, 105th Cong. 724 (1998) [hereinafter *Hearings*] (statement of Lee A. Casey, Attorney Hunton & Williams, Washington, D.C.) ("In attempting to subject a [nation's nationals] to the jurisdiction of the ICC, the ICC states are in fact attempting to act as an international legislature . . . .").

[42] *See* Grover, *supra* note 41, at 558. *See also Hearings*, *supra* note 41.

[43] *Id.*

Crimes"[44] (EOCs), and a procedure to allow for future amendments to the Rome Statute.[45] The statute also establishes the hierarchical order in which the court will determine "applicable law" by which the court will adjudge criminality—that is, it places its own provisions and the EOC at the top of the hierarchy, while at the bottom is "national law," which will only be applied if it is "not inconsistent with this Statute and with International law . . . ."[46] Thus, when the ICC has personal jurisdiction over the individual concerned, even individuals from non–member States,[47] its judicial interpretations of the law reign supreme over any other law it determines "inconsistent" with that interpretation.

While the ICC judges are afforded license to interpret the law, less deference is given to sovereign States, even "[w]here there are good–faith doctrinal differences."[48] For example, the ICC's case referral procedure accommodates sovereignty only to the extent that it allows a State to refer a case to the ICC,[49] while empowering two organizations to refer without consent—the United Nations (UN) Security Council acting under Chapter VII of the UN Charter; [50] or an ICC prosecutor, who can exercise his discretion independently.[51] While the statute facially limits such discretion to "the most serious crimes of concern to the international community as a whole," it does not provide objective discerning criteria.[52]

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[44] *See* Rome Statute, *supra* note 19, art. 8. *See also* Finalized Draft Elements of Crimes, ICC–ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter EOC].

[45] Rome Statute, *supra* note 19, art. 121.

[46] Rome Statute, *supra* note 19, art. 21.

[47] *See infra* Part II.B.

[48] Ruth Wedgewood, *The International Criminal Court: Reviewing the Case (An American Point of View)*, THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT, ESSAYS IN HONOUR OF PROFESSOR IGOR BLISHCHENKO 1039, 1043 (José Doria et al. eds., 2009) ("Where there are good–faith doctrinal differences [in the law], this [complementarity] is no protection.").

[49] Rome Statute, *supra* note 19, art. 13(a).

[50] *Id*.

[51] *Id*. art. 13(c) (authorizing the prosecutor to initiate an investigation). Article 13(c) of the Rome Statute authorizes the prosecutor to initiate an investigation. *Id*. After initiating an investigation under article 13(c), the prosecutor is required to notify all "state parties" who would normally exercise jurisdiction over the crimes concerned. *Id.* art. 18(1). Upon receipt of that notification, the State has thiry days to inform the Court that it is investigating the crimes at issue. *Id.* art. 18(2). The prosecutor must defer to the State unless the pre–trial chamber approves a prosecutor's request to authorize the investigation notwithstanding the State's investigation. *Id*.

[52] *See id.* art. 5.

The discretion to refer, however, is not unfettered. Article 17 of the statute entitled "Issues of admissibility"[53] (also referred to as "complementarity"),[54] places limitations on when a case can be referred. For example, this provision bars the ICC from taking action on a case if the State is investigating or prosecuting the case.[55] The protection even extends to cases where a State has investigated and decided not to prosecute.[56] The only exceptions to these protections are if the State is "unwilling" or "unable" to "genuinely" investigate or prosecute the case themselves,[57] concepts the ICC has recently interpreted in a restrictive manner.[58] Inability only occurs when there is "a total or substantial collapse or unavailability" of a State's judicial system.[59] Unwillingness only occurs when the proceedings are not conducted "independently or impartially" or "in a manner inconsistent with an intent to bring the person to justice."[60] Yet, there is one gaping hole in these protections, the substance of which Ruth Wedgewood concisely describes as follows: "The [United States] by definition will be unwilling to prosecute its pilots or military commanders for carrying out missions that it believes to be lawful."[61] In other words, the statute makes no allowance for a State's good–faith differences in interpreting the law.

B. The Long Arm of the Rome Statute

It is not surprising then that several ICC member States have amended their domestic criminal codes to comply with the Rome Statute, including Canada, United Kingdom, Australia, Germany, and France.[62] Consequently, as ICC

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[53] *See id*. art. 17.

[54] *Id.* art. 1. Article 1 of the Rome Statute provides that jurisdiction of the court "shall be complementary to national criminal jurisdictions." *Id.* Article 17 of the statute is the mechanism through which this complementarity is maintained. *Id*. art. 17.

[55] *Id*. art. 17.1(a).

[56] *Id*. art. 17.1(b).

[57] *Id*. art. 17.1(a),(b).

[58] *See, e.g.*, Prosecutor v. Saif Al–Islam Gaddafi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Abdullah Al–Senussi, ¶ 169 (Oct. 11, 2013). In *Gaddafi*, the International Criminal Court (ICC) considered whether Libya was "either unwilling or unable genuinely to carry out the proceedings." *Id.* The court determined that Libya was not "unable genuinely" or "unwilling genuinely" to carry out the proceedings, *id.* ¶ 311, despite evidence indicating the accused would receive an unfair trial, *id.* ¶¶ 244–58, and evidence that Libya's judicial system was compromised by the security situation there. *Id.* ¶¶ 258–88. In making their decision, the court relied heavily on the active steps Libya was taking in processing the case. *Id.* a¶¶ 294–310.

[59] Rome Statute, *supra* note 19, art. 17.3.

[60] *Id*. at art. 17.2(c).

[61] Wedgewood, *supra* note 48, at 1043.

[62] *See* Michael P. Hatchell, *Note and Comment: Closing the Gaps in United States Law* and *Implementing the Rome Statute: A Comparative Approach*, 12 ILSA J. INT'L & COMP. L. 183, 184 (2005) (explaining that Canada, United Kingdom, Australia, Germany, and

member States, the court has worldwide personal jurisdiction over nationals of these countries[63] and can prosecute them for one of the four categories of crimes over which the court has subject matter jurisdiction: genocide, crimes against humanity, war of aggression, and war crimes.[64]

Additionally, for the same subject matter crimes, the Rome Statute allows personal jurisdiction over servicemembers of States that have not consented to that personal jurisdiction in the three following circumstances: first, when the UN Security Council refers the case to the ICC prosecutor;[65] second, if the crime occurs in the territory of a non–member State which requests the ICC to exercise jurisdiction;[66] and third, if the alleged crime occurs in the territory of a member State.[67] It is because of this latter circumstance, precipitated by the U.S.'s international responsibilities and force posture, that its servicemembers face greater exposure to ICC jurisdiction compared to their allied counterparts mentioned in the preceding paragraph.[68] That exposure is further aggravated as

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France have ratified the Rome Statute and incorporated the statute's punitive articles into their domestic laws).

[63] Rome Statute, *supra* note 19, art. 12.1.

[64] *Id.* art. 5.

[65] *Id.* arts. 12.2, 13(b).

[66] *Id.* art. 12.3.

[67] *Id.* art. 12.2(a).

[68] Wedgewood, *supra* note 48, at 1042–43. Wedgwood states in pertinent part,

> The [United States] [f]aces a number of crucial and hazardous military tasks in which it may have few operational allies. These include the defense of South Korea, strategic stability in the Taiwan Straits, balance in the Middle East, and measures against international terrorism. NATO allies may or may not choose to share in these responsibilities. With a commitment to maintain security in key areas of the world, Washington is logically concerned with preserving realistic standards for military operations. Innovative proposals for new battlefield standards and the use of advanced technology to save innocent lives will always warrant serious discussion among responsible governments, humanitarian agencies, religious thinkers, military analysts, political commentators, and the public. But they do not routinely belong in the escalated rhetoric of a criminal tribunal. With 220,000 military personnel serving in overseas deployment, it is not surprising that Washington should be cautious about the ICC's broad wingspan.

Id.

the U.S., unlike these allies, has not amended its domestic law to comply with the Rome Statute.[69]

III. The ICC and the Rule of Law

A. The Limits of Article 98 Agreements

The U.S. has sought to protect its servicemembers from ICC jurisdiction by entering into over one hundred Article 98 Agreements since the Rome statute came into force in 2002.[70] Article 98 of the ICC Statute provides in pertinent part that the ICC "may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements . . . ."[71] Under Article 98 agreements, each signatory agrees not to hand over each other's citizens to the ICC unless both parties consent in advance.[72] While the legal validity of these agreements has been questioned,[73] there is no question that Article 98 agreements do not stop the ICC from investigating a case, issuing arrest warrants, and indicting U.S. servicemembers.[74]

The stage is set for the ICC to become "a platform to critique U.S. . . . military policy,"[75] or perhaps more aptly, an "auditor of American military operations."[76] Thus, any gap between U.S. law and the Rome Statute should be of considerable concern for U.S. commanders operating in any country where the Rome Statute allows personal jurisdiction over U.S. servicemembers. Such a gap could create

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[69] David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. J. INT'L. H.R. 30, 32 (2009).

[70] JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL 31495, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT 26 (2006).

[71] Rome Statute, *supra* note 19, art. 98(2).

[72] Elsea, *supra* note 70, at 26.

[73] *Compare* Ryan Goodman, *President Certifies U.S. Forces in Mali Not at Risk of International Criminal Court, but is that Legally Valid?*, JUSTSECURITY (Feb. 3, 2014, 9:24 AM), http:justsecurity.org/6702/president-certifies-armed-forces-mali-risk-inter national-criminal-court-legally-valid/ (arguing article 98 agreements defeat the object and purpose of the Rome Statute and therefore the agreements are invalidated by Article 18 of the Vienna Convention on the Law of Treaties), *with* Jeffrey S. Dietz, *Protecting the Protectors: Can The United States Successfully Exempt U.S. Persons From The International Criminal Court with U.S. Article 98 Agreements?*, 27 HOUS. J. INT'L. L. 137, 157 (2004) (arguing article 98 agreements do not defeat the object and purpose of the Rome Statute as article 98 expressly contemplates surrender requests may conflict with a State's international obligation not to surrender an accused).

[74] *See* Ruth Wedgewood, *The Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 193, 207 (2001) (explaining that that Article 98(2) agreements do not stop the ICC from exercising its jurisdiction up to the point of arrest).

[75] *Id.*

[76] *Id.* at 198.

an opportunity for opposing forces to use ICC processes to paint U.S. actions as lawless,[77] striking directly at heart of the U.S. center of gravity, the American people.[78] Indeed, perceived loss of legitimacy can directly translate to strategic loss,[79] and in recent history the legitimacy of military operations has been called into question over allegations of violations of LOAC.[80] As nearly any force confronting the U.S. would have to fight asymmetrically—and likely violate the LOAC in the process[81]—a gap between the Rome Statute and U.S. law could paradoxically allow an enemy who violates the LOAC to occupy moral high ground,[82] the risk of which the U.S. Army Counter Insurgency Manual succinctly captures: "Lose Moral Legitimacy, Lose the War."[83]

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[77] Major General (Retired) Charles J. Dunlap, Jr., *Law of War Manuals and War Fighting: A Perspective*, 47 TEX. INT'L L.J. 265, 268 (2012) ("There is no question that many belligerents . . . seek to gain an advantage by portraying [the United States] and other forces as violating the law of war, and thus erode the popular support . . . .").

[78] William George Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 CHI. J. INT'L L. 431, 441 (2003). Eckhardt states in pertinent part,

> Knowing that our society so respects the rule of law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and or execution of those plans as contrary to the law of war. Our vulnerability here is what philosopher of war Carl von Clausewitz would term our "center of gravity."

Id.

[79] *See* Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 23 (2005) (arguing that the Nixon Administration's failure to address Vietcong allegations of "wanton destruction" during Operation Linebacker II contributed to U.S. defeat and became a model for future adversaries to discredit U.S. operations).

[80] *See* Richard A. Oppel, Jr. & Robert F. Worth, *The Conflict in Iraq: Insurgency; G.I.'s Open Attack to Take Falluja from Iraq Rebels*, N.Y. TIMES, A1 (Nov. 8, 2004) (explaining that reports of "large scale" civilian casualties forced the U.S. to cease operations in Falluja in April 2004); John J. Kruzel, *U.S. Denies Using White Phosphorous in Afghanistan, Gates Pledges More Investigation*, AMERICAN FORCES PRESS SERVICE (May 11, 2009), http://www.defense.gov/news/newsarticle.aspx?id=54294.

[81] Michael N. Schmitt, *Asymmetrical Warfare and International Humanitarian Law*, 62 A.F. L. REV. 1, 5, 15 (2009) (explaining that the U.S.'s technological military advantage "far out–distances" all others which compels its enemies to engage in concealment warfare in violation of the LOAC).

[82] *See* Michael N. Schmitt, *21st Century Conflict: Can The Law Survive?*, 8 MELB. J. INT'L L. 443, 470 (2007) (arguing that technically advanced militaries like the U.S. are held to a higher moral standard than the enemies they confront, which explains why "[A]bu Ghraib somehow generates a greater visceral reaction than the kidnapping and beheading of innocent civilians").

[83] U.S. DEP'T OF ARMY, FIELD MANUAL 3-23, COUNTERINSURGENCY para. 7-42 (15 Dec. 2006).

B. Preempting an International Criminal Court Investigation

A closer analysis of the Rome Statute's complementarity provisions and the court's decisions interpreting it reveal how the U.S. can preempt an ICC investigation when a violation of the Rome Statute is alleged.[84] First, the record must show that the State in question is (or already has) investigated or prosecuted the allegations.[85] Second, the ICC will defer to a State's prosecutorial decision—including a decision not to prosecute—unless the ICC determines that State was "unwilling" or "unable" to "genuinely" carry out proceedings.[86] Third, the allegations investigated must cover the "same person" and the "same conduct" as would have been investigated by the ICC.[87]

The same "person" and the same "conduct" does not mean the crimes investigated or charged under domestic law have to be equivalent to those that could be charged under the ICC statute.[88] For example, in *Prosecutor v. Gaddafi*, the Government of Libya had no equivalent of the Rome Statute's "Crimes Against Humanity" provision which was at issue in that case.[89] The court nonetheless stated this would not *per se* mean the ICC could assert jurisdiction over the matter, that "domestic investigation or prosecution for 'ordinary crimes' to the extent that the case covers the same conduct," would be sufficient to invoke the statutes complementarity protections.[90] On the other hand, failure to investigate a matter because it is not a crime under domestic law would certainly increase the risk of an ICC intervention.[91] In particular, as the court stated in *Prosecutor v. Katanga*, "[I]naction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17(1)(d) of the Statute."[92]

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[84] *See* Rome Statute, *supra* note 19, art. 1 (stating that jurisdiction of the court "shall be complementary to national criminal jurisdictions"); *id.* art. 17 (establishing the mechanism through which a case is determined "inadmissible" before the court).
[85] *See id.* art. 17.1(a),(b).
[86] *Id*.
[87] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/07, Decision on the Prosecutor's Application for Warrants of Arrest, ¶ 31 (Feb. 10, 2006) ("It is a *conditio sine qua non* for a case arising from the investigation of a situation to be admissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court").
[88] *Id.*
[89] Prosecutor v. Saif Al–Islam Gaddafi, Case No. ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al–Islam Gaddafi, ¶ 88 (May 31, 2013).
[90] *Id.*
[91] *See* Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Appeal Judgment, ¶78 (Jun. 12, 2009).
[92] *Id.*

Indeed, particularly when it comes to investigating senior leaders, inaction would increase the risk of an ICC investigation, as seniority weighs heavily in determining whether the case is of sufficient "gravity" for the ICC to assert jurisdiction pursuant to article 17(1)(d) of the Rome Statute.[93] Specifically, in *Prosecutor v. Dyilo* the ICC established a three–part test to determine whether a given case is of sufficient "gravity" which can be summarized as follows:[94] first, is the individual a senior leader?;[95] second, is the individual implicated in "systematic or large–scale crimes?;"[96] third, is the individual among those those suspected of being most responsible?[97] As each criterion most directly bears on senior decision–makers, this section will focus on two areas where military commanders may be vulnerable to ICC prosecution due to inconsistencies between U.S. law and the Rome Statute—command responsibility and the rule of proportionality.

1. Command Responsibility—The Duty To Prevent

Command responsibility is a current issue for the U.S.. In particular, on December 2, 2014, the ICC Office of the Prosecutor (OTP) released its 2014 Report of Inquiry (2014 ROI) which referenced "U.S. senior commanders" in Afghanistan.[98] It provided the following excerpt regarding detainee operations in Afghanistan from February 2003 through June 2004, which implicated command responsibility: "[T]here is information available that interrogators allegedly committed abuses that were outside the scope of any approved [interrogation] techniques, such as severe beating, especially beating on the soles of the feet, suspension by the wrists, and threats to shoot or kill."[99]

This article will not address the facts or merits of any such cases against U.S. commanders. However, it will occasionally use the allegations to contextualize how one specific aspect of command responsibility—the duty to prevent subordinate war crimes—is handled under the Uniform Code of Military Justice (UCMJ)[100] and the U.S. criminal code applicable to all U.S. servicemembers,[101]

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[93] Rome Statute, *supra* note 19, art. 17(1)(d).
[94] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/07, Decision on the Prosecutor's Application for Warrants of Arrest, ¶¶ 52–53 (Feb. 10, 2006).
[95] *See id.* ¶ 52.
[96] *See id.* ¶ 53.
[97] *See id.*
[98] Office of the Prosecutor, Report on Preliminary Examination Activities ¶ 95 (2014) [hereinafter 2014 ROI], http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf.
[99] *Id.* ¶ 95.
[100] 10 U.S.C. §§ 801-946 (2012) (codifying the Uniform Code of Military Justice (UCMJ)).
[101] *See generally id.* § 825 (establishing who is subject to jurisdiction under the UCMJ).

in comparison to the Rome Statute. In so doing, this article will presume the interrogators who used the alleged unauthorized techniques violated both the UCMJ and international law, with the only issue being whether the referenced U.S. commanders can be held liable for their subordinates' crimes.

There are differences between how these commanders can be held liable for crimes of their subordinates under the UCMJ and the Rome Statute. To understand the extent of those differences, it is first necessary to understand a substantial similarity between the UCMJ and the Rome Statute—vicarious liability.[102] Each has vicarious liability provisions which, under certain circumstances, would hold an individual responsible for the crimes of others as if they had committed the crimes themselves.[103] The UCMJ refers to this type of responsibility as "principle liability" and "co–conspirator" liability, and under either legal regime, proving an offense on a vicarious liability theory requires a high threshold of *mens rea*.[104]

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[102] UCMJ art. 77 (codified at 10 U.S.C. §877 (2012)); UCMJ art. 81 (codified at 10 U.S.C. §881 (2012)). The UCMJ has two types of vicarious liability where an accused can be held responsible for the criminal acts of others—principle liability, UCMJ art. 77 (2012), and co–conspirator liability, UCMJ art. 81 (2012). The Rome Statute has similar vicarious liability provisions in Article 25.3(a), Rome Statute, *supra* note 19, art. 25.3(a) (establishing liability if an accused "[o]rders, solicits, or induces," or "aids, abets or otherwise assists" in the commission of a crime); Article 25.3(b) and (c), *id.* art. 25.3(b), (c) (establishing liability when an accused commits a crime "jointly with or through another person").

[103] *See* UCMJ art. 77 (2012) (establishing principle liability); UCMJ art. 81 (2012) (establishing co–conspirator liability); Rome Statute, *supra* note 19, art. 25.3(a) (establishing liability when an accused commits criminal acts "jointly with or through another person"); *id.* art. 25.3(b),(c) (establishing liability when an accused "[o]rders, solicits, or induces," or "aids, abets or otherwise assists" in the commission of a crime.).

[104] *See* UCMJ art. 77 (2012); UCMJ art. 81 (2012); Rome Statute, *supra* note 19, art. 25.3(a); *id.* art. 25.3(b),(c). Both the UCMJ, Article 77 and the UCMJ, Article 81 require a high threshold of *mens rea* to sustain a conviction for the underlying crime in that the accused must possess at least some intent to commit the underlying criminal act. *See* MANUAL FOR COURTS–MARTIAL, UNITED STATES pt. IV, ¶ 1.b.(2)(b)(2012) [hereinafter 2012 MCM] (establishing that an accused can be held responsible as a principle if he were to"[a]ssist, encourage, command," or procure another to do the same, or "[s]hare in the criminal purpose or design" of the crime); *id.* 5.b (establishing criminal responsibility for those who enter into an conspiracy to commit a crime). The Rome Statute has similar vicarious liability provisions that require a similar high level of *mens rea*. For example, an accused can be held vicariously responsible under the Rome Statute if he commits a crime "jointly with or through another person." Rome Statute, *supra* note 19, art. 25.3(a). He can also be held liable if he "[o]rders, solicits, or induces," or "aids, abets or otherwise assists" in the commission of a crime. *Id.* art. 25.3(b),(c). Article 30 of the Rome Statute makes clear, in the absence of contrary guidance written into the statute, that the requisite *mens rea* for a given crime is intent. *Id.* art. 19 ("Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.").

A major difference between the Rome Statute and the UCMJ is that the former has a separate command responsibility provision that imposes liability upon commanders if they "knew" or "should have known" of their subordinates' crimes and failed to act.[105] The UCMJ, by contrast, has no such command responsibility provision.[106] Thus, aside from the co–conspirator context where a failure to act was conspired, imposing vicarious liability on a commander for a failure to act requires meeting the elements of principle liability under UCMJ Article 77.[107]

To illustrate how a commander's failure to act may be punishable by application of Article 77 and other UCMJ articles, this section will also discuss the Vietnam War era case of *United States v. Captain Ernest Medina.*[108] In *Medina* the government charged the accused commander with intentional murder under UCMJ Article 118.[109] The charge was based on the accused's omission—his failure to prevent his subordinates' massacre of hundreds of civilians over the course of hours, a short distance from him.[110] The government pursued a principal theory of liability under UCMJ Article 77.[111] The 1969 Manual for Courts–Martial (MCM) which was in effect at the time of the trial[112]—and in a nearly identical fashion to the 2012 MCM currently in effect—specified under Article 77 that an accused may be required to act if he "had a duty to interfere."[113] An

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[105] Rome Statute, *supra* note 19, art. 28(a)(i) ("That [a] military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes"). *See also* Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, 184–85 (Jun. 15, 2009) (confirming charges against the accused under a command responsibility theory for the crimes committed by his subordinates).

[106] *See generally* 10 U.S.C. §§ 801–946 (2012) (codifying the Uniform Code of Military Justice).

[107] *See* UCMJ art. 77 (2012) (establishing principle liability); UCMJ art. 81 (2012) (establishing co–conspirator liability).

[108] Michael L. Smidt, *Yamashita Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 195 (2000).

[109] *Id.* at 195 n. 167.

[110] GARY D. SOLIS, THE LAW OF ARMED CONFLICT 388–89 (Cambridge University Press ed., 2010).

[111] *Id.*

[112] *Id*. at 389 n. 46.

[113] *Compare* MANUAL FOR COURTS–MARTIAL, UNITED STATES, REVISED EDITION, ch. XXVIII, ¶ 156 (1969) [hereinafter 1969 MCM] ("If he had a duty to interfere and his noninterference was designed by him to operate and did operate as an encouragement to or protection of the perpetrator, he is a principle."), *with* 2012 MCM, *supra* note 104, pt. IV, ¶ 1.b.(2)(a) ("If a person (for example, a security guard) has a duty to interfere in the commission of an offense, but does not interfere, that person is a party to the crime if such

earlier MCM, the 1951 version, provided a useful example of how "the duty to interfere" could operate under a principle theory of liability.

> [A] sentinel or a guard charged with the duty of preventing the removal of government property who stands passively by while such property is taken in or from his presence by persons known to him to be thieves: is guilty of larceny of such property, for he is duty–bound to prevent offenses against the property he is protecting, and his inaction in the presence of the perpetrators constitutes assent to, and concurrence in, the larceny.[114]

Regarding command responsibility, however, none of the referenced MCMs articulate when a commander in Captain Medina's situation has a "duty to interfere" under Article 77.[115] This is in contrast to the Military Commission's Act (MCA) principle liability provision, which specifically addresses when a commander has an obligation to act—if he "knew, had reason to know, or should have known, that a subordinate was about to commit" war crimes.[116]

We must therefore look outside of the MCM—to the U.S. Army's still applicable 1956 Field Manual (FM) 27-10[117]—to ascertain when Captain Medina and the U.S. Commanders referenced in the ICC's 2014 ROI[118] had a "duty to interfere" under Article 77. In particular, FM27-10 references a "custom of the service" that imposes upon commanders a duty to act in certain circumstances,[119] a custom applicable to all U.S. service components.[120] Like the MCA and the

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a noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.").

114 MANUAL FOR COURTS–MARTIAL, UNITED STATES, ch. XXVIII, ¶ 156 (1951) [hereinafter 1951 MCM].

115 *See generally* 2012 MCM, *supra* note 104, pt. IV, ¶ 1; 1969 MCM, *supra* note 113, ch. XXVIII, ¶ 156; 1951 MCM, *supra* note 114, ch. XXVIII, ¶ 156.

116 10 U.S.C. § 950q (2012).

117 While originally published in 1956, the U.S. Army's Law of War Manual, Field Manual (FM) 27-10, was updated in 1976. U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 1. The update however, did not change the command responsibility provision. *See id*.

118 *See* 2014 ROI, *supra* note 98, ¶ 95.

119 *See* 2012 MCM, *supra* note 104, pt. IV, ¶ 16.b.(3)(a) (It is an established principle of U.S. Military jurisprudence that a "duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service."); *Id.;* United States v. Martinez, 42 M.J. 327, 330 (C.A.A.F. 1994) (stating a legal duty to act can be established by military tradition, necessity, and experience). As it pertains to FM 27-10, it specifies that its provisions are evidence of "custom and practice." U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 3. As such, it is offered here as evidence of "custom of the service"—as articulating an affirmative duty grounded in custom that requires commanders to act when they know, or should know, of their subordinates' war crimes. *Id.* at 178-79.

120 *See* U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL ¶ 18.23.3 (Jun. 2015) [hereinafter DOD MANUAL 2015]. The DoD Law of War (LOW) Manual was

Rome Statute, FM 27-10 has a command responsibility provision that requires U.S. commanders to act in two situations—when they have "actual knowledge" of their subordinates' war crimes, or when they have constructive knowledge. The latter exists if the commander "should have knowledge, through reports received by him or through other means that troops or other persons subject to his control are about to commit or have committed war crimes . . . ."[121] Also similar to the MCA and the Rome Statute, the FM 27-10 provision requires commanders to "take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof."[122]

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a joint effort by all U.S. Military services. *Id.* at v–vi. The LOW manual cites FM 27-10's command responsibility provision in support of its assertion that "[c]ommanders have duties to take necessary and reasonable measures to ensure that their subordinates do not commit violations of the law of war." *Id.* ¶ 18.23.3, n. 334. Further, FM 27-10's articulation of command responsibility doctrine is substantially mirrored in legal publications across all U.S. Military services, indicating a well–ingrained and uniform "custom of the service" across the Department of Defense. *Compare* U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79 ("The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops . . . subject to his control are about to commit or have committed a war crime . . . ."), *with* U.S. MARINE CORPS, MARINE CORPS REFERENCE PUBLICATION (MCRP) 4-11.8B, WAR CRIMES 8 (6 Sep. 2005) (stating "[c]ommanders are legally responsible for violations committed by subordinates" when they "knew of the act" or "should have known"), *and* OCEANS LAW AND POLICY DEP'T, U.S. NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para.6.1.3, n. 13 (15 Nov.1997) (stating that a commander may be "presumed" to know of his subordinates war crimes if "the commander had information which should have enabled him or her to conclude under the circumstances that such breach was to be expected"), *and* THE COMMANDANT, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. AIR FORCE, AIR FORCE OPERATIONS AND THE LAW 52 (2014) (stating that a commander is responsible if he has "actual knowledge, or should have known" of his subordinates' war crimes), *and* THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER'S LEGAL HANDBOOK 276 (Mar. 2015) ("Commanders are legally responsible for war crimes that they personally committed, or know or should have known about and take no action to prevent, stop, or punish.").

[121] *Compare id.*, *with* 10 U.S.C. § 950q (2012) (requiring the commander to act if he "knew, had reason to know, or should have known" of his subordinates' war crimes), *and* Rome Statute, *supra* note 19, art. 28(a)(i) (requiring the commander to act if he "either knew or, owing to the circumstances at the time, should have known" of his subordinates' war crimes).

[122] *Compare* U.S. LAW OF WAR MANUAL 1956, *supra note* 30, at 178–79, *with* 10 U.S.C. § 950q (2012) (imposing a duty upon a commander "to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof"), *and* Rome Statute, *supra* note 19, art. 28(a)(i) (establishing a duty to take "all necessary and reasonable measures within his or her power to prevent or repress their commission [of war crimes] or to submit the matter to the competent authorities for investigation and prosecution.").

Further, as it pertains to "actual knowledge" of subordinates' war crimes, there is little difference between the Rome Statute and the UCMJ. For example, the current U.S. Military Judge's Benchbook (JBB) and the Rome Statute's EOC both provide that circumstantial evidence of knowledge can be established by the "relevant facts and circumstances" surrounding the case.[123] However, the text of both FM 27-10 and the Rome Statute reveal a risk from a prosecutor's perspective of relying solely on an actual knowledge theory of the case—if a commander's actual knowledge is not proven, it cannot be said there was an obligation to act.[124]

For example, in Captain Medina's case, the defense theory claimed he lacked knowledge that his subordinates were committing war crimes.[125] Moreover, the government relied solely on an actual knowledge theory to prove the case.[126] That is, the government requested the jury be instructed the accused must have had "actual knowledge" of his subordinates' crimes.[127] In the end, the military jury

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[123] *Compare* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK ¶ 7-3, n. 3 (10 Sep. 2014) [hereinafter JBB] (explaining that circumstantial evidence of knowledge can be inferred from "all relevant facts and circumstances"), *with* EOC, *supra* note 44, at 1 ("Existence of intent and knowledge can be inferred from relevant facts and circumstances."). The ICTY in *Prosecutor v. Dario Kordi* provided an indication of how "[c]ircumstantial evidence will allow for an inference that the superior 'must have known' of subordinates' criminal acts." Prosecutor v. Dario Kordi, Case No. IT-95-14/2-T, Judgement, ¶ 427 (Int'l Crim. Trib. For the Former Yugoslavia Feb. 26, 2001). The court listed the following factors that could be used when making the determination:

> [t]he number, type, and scope of illegal acts; the time during which they occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; their widespread occurrence; the tactical tempo of operations; the modus operandi of similar illegal acts; the officers and staff involved and the location of the commander at the time.

Id.

[124] A commander's duty to act does not arise under the text of either FM 27-10 or the Rome Statute unless he has actual or constructive knowledge of his subordinates' war crimes. *See* U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79 (establishing that a commander has a duty to take "necessary and reasonable steps" when he has "actual knowledge" or constructive knowledge ("should have knowledge") of his subordinates' war crimes); Rome Statute, *supra* note 19, art. 28(a)(i) (establishing that a commander has a duty to take "necessary and reasonable measures" when he has actual knowledge ("knew") or constructive knowledge ("should have known") of his subordinates' war crimes). It follows that if the government was relying solely on an actual knowledge theory under either legal regime, a failure to prove actual knowledge would mean the commander had no duty to take "necessary and reasonable" steps or measures.

[125] *See* SOLIS, *supra* note 110, at 388–90.

[126] *See id*.

[127] *Id.*

acquitted Captain Medina.[128] While the reasons for the jury's decision will likely never be known,[129] the jury could have determined Captain Medina did not have an obligation to act because he lacked actual knowledge of his subordinates' crimes.[130] Such a determination is difficult to swallow, however, given Captain Medina's short distance from the massacre, the hail of gunfire he must have heard, and evidence, albeit non–conclusive, suggesting he either ordered or incited his subordinates to act.[131]

It is also possible that the jury found Captain Medina had "actual knowledge" of his subordinates' crimes, and that he had an obligation to act, but that his failure to act was not accompanied by the appropriate level of *mens rea.*[132] The U.S. Military Nurnberg Tribunal in *United States v. Von Leeb* established the *mens rea*

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[128] *Id.* at 390.

[129] The 1969 MCM, like the 2012 MCM, requires that military jurors take an oath of silence regarding their deliberative process; therefore, it will likely never be known why the jury acquitted Captain Medina. *See* 1969 MCM, *supra* note 113, ch. XXII, ¶ 114b (providing the oath to be given to court members, wherein they swear they "will not disclose or discover the vote or opinion of any particular member of the court . . . unless required to do in the due course of law"); 2012 MCM, *supra* note 104, R.C.M. 807 (b)(2) (establishing the "Oath for members" and requiring they swear they "will not disclose or discover the vote or opinion of any particular member of the court . . . unless required to do so in due course of the law . . .").

[130] *See, e.g.*, U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79 (establishing that a commander only has a duty to take "necessary and reasonable steps" when he has "actual knowledge" or constructive knowledge ("should have knowledge") of his subordinates' war crimes); Rome Statute, *supra* note 19, at art 28(a)(i) (establishing that a commander only has a duty to take "necessary and reasonable measures" when he has actual knowledge ("knew") or constructive knowledge ("should have known") of his subordinates' war crimes).

[131] *See* SOLIS, *supra* note 110, at 388–90.

[132] Any UCMJ provision used to prosecute a commander for failing to act in response to his subordinates' war crimes would have both an *actus reus* element and a *mens rea* element. *See, e.g.*, UCMJ art. 77 (2012) (establishing principle liability based on a "failure to act . . . intended to . . . operate as an aid or encouragement to the actual perpetrator"); UCMJ art. 119 (2012) (requiring an involuntary manslaughter conviction be based on an act or omission that amounts to "culpable negligence"); UCMJ art. 134 (2012) (requiring a Negligent Homicide conviction be based on "failure to act" that amounts to "simple negligence"); UCMJ Article 92 (establishing "[a] person is derelict in the performance of duties when that person willfully or negligently fails to perform that person's duties . . ."). The *actus reus* would be the commander's failure to act when duty bound to do so. *See* U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79 (establishing that a commander has a duty to take "necessary and reasonable steps" when he has "actual knowledge" or constructive knowledge ("should have known") of his subordinates' war crimes). The *mens rea* would obviously depend upon which UCMJ provision the commander is charged with violating. In any event, it is conceivable that Captain Medina's jury determined he had committed the *actus reus*—that he failed to act when he knew of his subordinates' war crimes—but determined he did not possess the requisite *mens rea*.

standard required to prove such a failure in the command responsibility context—"a wanton, immoral disregard of the action of his subordinates amounting to acquiescence"[133]—the standard endorsed by the 2015 Department of Defense Law of War Manual[134] and which is nearly identical to the standard endorsed by the International Tribunal for Rwanda (ICTR).[135] The *Von Leeb* standard is nearly identical to the culpable negligence definition in the UCMJ applied in involuntary manslaughter cases,[136] but lower than the specific intent *mens rea* standard required by Article 77.[137] Consequently, Captain Medina could not have been held vicariously liable under Article 77 for the crimes of subordinates based on a culpable negligence standard.

In Captain Medina's case, however, the military judge reduced the intentional murder charges to involuntary manslaughter under UCMJ Article 119,[138] and, therefore, his jury would have been instructed on a culpable negligence standard.[139] Also, Article 119 envisions responsibility arising from a "failure to act"[140] which must be the proximate cause of the resulting harm[141]—a similar

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[133] United States v. Von Leeb (High Command Case), 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10, Nurnberg, Oct 1946–Nov. 1949, at 544.

[134] *See* DOD MANUAL 2015, *supra* note 120, ¶ 18.23.3.2.

[135] *Compare Von Leeb*, 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10 at 544, *with* Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgement, ¶ 35 (Int'l Crim. Trib. For Rwanda Jun. 16, 2003) ("A military commander . . . may . . . be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or willfully disregarding them.").

[136] *See* JBB, *supra* note 123, ¶ 3-44-2 ("'Culpable' negligence is a negligent act or failure to act accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others.").

[137] *See* 1969 MCM, *supra* note 113, ch. XXVIII, ¶ 156. Under the 1969 MCM, the *mens rea* requirement is met if a commander's failure to interfere "was designed by him to operate . . . as an encouragement to or protection of the perpetrator." *Id.* Similarly, under the 2012 MCM currently in effect, the *mens rea* requirement under Article 77 is met if the failure to act is "intended to . . . operate as an aid or encouragement to the actual perpetrator." 2012 MCM, *supra* note 104, pt. IV, ¶ 1.b.(2)(b).

[138] *See* Editor's Note to Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB L. 7, 9 (1972).

[139] *See* 1969 MCM, *supra* note 113, ch. XXVIII, ¶ 198b. Under the 1969 MCM the applicable *mens rea* for involuntary manslaughter is culpable negligence. *Id.* In this respect, the 1969 MCM is identical to the 2012 MCM. *See* 2012 MCM, *supra* note 104, pt. IV, ¶ 44.c.(2)(a).

[140] *See* 1969 MCM, *supra* note 113, ch. XXVIII, ¶ 198.b (explaining "[t]he basis of a charge of involuntary manslaughter may be a [culpable] negligent act or omission"); 2012 MCM, *supra* note 104, pt. IV, ¶ 3.b.(2)(b) (requiring an involuntary manslaughter allegation be based on an "act or omission of the accused").

[141] *See* JBB, *supra* note 123, ¶ 3-44-2d n.1. Article 119, UCMJ, requires that an accused's failure to act be a proximate cause of the resulting harm. UCMJ art.119 (2012). To be the

requirement exists under Article 77[142] and international command responsibility jurisprudence.[143] Further, UCMJ Article 119 would also incorporate the duty to act referenced in FM 27-10's command responsibility provision[144]—imposing a duty to act if Captain Medina either had actual or constructive knowledge of his subordinates' war crimes.[145] He could then be held liable if he was culpably negligent in failing to carry out that duty.

In *Bemba Gombo,* however, the ICC appears to have parted with the culpable negligence standard established in *Von Leeb*[146] In particular, the court posited that the "should have known" language in the Rome Statute is a form of "negligence" and a standard of "fault."[147] Even with this negligence standard, however, the UCMJ would still provide coverage. For example, both Negligent Homicide under Article 134 and Negligent Dereliction of Duty under Article 92

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proximate cause, "an act need not be the sole cause of death, nor must it be the immediate cause—the latest in time and space preceding the death." United States v. Lingenfelter, 30 M.J. 302, 307 (C.M.A. 1990) (quoting United States v. Cooke, 18 M.J. 152, 154 (C.M.A. 1984)). Rather, it must have a "material role in the victim's decease." *Id.*

142 2012 MCM, *supra* note 104, pt. IV, ¶ 1.b.(2)(b) (requiring that such a failure to act under UCMJ Article 77 must have been "intended to and does operate as an aid or encouragement to the actual perpetrator.").

143 *See* Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 399 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 16, 1998) (establishing a "but for" causation requirement as the "necessary causal nexus" between the crimes committed by subordinates and the superior's failure to act).

144 *See* 2012 MCM, *supra* note 104, pt. IV, ¶ 16(c)(3)(a) (stating that a duty to act may be imposed by "treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service"). Military jurisprudence has established that a duty to act can be imposed by rules and laws external to the MCM; United States. v. McMurrin, 72. M.J. 697, 706 (N–M. Ct. Crim. App. 2013) (citing the 2012 MCM pt. IV, ¶ 16(c)(3)(a) for the proposition that an involuntary manslaughter conviction can be sustained on the basis of failing to act when duty bound to do so); United States v. Martinez, 42 M.J. 327, 330 (C.A.A.F. 1994) (stating a legal duty to act can be established by military tradition, necessity, and experience).

145 *See* U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79 (establishing that a commander has a duty to take "necessary and reasonable steps" when he has "actual knowledge" or constructive knowledge ("should have known") of his subordinates' war crimes).

146 United States v. Von Leeb (High Command Case), 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10, Nurnberg, Oct 1946–Nov. 1949, at 544.

147 *See* Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 429 (Jun. 15, 2009) ("The Statute encompasses two standards of fault element. The first . . . requires the existence of actual knowledge. The second, which is covered by the term 'should have known' . . . is in fact a form of negligence.").

envision responsibility arising from an omission.[148] Both provisions therefore could incorporate the duty referenced in FM 27-10's command responsibility provision,[149]—imposing a duty to act, if a commander either had actual or constructive knowledge of his subordinates' war crimes.[150] Commanders could then be held liable under either provision if they were negligent in failing to carry out that duty.

The differences between U.S. law and the Rome Statute can be illustrated by first understanding how constructive knowledge is applied by the former with the *Medina* fact pattern providing context. In *Medina*, the government did not request the jury be instructed on FM 27-10's constructive knowledge standard.[151] That is, they did not request the jury be instructed the accused had a duty to act if he "should have [had] knowledge" that his subordinates were committing war crimes.[152] On the other hand, it is not clear such an instruction would have made any difference. In particular, constructive knowledge requires an accused to have had some information that would have fairly put him notice, a principle

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[148] *See* 2012 MCM, *supra* note 104, pt. IV, ¶ 85.b.(4)(b) (listing as an element of negligent homicide under UCMJ Article 134 "an act" or "failure to act"); *id.* ¶ 16.c.(3)(c) (establishing "[a] person is derelict in the performance of duties [under UCMJ Article 92] when that person willfully or negligently fails to perform that person's duties . . .").

[149] *See* 2012 MCM, *supra* note 104, pt. IV, ¶ 16(c)(3)(a) (stating that a duty to act may be imposed by "treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service"); United States. v. McMurrin 72. M.J. 697, 706 (N–M. Ct. Crim. App. 2013) (citing the 2012 MCM pt. IV, ¶ 16(c)(3)(a) for the proposition that an involuntary manslaughter conviction can be sustained on the basis of failing to act when duty bound to do so); United States v. Martinez, 42 M.J. 327, 330 (C.A.A.F. 1994) (stating a legal duty to act can be established by military tradition, necessity, and experience).

[150] *See* U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79 (establishing that a commander has a duty to take "necessary and reasonable steps" when he has "actual knowledge" or constructive knowledge ("should have knowledge") of his subordinates' war crimes).

[151] *See* SOLIS, *supra* note 110, at 389.

[152] U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79.

established in international criminal tribunal precedent,[153] FM 27-10,[154] and the UCMJ.[155] Thus, the jury might have still concluded, even if they had received the

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[153] *See e.g.*, United States v. List (The Hostage Case), 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10, Nurnberg, Oct 1946–Nov. 1949, at 1260 (stating a commander would "normally" be considered to have knowledge of his subordinates' crimes when reports detailing them were "received at his headquarters, they being sent there for his special benefit"); Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶ 321 (Int'l Crim. Trib. For the Former Yugoslavia Jun. 30, 2006) (specifying a superior can be "imputed knowledge" when information of his subordinate crimes was "available to him"); United Nations War Crimes Commission, Yamashita Trial, 4 Law Reports of Trials of War Criminals 94–95 (1949) ("Means of knowledge and knowledge itself are, in legal effect, the same thing where there is enough to put a party on inquiry."). *See also* Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Amnesty International Amicus Curiae Observations on Superior Responsibility Submitted Pursuant to Rule 103 of the Rules of Procedure and Evidence, ¶¶ 5–6 (20 April 2009) [hereinafter AI Submission] (explaining that contemporary international criminal tribunals have consistently held commanders liable for their subordinates' crimes only when the information thereof was available to them).

[154] U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79. The FM 27-10 standard (nearly identically to *List*) would charge a commander with constructive knowledge "if he had information through reports received by him or through other means" of his subordinates' war crimes. *Compare id.*, *with List*, 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10 at 1269. However, the FM 27-10 standard contains a refinement that *List* does not—it limits application of constructive knowledge to those circumstances mentioned in the previous sentence where the commander "should have knowledge" of his subordinates war crimes. U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79.

[155] *See e.g.*, 2012 MCM, *supra* note 104, pt. IV, ¶16.b.(2) ("Actual knowledge need not be shown if the individual reasonably should have known of the duties. This may be demonstrated by regulations, training or operating manuals, customs of the service, academic literature or testimony, testimony of persons who have held similar or superior positions, or similar evidence."). While the 2012 MCM does not specify how its "should have known" constructive knowledge standard is to be applied, its predecessors indicate that the accused must have had information readily available to be deemed to have had constructive knowledge. For example, the 1949 MCM provided that an individual could be considered to have constructive knowledge of an order or directive if it "was of so notorious a nature, or was so conspicuously posted or distributed, that the particular accused *ought to have known* of its existence." MANUAL FOR COURTS–MARTIAL, U.S. ARMY, ch. XXVIII, ¶ 140b (Feb. 1, 1949) [hereinafter 1949 MCM] (emphasis added). The 1951 MCM similarly specified that knowledge of an order or directive is "constructive" if it was "so published that the accused would in the ordinary course of events, or by the exercise of ordinary care, have secured knowledge of the order." 1951 MCM, *supra* note 114, ch. XXVII, ¶ 154a(4). Further, military courts have specifically stated that "should have known" is not a form of negligence—that an accused cannot be deemed to have had constructive knowledge merely because he was negligent in failing to know. *See* United States v. Curtin, 9 C.M.R. 427, 432 (C.M.A. 1958); ("There is another defect inherent in the instruction here under consideration in that it permits a conviction on the basis of an accused's negligence in failing to acquaint himself with the order rather than on the basis

constructive knowledge instruction, that there was insufficient information available to trigger an obligation to act.

Under the Rome Statute, by contrast, Captain Medina need not have had any information available to him regarding his subordinates' crimes to have had an obligation to act.[156] However, the difference is not manifest. The Rome Statute is worded nearly identically to FM 27-10's "should have [had] knowledge" standard.[157] Yet, in *Bemba Gombo*, the ICC interpreted the Rome Statute's "should have known" language as a "form of negligence" and a standard of "fault."[158] The court also emphasized that the "should have known" standard imposes an "active duty" upon commanders that requires them "to inquire, regardless of the availability of information at the time of the commission of the offense."[159] Thus, the Rome Statute imposes a duty on U.S. commanders where U.S. law does not. That is, it requires commanders to act even when they have no knowledge—actual or constructive—of their subordinates' crimes.[160] Consequently, the U.S. commanders referenced in the 2014 ROI[161] could have violated the Rome Statute without violating U.S. law.

To close the gap with the Rome Statute, U.S. commanders operating in ICC member states could draft general orders that impose a duty to act in situations

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of knowledge of the order and its subsequent violation."); United States v. Crane, 9 C.M.R. 437, 437 (C.M.A. 1958) (The same issue was before this Court in *United States v. Curtin*, when the court stated, "There we held that the instruction on constructive knowledge was erroneous and had no place in a court martial's deliberations of an Article 92 offense.").

156 *Compare* U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178–79 (establishing that a commander has a duty to take "necessary and reasonable steps" when he has "actual knowledge" or constructive knowledge ("should have knowledge") of his subordinates' war crimes), *with* Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 433 (Jun. 15, 2009); ("The 'should have known' standard requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time of the commission of the crime.").

157 *Compare* U.S. LAW OF WAR MANUAL 1956, *supra note* 30, at 178–79 ("The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops . . . have committed a war crime . . . ."), *with* Rome Statute, *supra* note 19, art. 28(a)(i) ("That [a] military commander . . . either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes").

158 *Bemba Gombo*, Case No. ICC-01/05-01/08 ¶ 429 ("[t]he Statute encompasses two standards of fault elements. The first . . . requires the existence of actual knowledge. The second, which is covered by the term 'should have known' . . . is in fact a form of negligence.").

159 *Bemba Gombo*, ¶ 433.

160 *Id*.

161 2014 ROI, *supra* note 98, ¶ 95.

required by *Bemba Gombo*.[162] Such an order could enable prosecution under the UCMJ provisions and serve to preempt an ICC investigation.[163] On the other hand, it is difficult to contemplate how any order could be broad enough to accomplish this goal. Penal directives governing U.S. servicemembers are "rule–like" norms, while Rome Statute's command responsibility provision after *Bemba Gombo* is more akin to a "standard–like" norm.[164] Professor Louis Kaplow provides the following analogy to distinguish the two: "A rule might prohibit 'driving in excess of [fifty–five] miles per hour on expressways' . . . . A standard might prohibit 'driving at an excessive speed on expressways.'"[165] According to Professor Kaplow, the two are distinguished by "[t]he extent to which efforts to give content to the law are undertaken before or after individuals act." [166]

The UCMJ requires the promulgation of statutes, orders, and directives that are analogous to the fifty–five miles per hour speed limit—that is, they must proscribe an unambiguous duty that can be applied before the fact.[167] By contrast, after *Bemba Gombo*, the Rome Statute's command responsibility provision is more analogous to prohibiting "driving at an excessive speed." In particular, commanders now have an undefined "active duty" to seek out their subordinates' crimes and they need not even have knowledge of them—actual or constructive—to be responsible for their commission.[168] More to the point, the Rome Statute's command responsibility provision is likely broader than any order or directive that could be promulgated by the U.S.

2. Rule of Proportionality

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[162] *See* 2012 MCM, *supra* note 104, pt. IV, ¶ 16.c(1)(a) (establishing the authority to issue general orders and regulations).

[163] *See e.g.*, 2012 MCM, *supra* note 104, pt. IV, ¶ 16.c(1). For example, a General Officer could publish an order that imposes an "active duty" on his commanders to seek out evidence of their subordinates' war crimes. *See id.* (criminalizing "[v]iolation of or failure to obey a lawful general order or regulation").

[164] *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992).

[165] *Id.*

[166] *Id.*

[167] *See* United States v. King, 60 M.J. 832, 835 (C.G. Ct. Crim. App. 2005) ("Given the ambiguity surrounding the scope of Appellant's military duty under the Personnel Manual to support his son, we cannot affirm a conviction for dereliction of this duty based on the record before us."). *See also* United States v. Dedder 24 M.J. 176, 179 (C.M.A. 1987) ("[P]enal statutes applicable to service members and military directives intended to govern their conduct must convey some notice of the standards of behavior they require.").

[168] Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 432–33 (June 15, 2009).

Differences between how the United States and the ICC would assess whether the rule of proportionality was violated also has consequences for complementarity protection. A major difference between the two resides in how they respectively criminalize a violation of the proportionality rule. The ICC has broken down the proportionality rule into criminal elements in the EOC, and does thereby directly criminalize a violation of the rule.[169] That is, under the EOC, an individual violates the rule if he "knew" the collateral damage (CD) resulting from an attack would be "*clearly* excessive" in relation to "the concrete and direct *overall* military advantage anticipated."[170]

With the exception of the italicized text in the previous sentence, the version of the proportionality rule the U.S. follows (U.S. version)[171] is nearly identical to the proportionality rule in the EOC (EOC version).[172] However, the U.S. version is not codified into the UCMJ.[173] Consequently, a commander who violates the U.S. version would have to be charged with an ordinary crime under the UCMJ to be criminally liable for the violation.[174] In a proposed treaty reservation to API—whose proportionality provision is nearly identical to the U.S. version[175]—U.S. officials provided the following indication as to the type of ordinary crime that would constitute a violation of the proportionality rule: "It is the understanding of the United States of America that collateral civilian losses . . . are excessive only when they are tantamount to the intentional attack of the civilian population, or to the total disregard for the safety of the civilian population."[176]

This interpretation is also consistent with the views of Hays Parks, a U.S. LOAC scholar, who states, "[T]he concept of proportionality (as it is codified in Protocol I) is not violated unless acts have occurred that are tantamount to the direct attack of the civilian population . . . or involve wanton negligence that is tantamount to an intentional attack of the civilian population."[177]

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169 EOC, *supra* note 44, art. 8(2)(b)(iv).
170 *Id.*
171 *See* DOD MANUAL 2015, *supra* note 120, ¶ 5.12.
172 *Compare* API, *supra* note 9, art. 51(b), *with* EOC, *supra* note 44, art. 8(2)(b)(iv)(2)–(3).
173 *See generally* 10 U.S.C. §§ 801-946 (2012) (codifying the Uniform Code of Military Justice).
174 *See generally id.*
175 *Compare* API, *supra* note 9, art. 51(b), *with* DOD MANUAL 2015, *supra* note 120, ¶ 5.12.
176 *See generally* REPORT BY THE J–5, JCS REVIEW OF THE 1977 PROTOCOLS ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, A–I5B (1982) [hereinafter JCS REPORT] (on file with the author).
177 W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 173 (1990).

The proposed treaty reservation and Hays Parks' comments reflect that the lowest level of culpability that would result in a proportionality violation is culpable negligence.[178] The UCMJ defines culpable negligence as "a negligent act or failure to act accompanied by a gross, reckless, wanton, or deliberate disregard for the foreseeable results to others."[179] The UCMJ contains two contextually applicable provisions that would criminalize CD resulting from culpably negligent conduct: Involuntary Manslaughter in the case of death;[180] and in the absence of death, Aggravated Assault if the attack was "likely to produce death or grievous bodily harm."[181]

The extent to which the U.S. could preempt an ICC investigation rests centrally on answering the following question: can a violation the EOC version occur that does not amount to a violation of the above–mentioned UCMJ provisions? The answer to this question is likely "yes." For example, if a commander ordered an attack on a valid "military objective,"[182] took "all feasible precautions" to protect civilians,[183] and subjectively determined the CD would not be excessive, it would be difficult to conceive how he could still be culpably negligent. By contrast, as will be explained in the paragraph below, under at least

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[178] *Compare id*., *with* JCS Report, *supra* note 176, at A-I5B, and 2012 MCM, *supra* note 104, pt. IV, ¶ 16.c(2)(a)(i) ("Culpable negligence is a degree of carelessness greater than simple negligence. It is a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission.").

[179] JBB, *supra* note 123, ¶ 3-44-3.

[180] *Id*.

[181] *Id.* ¶ 3-54-8.

[182] API, *supra* note 9, Art. 52(2) ("Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization . . . offers a definite military advantage.") *See also* DOD MANUAL 2015, *supra* note 120, ¶ 5.7.3.

[183] For example, Article 57 of API requires the attacker take "all feasible precautions in the choice of means and methods of attack." *See* API, *supra* note 9, Art. 57(2)(a)(ii). *See also* DOD MANUAL 2015, *supra* note 120, ¶ 5.11. Thus, if the attacker has available two equally viable times of neutralizing a military objective—for example, a night attack verses a day time attack—Article 57 of API would require the attack occur at the time when the least amount of collateral death would occur. *See* API, *supra* note 9, Art. 57(2)(a)(ii). *See also* DOD MANUAL 2015, *supra* note 120, ¶ 5.11.2. Similarly, if the attacker has two available weapon systems to neutralize the target, Article 57 would require he use the means that causes the least amount of harm to civilians and civilian objects. *See* API, *supra* note 9, Art. 57(2)(a)(ii). *See also* DOD MANUAL 2015, *supra* note 120, ¶ 5.11.3. Finally, Article 57 would also require that if the attacker has the choice between two targets offering a similar military advantage, that he select the target that is expected "to cause the least danger to civilian lives and to civilian objects." *See* API, *supra* note 9, art. 57(3). As to this final requirement however, the recently released Department of Defense (DoD) Law of War Manual provides "this rule is not a requirement of customary international law." DOD MANUAL 2015, *supra* note 120, ¶ 5.11.5.

one interpretation of the EOC version, the ICC could still determine whether in such a case the CD was excessive, and therefore the attack was disproportionate.

There is a difference of opinion as to whether the EOC version requires a subjective assessment, as opposed to an objective assessment, concerning whether the CD is "excessive" in relation to the military advantage.[184] During the drafting of the EOC version, one group of states (first group) believed the attacker "must personally make a value judgement and come to the conclusion that the civilian damage would be excessive."[185] A second group of states (second group) believed "that the perpetrator need only know the extent of the injury or damage he/she will cause and the military advantage anticipated."[186] For the second group, whether the CD was "excessive" should be determined by the Court on an objective basis from the perspective of a reasonable commander."[187] In the end, neither interpretation was definitely adopted and, therefore, the EOC version can be interpreted either way.[188] Thus, the latter group's interpretation could criminalize conduct that falls below the culpable negligence threshold. That is, it would allow a determination that that the CD was excessive even if an accused commander took all feasible precautions, and subjectively determined the CD would not be excessive.

There is reason to believe that the ICC prosecutor may be applying this second group's interpretation. In particular, in their "Report on Preliminary Examination Activities 2013," the OTP asserted,

> [T]he United Nations Assistance Mission Afghanistan UNAMA has observed that a high number of air–strikes launched by members of pro–government forces which were directed at military targets have caused incidental loss of civilian life and harm to civilians which *appears* to be excessive by comparison with the anticipated concrete and direct military advantage.[189]

The ICC did not open an investigation into the referenced airstrikes; however, the stated reason for not doing so was that: the Rome Statute does not criminalize disproportionate attacks in a NIAC.[190] Nonetheless the excerpt is revealing as it

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[184] KNUT DÖRMANN ET AL., ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 164 (Cambridge University Press ed. 2003).
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.* at 165.
[189] Office of the Prosecutor, Report on Preliminary Examination Activities ¶ 47 (2013) (emphasis added).
[190] *Id.*

shows the OTP's willingness to assert a disproportionate attack based on what "appears" to be so. That is, without indicating whether the commanders in question personally made a "value judgement"—a prerequisite to qualify as disproportionate attack under the first group's interpretation.[191]

Perhaps then, to close the gap with the Rome Statute, to ensure complementarity protection, the U.S. could incorporate the broadest interpretation of the EOC version into the UCMJ. According to Hays Parks, however, this likely would not be possible.[192] Parks asserts that the proportionality rule would be "void for vagueness" under U.S. constitutional jurisprudence,[193] a view recently shared by Professor Robert D. Sloane.[194] According to Professor Sloane, the "hypothetical constitutional infirmity" referenced by Hayes Parks likely resides in the fact that the attacker must weigh two "incommensurable" concepts—"civilian welfare" and "military advantage"—concepts which are open to a broad range of subjective interpretation.[195]

Finally, the EOC version does appear to mitigate any risk that U.S. commanders may be investigated for a violation of the proportionality rule that does not violate U.S. law. That is, it requires the CD to be "clearly excessive" as opposed to just "excessive" in the U.S. version, and adds the term "overall" before "military advantage."[196] However, the commentary to the EOC version warns against such an interpretation, stating, "[T]he addition of the words 'clearly' and 'overall' in the definition of collateral damage is not reflected in any existing legal source. Therefore, the addition must be understood as not changing existing law."[197] Consequently, the differences between the UCMJ and the EOC version appear to create an unmitigated risk that the former is not extensive enough to cover a violation of the latter.

3. Maximum Punishment

Even if the UCMJ was extensive enough to cover the same conduct as the Rome Statute, preempting an ICC investigation may still not be possible. In particular, the maximum confinement under the UCMJ for the most serious crime

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191 DÖRMANN, *supra* note 184, at 164.
192 Parks, *supra* note 177, at 173.
193 *Id*.
194 Professor Robert D. Sloane, *Puzzles of Proportion and the 'Reasonable Military Commander': Reflections on the Law, Ethics, and Geopolitics of Proportionality*, 6 HARV. NAT'L SEC. J. 299, 309 (2015).
195 *Id.*
196 *Compare* 2015 Manual, *supra* note 142, ¶ 5.12., *with* EOC, *supra* note 41, art. 8(2)(b)(iv)(2)–(3).
197 DÖRMANN, *supra* note 184, at 169.

mentioned above—involuntary manslaughter—is normally ten years,[198] compared to life under the Rome Statute.[199] For the following crimes referenced above, the gulf is much larger: for aggravated assault, the maximum confinement is normally three years;[200] for negligent homicide, three years;[201] and for negligent dereliction of duty, just three months.[202] While the Rome Statute does not consider "punishment" in determining whether a country is "genuinely" unwilling or unable to process a case, the Office of the Prosecutor (OTP) recently indicated, with regard to Colombia, that it would consider punishment.

> [T]he Office has informed the Colombian authorities that a sentence that is grossly or manifestly inadequate, in light of the gravity of the crimes and the form of participation of the accused, would vitiate the genuineness of a national proceeding, even if all previous stages of the proceeding had been deemed genuine.[203]

The Office of the Prosecutor was referring to Colombia's so–called "Justice and Peace Law," put into force on July 25, 2005, as part of a peace–process to bring over forty years of bloodshed to an end.[204] To that end, the law established a minimum punishment of five years and a maximum of eight years for members of certain armed groups accused of genocide, crimes against humanity, and war crimes[205]—crimes for which the ICC imposes a maximum penalty of confinement for life.[206] It should be noted, however, that the ICC has not ruled on whether

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[198] 2012 MCM, *supra* note 104, pt. IV, ¶ 44.e (establishing the maximum period of confinement for involuntary manslaughter as ten years unless the victim was a child, in which case it would be fifteen years).

[199] Rome Statute, *supra* note 19, art. 77.1.

[200] 2012 MCM, *supra* note 104, pt. IV, ¶ 54.e(b),(c) (establishing the maximum period of confinement for aggravated assault as 3 years, unless the victim was a child, in which case it would be five years).

[201] *Id.* at pt. IV, ¶ 85.e.

[202] *Id.* at pt. IV, ¶ 16.e.(3)(A)–(B). *But see* THE DEFENSE LEGAL POLICY BOARD, REPORT OF THE SUBCOMMITTEE ON MILITARY JUSTICE IN COMBAT ZONES 45 (2014) ("The MCM should be amended to increase the maximum punishment for dereliction of duty to ensure appropriate sanctions in civilian casualty cases.").

[203] 2014 ROI, *supra* note 98, ¶ 114.

[204] Jennifer S. Easterday, *Deciding the Fate of Complementarity: A Colombian Case Study*, 26 ARIZ. J. INT'L & COMP. L. 50, 50–51 (2009).

[205] KAI AMBROS, THE COLOMBIAN PEACE PROCESS AND THE PRINCIPLE OF COMPLEMENTARITY OF THE INTERNATIONAL CRIMINAL COURT 4 (Springer ed., 2010) (explaining that in order to reintegrate former fighters, the Colombian government established "law 975 of 2005," establishing a minimum punishment of five years, and a maximum of eight years, for irregular armed groups).

[206] Rome Statute, *supra* note 19, art. 77.1.

punishment bears on complementarity, though some scholars would concur with the OTP's interpretation quoted above.[207]

IV. The Anatomy of Judicial Lawmaking—*Prosecutor v. Bemba Gombo*

A. Hurdling Safeguards against Judicial Lawmaking

When the ICC does rule, it must comply with the restrictions contained in the Rome Statute that address judicial law making. In particular, Article 22(2) of the Rome Statute contains three fundamental protections that are designed to guard against the type of creativity that occurred at the ICTY.[208] The first protection requires that the definition of a crime be "strictly construed" by the court. The second prohibits extending the law "by analogy," [209] which is designed to discourage the legislation of new crimes.[210] The third requires that "[i]n case of ambiguity, the definition [of a crime] shall be interpreted in favor of the person being investigated, prosecuted, or defended."[211] Despite these limitations, however, "[t]he scope for judicially creative interpretation remains . . . ."[212] Indeed, the ICC appears to have begun to engage in the type of judicial creativity Article 22(2) was designed to prohibit.

In *Bemba Gombo,* for example, the ICC fundamentally transformed the "should have known" standard contained in Article 28 of the Rome Statute.[213] They did so first by concluding the standard "is in fact a form of negligence" and

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[207] *See e.g.*, Kevin Jon Heller, *A Sentence–Based Theory of Complementarit*y, 53 HARV. INT'L L.J. 201, 226 (2012) (arguing the ICC should "focus exclusively on sentence when determining whether a national prosecution of an ordinary crime is admissible"); Easterday, *supra* note 204, at 104 (suggesting that Colombia's "Justice and Peace Law" is evidence that Colombia is "shielding" persons from criminal responsibility).

[208] Rome Statute, *supra* note 19, art. 22(2).

[209] *Id.*

[210] *See* Grover, *supra* note 41, at 555 ("The ban on analogy is . . . intended to discourage the creation of substantially new crimes.").

[211] Rome Statute, *supra* note 19, art. 22(2).

[212] SHANE DARCY, JUDGES, LAW AND WAR 278–79 (Cambridge University Press, ed., iBooks ed. 2014) (discussing the ICC statute).

[213] *Compare* Rome Statute, *supra* note 19, art. 28(a)(i) (establishing responsibility when "[t]he military commander . . . either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes" and "failed to take all necessary and reasonable measures"), *with* Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 433 (Jun. 15, 2009) ("The 'should have known' standard requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time of the commission of the crime.").

thus a standard of "fault."[214] Second, this led the court to conclude that the "should have known" standard imposes upon the commander "more of an active duty" to seek out information of subordinates' war crimes than its "had reason to know" counterpart in the ICTY and ICTR statutes.[215] Third, in stark contrast to contemporary international criminal tribunal precedent, the court determined the "should have known" standard imposes responsibility upon a commander "regardless of the availability of information."[216] Thus, as the court would have it, commanders are now responsible for knowing information that is not readily available to them; they have an affirmative duty to seek out information, the extent to which the court has refrained from defining.[217] Further, a commander apparently can be liable for mere "negligence" in violating that ambiguous duty. As discussed in Part IV.B thru IV.D., the court reached these conclusions by misreading the Rome Statute's legislative history, equating constructive knowledge with fault, and over–relying on the ordinary meaning of the phrase "should have known."

B. Misreading the Legislative History of the Rome Statute

The *Bemba Gombo* court reached the conclusion that the "should have known" standard was a negligent culpability standard by apparently relying on Amnesty International's *amicus curiae* submission, which misinterpreted the legislative history of the Rome Statute.[218] In that submission, Amnesty International asserted the legislative history of the "should have known" standard in the Rome Statute indicated "the drafters . . . deliberately departed from the 'had reason to know' formulation of the statutes of the ad hoc tribunals, and

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[214] *Id.* ¶ 429 ("The Statute encompasses two standards of fault elements. The first . . . requires the existence of actual knowledge. The second, which is covered by the term 'should have known' . . . is in fact a form of negligence.")

[215] *Id.* ¶¶ 433–34.

[216] *See* AI Submission, *supra* note 153, ¶ 5. Under traditional command responsibility doctrine, the commander had a duty act if he had information readily available to him, putting him on notice of his subordinates' crimes. *See* AI Submission, *supra* note 153, ¶ 5. The ad hoc tribunals of the ICTY and ICTR have consistently found that a commander has no active duty to seek out information of his subordinates' crimes. *Id.* Amnesty International argued in their submission to the *Bemba Gombo* court that the Rome Statute's command responsibility provision actually imposes an affirmative duty on the part of the commander to seek out such information of his subordinates' crimes. *Id.* ¶ 7. The court apparently adopted Amnesty International's position in this regard. *See Bemba Gombo*, Case No. ICC-01/05-01/08 ¶ 433–34.

[217] *Id.*

[218] *Id.* at ¶ 432 (citing Amnesty International's amicus curiae submission in support of its determination that the "should have known standard" requires the superior to have merely been negligent in failing to acquire knowledge of his subordinates crimes). *See also* AI Submission, *supra* note 153, ¶¶ 3, 6.

intentionally incorporated a *negligence standard* for the mental element of superior responsibility for military commanders."[219] The lynchpin of Amnesty International's argument was a statement made by the U.S. representative during the Rome Statute's legislative conference.[220] Amnesty International asserted "widespread support" for the following "proposal," made by the same U.S. Representative, that was really just an observation—one that mischaracterized "should have known" as a negligence–based culpability standard:

> An important feature in military command responsibility and one that was unique in a criminal context was the existence of *negligence* as a criterion of criminal responsibility. Thus, a military commander was expected to take responsibility if he knew or should have known that the forces under his control were going to commit a criminal act. That appeared to be justified by the fact that he was in charge of an inherently lethal force.[221]

The actual proposal Amnesty International omitted from their brief regarded expanding command responsibility to civilian supervisors.[222] When viewed in this context, it is clear the reference to military commanders was intended merely as juxtaposition to the liability being proposed for civilian supervisors.[223] The actual proposal is as follows:

> Ms. Borek (United States of America), introducing the draft proposal, said that her delegation had had serious doubts about extending the concept of command responsibility to a civilian supervisor because of the very different rules governing criminal punishment in civilian and military organizations. Recognizing, however, that there was a strong interest in some form of responsibility for civilian supervisors, it was submitting a proposal in an endeavor to facilitate agreement. The main difference between civilian supervisors and military commanders lay in the nature and scope of their authority. The latter's authority rested on the military discipline system, which had a penal dimension, whereas there was no comparable punishment system for civilians in most countries. Another difference was that a military commander was in charge of a

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219 *See* AI Submission, *supra* note 153, ¶ 10.
220 *Id.*
221 Plenary and Committee Meetings, Rome, Italy, June 15–July 17, 1998, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, ¶ 67 U.N. Doc. A/CONF.183/13 (Vol. II) (2002) [hereinafter UN Report] (emphasis added).
222 *Id.*
223 *Id.*

> lethal force, whereas a civilian supervisor was in charge of what might be termed a bureaucracy.[224]

The final version of the statute adopts the U.S. Representative Ms. Borek's, proposal by establishing command–like responsibility for civilian superiors who "knew" of their subordinates' crimes, though modifying the "should have known" phraseology.[225] That is, civilian superiors can be deemed to have knowledge if they "consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes."[226] The reason for the higher threshold for civilians is apparently based on Ms. Borek's concern that "[t]he negligence standard was not appropriate in a civilian context, and was basically contrary to the usual principles of criminal law responsibility."[227] The proposal plainly received "widespread support," as it was adopted.[228] It is just as clear that support was aimed only at establishing command–type responsibility for civilians.[229]

C. Equating Constructive Knowledge with Fault

Nonetheless, the *Bemba Gombo* court interpreted the Rome Statute's "should have known" language as creating a standard of "fault" by which guilt or innocence would be assessed.[230] In so doing, they lowered the command responsibility's *mens rea* requirement to negligence, and forewent any analysis of how *mens rea* and constructive knowledge interact with the two core elements of "indirect" command responsibility: first is a duty to act; and second, an omission.[231] These elements have their origins in the first modern command

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[224] *Id.*

[225] Rome Statute, *supra* note 19, art. 28(a)(i).

[226] *Id.* at art. 28(a)(ii).

[227] UN Report, *supra* note 221, ¶ 68.

[228] *See id.* at art. 28(a)(ii) (establishing that a civilian "superior" can be held liable for the crimes of his subordinates if he "knew, or consciously disregarded information which clearly indicated" his subordinates were engaging in criminal conduct).

[229] *See* AI Submission, *supra* note 153, n.28. Amnesty International cites "¶¶69-82" of the UN Report documenting the Rome Statute's legislative history to support its assertion that there was "widespread support" for a proposal to establish a negligence based command responsibility standard. *Id.* However, even a cursory review of "¶¶69-82" reveals this is not the case—the universal support pertained only to creating a differing standard of responsibility for civilian superiors. UN Report, *supra* note 221, ¶ 68-82 (quoting representatives from the following countries who supported the U.S. proposal to create a different standard of responsibility for civilian superiors: Netherlands, Jordan, Israel, Slovenia, Russian Federation, France, Mexico, and Australia).

[230] *Id.* ¶ 433.

[231] "Indirect" command responsibility arises when a commander fails to act with regard to his subordinates' behavior when he has a duty to do so. Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶ 333 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 16, 1998).

responsibility case that occurred in the aftermath of World War II, *United States v. Yamashita*,[232] and are also present in the ICTY, ICTR, and Rome Statutes.[233] An understanding of how *mens rea* and constructive knowledge interplay with these elements under each statute is therefore necessary to understand the extent of the court's error.

1. The Core Elements of Command Responsibility—A Duty to Act and an Omission

Under each statute, knowledge is established if the accused actually "knew" of his subordinates' crimes, or if it can be established constructively that the accused "had reason to know" or "should have known," the latter phraseology the Rome Statute adopted.[234] These constructive knowledge standards also have their

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This is in contrast to "direct" command responsibility where the commander engages in positive acts such as ordering, instigating, or planning criminal acts of his subordinates. *Id.* Under either theory, the commander can be held liable for the acts of his subordinates. *Id.*

[232] United Nations War Crimes Commission, Yamashita Trial, 4 Law Reports of Trials of War Criminals 1 (1949) (explaining the case against the accused was he "knew or must have known" of his subordinates' war crimes, and that by "[u]nlawfully disregarding and failing . . . to control" his subordinates, he was responsible for their war crimes); *See also* BRITISH LAW OF WAR MANUAL 2004, *supra* note 30, at 438 ("The concept of command responsibility was first enunciated in the case of General Yamashita.").

[233] *See infra* Part C.1.

[234] *See* Rome Statute, *supra* note 19, art. 28(a)(i) (establishing a duty act if the accused "knew or should have known" of his subordinates' crimes and specifying that failure to "take all necessary and reasonable measures" results in liability); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia Since 1991 art. 7(3), May 25 1993, 32 I.L.M. 1192, 1194 [hereinafter ICTY Statute] (establishing a duty to act if the commander "knew or had reason to know" of his subordinates' crimes and specifying that failure to take "necessary and reasonable measures" results in liability); Statute of the International Tribunal for Rwanda art. 6(3), Nov. 8, 1994, 33 I.L.M. 1602, 1604–05 [hereinafter ICTR Statute] (establishing a duty to act if the commander "knew or had reason to know" of his subordinates' crimes and specifying that failure to take "necessary and reasonable measures" results in liability). *See also* 19 United States v. Seomu Toyoda 5005-06 (official Transcript Record of Trial) (Int'l. Mil. Trib. for the Far East Sept. 1949) (establishing the commander has a duty to act where he has actual or constructive knowledge of his subordinates' crimes and fails to take "appropriate measures as are within his power to control," which results in liability); United States v. List (The Hostage Case), 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10, Nurnberg, Oct 1946–Nov. 1949, at 1259–60 (establishing a rebuttable presumption of a commander's duty to act when subordinate crimes contained in reports are "received at his headquarters, they being sent there for his special benefit" or when such crimes occur "within the area of his command while he is present therein").

origins in World War II tribunal cases[235] and are also referred to as "imputed knowledge."[236] Constructive knowledge has also been articulated in other doctrines as "ought to have under the circumstances"[237]; "information that would have enabled them to conclude;"[238] and as "should have known through reports or other means."[239] Once the accused is on notice, either actually or constructively, of his subordinates' crimes, he can be held liable if he fails to take "necessary and reasonable measures."[240] This phrase is similar to the U.S.'s World War II era Tribunal case law,[241] and is identical in each statute, with the significant exception that the Rome Statute adds the word "all" before "necessary."[242]

2. The Requisite Mens Rea

Once the *actus reus* is established under any of the statutes—that the accused failed to act when duty bound to do so[243]—a *mens rea* element must too be assessed, as none of the statutes establish a strict liability offense.[244] The

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[235] *See* Major Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 95 (1973) ("Almost universally the post–World War II Tribunals cases concluded that a commander is responsible for offenses committed within his command if the evidence establishes that he had actual knowledge or should have had knowledge, and thereafter failed to act.").

[236] *See, e.g.*, Prosecutor v. Orić, Case No. IT-03-68-T, Judgment, ¶ 321 (Int'l Crim. Trib. For the Former Yugoslavia Jun. 30, 2006) (referencing "Imputed Knowledge" if an accused "had reason to know" of his subordinates' crimes); Prosecutor v. Dario Kordi, Case No. IT-95-14/2-T, Judgment, ¶ 429 (Int'l Crim. Trib. For the Former Yugoslavia Feb. 26, 2001) (referencing "imputed knowledge" as a commander "having reason to know"). *See also* Prosecutor v. Zejnil Delaić, Case No. IT-96-21-T, Judgment, ¶ 1220 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 16, 1998) (using the term "constructive knowledge").

[237] *Yamashita*, 4 Law Reports of Trials of War Criminals 1 at 94.

[238] API, *supra* note 9, art. 86.

[239] U.S. LAW OF WAR MANUAL 1956, *supra* note 30, at 178.

[240] *See, e.g.*, ICTR Statute, *supra* note 234, art. 6(3) (requiring "necessary and reasonable measures"); ICTY Statute, *supra* note 234, art. 7(3) (requiring "necessary and reasonable measures"). *But see* Rome Statute, *supra* note 19, art. 28(a)(ii) (requiring "all necessary and reasonable measures").

[241] *See* 19 United States v. Seomu Toyoda 5005-06 (official Transcript Record of Trial) (Int'l. Mil. Trib. for the Far East Sept. 1949) (requiring "appropriate measures"); In Re Yamashita, 327 U.S. 1, 15 (1946) (requiring "such measures as were within his power and appropriate in the circumstances . . .").

[242] *See* Rome Statute, *supra* note 19, art. 28(a)(ii).

[243] *See supra* Part IV.C.1.

[244] *See* Prosecutor v. Sefer Halilović, Case No. IT-01-48-T, Judgment, ¶ 65 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 16, 2005) ("Superior responsibility is not a form of strict liability."); Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the

previously discussed post–World War II military tribunal case of *United States v. Von Leeb* established the *mens rea* standard for command responsibility cases.

> There must be a personal dereliction . . . where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. [245]

The *Von Leeb* standard is also consistent with the holding of the International Tribunal for Rwanda (ICTR) in *Prosecutor v. Bagilisiiema,* which specifically rejected an ordinary negligence standard.

> References to "negligence" in the context of superior responsibility are likely to lead to confusion of thought as the Judgment of the Trial Chamber in the present case illustrates. The law imposes upon a superior a duty to prevent crimes which he knows or has reason to know were about to be committed, and to punish crimes which he knows or has reason to know had been committed, by subordinates over whom he has effective control. A military commander, or a civilian superior, may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or willfully disregarding them.[246]

Further, while the ICTY has been less forthcoming in articulating the *mens rea* requirement for command responsibility,[247] it has endorsed the ICTR's *Bagilishema* holding that mere negligence is not the appropriate standard.[248] Also

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Prosecutor, ¶ 427 (Jun. 15, 2009) ("[T]he Rome Statute does not endorse the concept of strict liability."); Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgment, ¶ 35 (Int'l Crim. Trib. For Rwanda Jun. 16, 2003) ("A military commander . . . may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or willfully disregarding them.").

[245] United States v. Von Leeb (High Command Case), 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10, Nurnberg, Oct 1946–Nov. 1949, at 544 (emphasis added). *See also* COMMENTARY TO THE ADDITIONAL PROTOCOLS OF 6 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 August 1949 ¶ 3546 (Yves Sandoz et al. eds. 1987) [hereinafter API Commentary] (citing the *Von Leeb mens rea* standard).

[246] *Bagilishema*, Case No. ICTR-95-1A-A ¶ 35.

[247] *Halilović*, Case No. IT-01-48-T ¶ 70 (stating the requisite *mens rea* in command responsibility cases depended on the "specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question").

[248] *Compare* Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgment, ¶ 313-33 (Int'l Crim. Trib. For the Former Yugoslavia Mar. 3, 2000) (asserting command responsibility is a negligence based assessment), *with* Prosecutor v. Tihomir Blaškić, Case

noteworthy is Judge Fausto Pocar, former ICTY President and a current member of the ICTR Appeals Chamber, who explicitly rejects the notion that command responsibility under any of the referenced statutes establishes responsibility for "mere negligence."[249]

D. Misled by the Ordinary Meaning of "Should Have Known"

The ordinary meaning of "should have known" naturally lends itself to the conclusion that mere negligence is the appropriate standard for command responsibility. At least, that appears to be the *Bemba Gombo* court's justification when it states that "the term 'should have known' is in fact a form of negligence."[250] In this regard, the ICC's ruling again appears to be consistent with Amnesty International's *amicus curiae* submission, which states in pertinent part that "should have known" must "be interpreted in accordance with the ordinary meaning of its terms in context and in light of the object and purpose of the Statute."[251]

As discussed in Part IV.D.1, this "ordinary meaning" has been a source of confusion that both the ICC and Amnesty International now appear to also have fallen victim to.[252] To be fair, the ICC and Amnesty International are not alone in their error—some academic literature does refer to the phrase "should have known" as establishing a negligence *mens rea* standard in the context of command responsibility.[253] To understand why this interpretation is wrong, it is first necessary to know modern command responsibility doctrine has its origins in cases the U.S. prosecuted in post–World War II military tribunals.[254] It is also

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No. IT-95-14-A, Appeal Judgment, ¶ 63 (Int'l Crim. Trib. For the Former Yugoslavia Jul. 29, 2004) (rejecting the lower court's determination that command responsibility is a negligence–based assessment).

[249] Interview with Judge Fausto Pocar, President, International Institute of Humanitarian Law, in Sanremo, Italy (May 22, 2015).

[250] Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 429 (Jun. 15, 2009).

[251] AI Submission, *supra* note 153, ¶ 7.

[252] *See infra* Part IV.D.1.

[253] *See, e.g.*, Joshua L. Root, *New Frontiers in the Laws of War: Some Other Mens Rea? The Nature of Command Responsibility in the Rome Statute*, 23 J. TRANSNAT'L L. & POL'Y 119, 136 (2013-2014); Victor Hansen, *What's Good for the Goose is Good for the Gander, Lessons from Abu Ghraib: Time for the United States to Adopt a Standard of Command Responsibility Towards its Own*, 42 GONZ. L. REV. 3, 51 (2007); Michal Stryszak, *Command Responsibility: How Much Should a Commander be Expected to Know?,* 11 USAFA J. LEG. STUD., 54 (2000).

[254] *See*, *e.g.*, BRITISH LAW OF WAR MANUAL 2004, *supra* note 30, at 438 ("The concept of command responsibility was first enunciated in the case of General Yamashita."); United

necessary to understand that almost "universally the post–World War II Tribunals cases concluded that a commander is responsible for offenses committed within his command if the evidence establishes that he had actual knowledge or should have had knowledge, and thereafter failed to act." [255] As such, in examining how the concept of constructive knowledge was understood by those tribunals, it is useful to explore how U.S. military manuals of the era defined the phrase "should have known."

1. Searching for the Meaning of "Should Have Known"

On February 1, 1949, the U.S. Army published a new Manual for Courts–Martial,[256] just over three years after the judgment in *United States v. Yamashita*[257] and mere months after the *United States v. Von Leeb* judgment.[258] That manual differed from its 1943 predecessor in at least one important aspect—it was updated to incorporate the concept of "constructive knowledge."[259] It articulated that concept as follows:

> [B]efore a person can properly be held responsible for a violation . . . it must appear that he knew of the order or

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Nations War Crimes Commission, Yamashita Trial, 4 Law Reports of Trials of War Criminals 1 (1949) (establishing the case against the accused was he "knew or must have known" of his subordinates' war crimes and that by "[u]nlawfully disregarding and failing . . . to control" his subordinates he was responsible for their war crimes); 19 United States v. Seomu Toyoda 5005-06 (official Transcript Record of Trial) (Int'l. Mil. Trib. for the Far East Sept. 1949) (establishing the commander has a duty to act where he has actual or constructive knowledge of his subordinates' crimes and failure to take "appropriate measures as are within his power to control" results in liability); United States v. List (The Hostage Case), 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10, Nurnberg, Oct 1946–Nov. 1949, at 1259–60. (establishing a rebuttable presumption of a commander's duty to act when subordinates' crimes contained in reports are "received at his headquarters, they being sent there for his special benefit" or when such crimes occur "within the area of his command while he is present therein"). *See also* United States v. Von Leeb (High Command Case), 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10, Nurnberg, Oct 1946–Nov. 1949, at 544 (establishing that the *mens rea* for command responsibility cases is "a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence").

[255] *See* Parks, *supra* note 235, at 95.

[256] *See generally* 1949 MCM, *supra* note 155.

[257] *Yamashita,* 4 Law Reports of War Criminals 1 at 33 ("The findings of the commission were delivered on December 7, 1945.").

[258] *Von Leeb*, 11 Trials of War Criminals Before the Nurnberg Military Tribunals Under Control Council Law No. 10 at 462) (specifying the judgment date as "October 27, 1948").

[259] *Compare* 1949 MCM, *supra* note 155, ch. XXVIII, ¶ 140b, *with* MANUAL FOR COURTS–MARTIAL, U.S. ARMY 1928 (corrected to April 20, 1943) (emphasis added).

> directive either actually or constructively. Constructive knowledge can be found to have existed when the order or directive was of so notorious a nature, or was so conspicuously posted or distributed, that the particular accused *ought to have known* of its existence.[260]

Interestingly, the *Yamashita* case reporter also uses the phrase "ought to have" and otherwise describes constructive knowledge in congruence with the 1949 MCM, albeit with the difference that the case reporter applies the standard to knowledge of facts rather than knowledge of law.

> Short of maintaining that a Commander has a duty to discover the state of discipline prevailing among his troops, Courts dealing with cases such as those at present under discussion may in suitable instances have regarded means of knowledge as being the same as knowledge itself. This presumption has been defined as follows:
>
> Means of knowledge and knowledge itself are, in legal effect, the same thing where there is enough to put a party on inquiry. Knowledge which one has or ought to have under the circumstances is imputed to him . . . . In other words, whatever fairly puts a person on inquiry is sufficient notice when: the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. A person has no right to shut his eyes or his ears to avoid information, and then say that he had no notice; he does wrong not to heed to "signs and signals" seen by him.[261]

Constructive knowledge, however, was a source of confusion at U.S. military courts–martial.[262] This confusion resided in an apparent propensity to interpret the phrase "should have known" according to its ordinary meaning, as establishing a negligent fault standard rather than a constructive knowledge standard.[263] That confusion was at issue in the 1958 U.S. court–martial case of *United States v. Curtin*, where the accused was charged with violating an order for which his knowledge was at issue.[264] The military judge in that case provided the following erroneous instruction to the jury regarding the accused's knowledge

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[260] 1949 MCM, *supra* note 155, ch. XXVIII, ¶ 140b.
[261] 39 AM. JUR., pp. 236-237, § 12; *Yamashita*, 4 Law Reports of Trials of War Criminals 1 at 94–95.
[262] *See e.g.*, United States v. Curtin, 9 C.M.R. 427, 432 (C.M.A. 1958); United States v. Crane, 9 C.M.R. 437, 437 (C.M.A. 1958).
[263] See *Curtin*, 9 C.M.R. at 432; *Crane*, 9 C.M.R. at 437.
[264] *Curtin*, 9 C.M.R. at 429.

of the order, which contributed to the accused's conviction being reversed on appeal: "Constructive knowledge of a matter exists when the accused, by the exercise of ordinary care, *should have known* of the matter, whether or not he did so in fact."[265]

Before explaining how that instruction was incorrect, the Court of Military Appeals (CMA) examined the definition of constructive knowledge in the 1951 MCM,[266] whose definition of the concept was nearly identical to 1949 MCM quoted above.[267] However, the 1951 MCM added the following detail in the discussion portion of Article 92, for which the court explains:

> [M]anual for Courts–Martial, United States, 1951, in discussing the offense here in issue, states that such knowledge "may be actual or constructive." It defines "actual" knowledge as knowledge which has been conveyed directly to the accused. Knowledge on the other hand is "constructive" when it is shown that "the order was so published that the accused would in the ordinary course of events, or by the exercise of ordinary care, have secured knowledge of the order."[268]

The CMA reasoned the military judge's instruction was incorrect because the 1951 MCM articulated the "should have known" standard as a knowledge standard, not a fault standard:

> There is another defect inherent in the instruction here under consideration in that it permits a conviction on the basis of an accused's negligence in failing to acquaint himself with the order rather than on the basis of knowledge of the order and its subsequent violation. The main thrust of the offense is knowing disobedience of an order rather than negligent failure to ascertain knowledge of the order.[269]

The same error was repeated in the U.S. court–martial case of *United States v. Crane*.[270] Again, the accused's knowledge of an order was at issue, and the military judge gave an instruction substantially similar to the one given in Curtin, which resulted in the CMA overturning the case on appeal. "[C]onstructive

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[265] *Id.* (emphasis added).
[266] *Id.* at 432.
[267] *Compare* 1951 MCM, *supra* note 114, ch. XXVII, ¶ 154a(4), *with* 1949 MCM, *supra* note 155, ch. XXVIII, ¶ 140b.
[268] *Curtin*, 9 C.M.R. at 432. *See also* 1951 MCM, *supra* note 114, ¶ 171b.
[269] *Curtin,* 9 C.M.R. at 432–33.
[270] *Crane*, 9 C.M.R. at 437.

knowledge of a matter exists 'when the accused, *by the exercise of ordinary care, should have known of the matter whether he did so in fact*."[271]

With the context of *Curtin* and *Crane* in mind, it is clear that the U.S. representative to the Rome Statute deliberations fell into the same trap as the judges in these cases had by characterizing "should have known" as a negligent fault standard.[272] Nor can there be any doubt that the Pre–Trial Chamber in *Bemba Gombo* fell into the same trap, as their following statement makes clear that they too have interpreted it as a fault standard:

> [T]he Chamber considers that article 28(a) of the Statute encompasses two standards of fault element. The first, which is encapsulated by the term "knew," requires the existence of actual knowledge. The second, which is covered by the term "should have known," is in fact a form of negligence.[273]

2. A Continuous and Ongoing Duty to Know?

In addition to interpreting "should have known" as a "form of negligence," the court also determined that the failure to acquire information is likewise punishable.[274] In doing so, they created a new duty—a "duty to know," a duty that is not delimited; or contained in the statute[275]—the same conceptual mistake made by the military judges in *Curtin* and *Crane.* Turning to *Curtin* and *Crane*, the CMA points to the heart of what went wrong: the military judge's instructions articulated the "should have known" standard as criminalizing the accused's "negligence in failing to acquaint himself with the order . . . ."[276] More to the point, if "negligence in failing to acquaint" is punishable, the instructions implied

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[271] *Id.* (emphasis added).

[272] *See* UN Report, *supra* note 221, at ¶ 67.

[273] Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 429 (Jun. 15, 2009).

[274] *Id*. ¶ 429.

[275] See Rome Statute, *supra* note 19, art. 28(a)(i),(ii).

[276] United States v. Curtin, 9 C.M.R. 427, 432 (C.M.A. 1958) ("There is another defect inherent in the instruction here under consideration in that it permits a conviction on the basis of an accused's negligence in failing to acquaint himself with the order rather than on the basis of knowledge of the order and its subsequent violation."). *See also* United States v. Crane, 9 C.M.R. 437, 437 (C.M.A. 1958) ("The same issue was before this *Court in United States v. Curtin* . . . . There we held that the instruction on constructive knowledge was erroneous and had no place in a court martial's deliberations of an Article 92 offense.").

an accused had a duty "to know" of his commander's orders.[277] Yet the law in question imposed a very different duty, a duty to *obey* a commander's orders.[278] Further, while the UCMJ provision specifically delineated when the duty to obey arose—when an accused "knew or should have known" of the orders[279]—neither jury instruction contained such a limitation on this "duty to know."[280] As such, the military judges interpreted "should have known" as implicitly creating a continuous and ongoing duty "to know," a duty not imposed by the underlying UCMJ offense, which is the reason the CMA overturned the convictions.[281]

Turning back to *Bemba Gombo,* we see that their following articulation of the "should have known" standard is identical in substance to the jury instructions in *Curtin* and *Crane*: "The 'should have known' standard requires the superior to 'ha[ve] merely been negligent in failing to acquire knowledge' of his subordinates' illegal conduct."[282] Thus, as commanders are liable for failing "to acquire knowledge" when they "should have known," it follows that they have a duty "to know" of their subordinates' crimes—a point the court tacitly acknowledges when they assert commanders have an "active duty" to "take the necessary measures to secure knowledge."[283] Yet, this duty "to know" is in stark contrast with the duty imposed by the Rome Statue—the duty to "take necessary and reasonable measures" to prevent, repress, or report war crimes.[284] Further, as there is no delimitation on when this judicially created "duty to know" arises, it follows that it is continuous and ongoing. This too is in contrast with the Rome Statute which imposes a duty only when the commander "knew" or "should have known" of his subordinates' war crimes.[285] Thus, *Bemba Gombo* transformed the Rome Statute's command responsibility provision—just as the military judges' instruction in *Curtin* and *Crane* transformed the UCMJ's violation of orders offense[286]—by creating a continuous and ongoing "duty to know."

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[277] *See Curtin*, 9 C.M.R. at 429 ("Constructive knowledge of a matter exists when the accused, by the exercise of ordinary care, should have known of the matter, whether or not he did so in fact."); *Crane*, 9 C.M.R. at 437 (C.M.A. 1958) ("[C]onstructive knowledge of a matter exists "when the accused, by the exercise of ordinary care, should have known of the matter whether he did so in fact.").

[278] *See also* 1951 MCM, *supra* note 114, ¶ 171b.(c) (listing as an element of the offense "Failure to Obey Other Lawful Order" that the accused "willfully disobeyed" the order).

[279] *Id.* ¶ 171b.

[280] *Curtin*, 9 C.M.R. at 429; *Crane*, 9 C.M.R. at 437.

[281] *Curtin*, 9 C.M.R. at 432. ("The main thrust of the offense [of violating a lawful order] is knowing disobedience of an order rather than negligent failure to ascertain knowledge of the order."). *See also Crane*, 9 CMR at 437 (citing *Curtin*).

[282] Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 432 (Jun. 15, 2009) (citations omitted).

[283] *Id*. ¶ 433.

[284] Rome Statute, *supra* note 19, art. 28(a)(i),(ii).

[285] *Id.*

[286] *See Curtin*, 9 C.M.R. at 432; *Crane*, 9 C.M.R. at 437.

E. Immediate Consequences for the U.S.

Unfortunately, the *Bemba Gombo* interpretation of command responsibility has implications for the U.S. In particular, the ICC has a basis to determine whether the *Bemba Gombo* interpretation of command responsibility is reflective of customary international law and therefore binding on all countries, including the U.S.[287] In particular, the *Bemba Gombo* decision cited, with approval, the ICTY Trial Chamber decision of *Prosecutor v. Blaškić*,[288] which determined that the "should have known" standard was customary international law.[289] The *Blaskić* Trial Chamber also determined that "should have known" was a negligence–based *mens rea* standard, following the same flawed logic as the military judges in *Curtin* and *Crane*.[290]

On appeal, the ICTY appeals chamber rejected the idea that the ICTY statute encompassed a mere negligence–based *mens rea* requirement for command responsibility.[291] However, it did not refute the *Blaškić* Trial Chamber's assertion that "should have known" created a negligence *mens rea* standard, or that the standard had become customary international law.[292] Thus, the *Blaškić* appeals chamber paved the way for the ICC to determine that the "should have known" standard, as *Bemba Gombo* and the *Blaškić* trial chambers have interpreted it, is customary international law.[293]

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[287] *See Bemba Gombo,* Case No. ICC-01/05-01/08 ¶¶ 432–33 (citing Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgment, ¶ 322 (Int'l Crim. Trib. For the Former Yugoslavia Mar. 2, 2000)) (citing *Blaškić* in support of its assertion that the "should have known" standard is a negligent fault standard, and implying that interpretation is customary international law).

[288] *Id.* ¶¶ 432–33.

[289] *Blaškić*, Case No. IT-95-14-T ¶¶ 313-33.

[290] *See id.*

[291] *See* Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Appeal Judgment, ¶ 63 (Int'l Crim. Trib. For the Former Yugoslavia Jul. 29, 2004).

[292] *See id.*

[293] While only States make customary international law, *see* FOREIGN RELATIONS LAW RESTATEMENT, *supra* note 17, § 102, as the ICRC has observed, "[I]nternational courts and tribunals on occasion conclude that a rule of customary international law exists when that rule is a desirable one for international peace and security or for the protection of the human person, provided that there is no important contrary opinio juris." ICRC STUDY VOLUME I, *supra* note 22, at xlviii. It also follows than that the referenced "international courts and tribunals," *id*., will be less inhibited in articulating a particular rule as customary international law if other tribunals have already done so. In this regard, the *Blaškić* Tribunal has laid the groundwork for the ICC to determine that the "should have known" standard is a negligent fault standard. *See Blaškić*, Case No. IT-95-14-T ¶¶ 313-33.

The implications of the *Bemba Gombo* decision for the U.S. are also immediate. The ICC's 2014 ROI illustrates that the ICC is considering investigating U.S. commanders for the actions of their subordinates in allegedly abusing detainees.[294] There can be no doubt those commanders at some point "knew" of such abuses as indicated by the fact the U.S. investigated and prosecuted the alleged perpetrators in both Iraq and Afghanistan, achieving a conviction rate of eighty–six percent.[295] Yet, the *Bemba Gombo* decision, following the same logic as the courts in *Curtin* and *Crane*, would convict those commanders for mere negligence in failing to obtain prior knowledge of their subordinates' illegality, and even if such information was not readily available to them.[296] The *Bemba Gombo* court did not elaborate the extent to which these commanders would have been required to proactively seek out knowledge.[297]

V. The International Criminal Court's Dual Role—Lawmaker and Adjudicator

A. The Long Term Consequences for the LOAC

A more important function of the Rome Statute is overlooked when focusing solely on how the ICC may adjudicate guilt or innocence. That is, the Rome Statute does not allow good–faith differences of opinion in interpreting the LOAC.[298] ICC member States appear to have delegated lawmaking authority to an institution that will inevitably run afoul of their interests.[299]

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[294] *See* 2014 ROI, *supra* note 98, ¶ 95.

[295] UNITED STATES OF AMERICA THIRD PERIODIC REPORT TO THE COMMITTEE AGAINST TORTURE, ¶ 199 (August 2013), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2f3-5&Lang=en.

[296] *See* Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶¶ 429, 433 (Jun. 15, 2009).

[297] *See id.* ¶ 433.

[298] *See* Wedgewood, *supra* note 48, at 1043 ("Where there are good–faith doctrinal differences [in the law], this [complementarity] is no protection."). *See also* Rome Statute, *supra* note 19, art. 1 (stating the jurisdiction of the court "shall be complementary to national criminal jurisdictions"); *id*. art. 17 (establishing the mechanism through which this complementarity is maintained); *id.* at Rome Statute, *supra* note 19, art. 21 (establishing a hierarchical order in which the court will determine "applicable law"—the Rome Statute and the EOC are at the top of the hierarchy, while at the bottom is "national law," which will only be applied if it is "not inconsistent with this Statute and with International law . . . .").

[299] Danner, *supra* note 5, at 42, 43. Professor Allison Danner posits States are reluctant to acknowledge they are delegating authority to international tribunals "[b]ecause of concerns about accountability," and consequently "judicial lawmaking may be the truth of international politics that cannot be named." *Id.* She further asserts the legal academy has

In particular, while each State has unique interests, a State's interest generally in developing the LOAC consists of balancing two competing concepts within the law—humanity and military necessity—a balance States are incentivized to carefully foster.[300] That is, States have civilian populations vulnerable to the ravages of war and military servicemembers who may be captured. States are thus incentivized to develop the law in a manner that requires these individuals be treated humanely. On the other hand, States have militaries to "pursue and safeguard vital national interests."[301] States are thus also incentivized to develop the law in a manner that ensures the military necessity component is preserved—that the law does not "unduly restrict their freedom of action on the battlefield."[302]

International Tribunals, by contrast, are headed by judges who focus on guilt or innocence and the applicability of rules and their exceptions to reach those conclusions. The following statement from Judge Cassese illustrates how that process can lead to legal precedent that misses the dilemma States face in maintaining the LOAC's delicate balance:

> We have all made judgments. We know that we are prone to manipulation. We manipulate laws, standards, political principles, and principles of interpretation. Very often, particularly in a criminal case, I sense that the defendant is guilty, and common sense leads me to believe that we should come to a particular conclusion. Then I say, 'All right, let us now build sound legal reasoning to support that conclusion.'[303]

The ICTY's *Krupreskić* decision is an illustration of how State concerns can be ignored by tribunals in developing the law.[304] By determining that the use of

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been similarly silent as international judges "reinforce the political slight–of–hand [sic] by denying that they make law." *Id.* at 42. *See also* Colonel Stuart W. Risch, *Hostile Outsider or Influential insider? The United States and the International Criminal Court*, ARMY LAW., Aug. 2009 (advocating the United States ratify the Rome Statute, but not addressing the ICC's power to make law); David J. Scheffer, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983 (urging the United States to ratify the Rome Statute, but not analyzing the implications on the future development of the LOAC); Jordan J. Paust, *The U.S. and the ICC: No More Excuses, The International Criminal Court at Ten (Symposium)*, 12 WASH. U. GLOBAL STUD. L. REV. 563 (asserting the United States has no valid excuse for not joining the ICC, but not addressing the ICC's lawmaking authority).

300 *Schmitt*, *supra* note 4, at 798–99.

301 *Id.* at 799.

302 *Id.*

303 DARCY, *supra* note 212, at 694–95.

304 *See* Prosecutor v. Kupreskić, Case No. IT-95-16-T, Judgment, ¶¶ 527–33, n. 788 (Int'l Crim. Trib. For the Former Yugoslavia Jan. 14, 2000)

belligerent reprisals is a violation of international law, the court apparently took no account of the national security concerns of States who explicitly authorize them to deter attacks against their civilian populations.[305] For example, the U.S. would allow reprisals when confronted with "massive and continuing attacks" on the U.S. population.[306] Additionally, the United States would permit "reprisals against the civilian population or civilian objects" of the attacking State within certain bounds, to the extent necessary and solely for bringing such attacks to end, as long as this response did not violate the 1949 Geneva Conventions.[307]

The United States has a pressing reason to be concerned about the legality of reprisals—the Chinese Doctrine of Unrestricted Warfare.[308] The doctrine is reminiscent of the Prussian doctrine of *Kriegraison geht vor Kriegsrecht*—meaning "military necessity in war overrides the law of war"—practiced by some German Military Officers from 1871 through World War II.[309] A September 2014 white paper by the U.S. Army Special Operations Command explains how Chinese doctrine similarly elevates military necessity above all other concerns.

> Recent Chinese doctrine articulates the use of a wide spectrum of warfare against its adversaries, including the United States. The People's Liberation Army (PLA) Colonels Liang and Xiangsui outline China's vision on how China will attack the United States through a combination of military and non-military actions. Qiao Liang states "the first rule of unrestricted warfare is that there are no rules, with nothing forbidden." Qiao Liang's rule suggests any method will be used to win the war at all cost. Liang's theory presents challenges because the United States must prepare for all worse case scenarios.[310]

The Rome Statute, however, does provide avenues to allow State influence to permeate the court's decisions that could conceivably stave off decisions like *Krupresić*. For example, ICC member States nominate and elect judges[311] to represent their interests on the court and a similar process exists for prosecutors.[312] Further, the Rome Statute permanently cements the influence of NSAs within its statutory framework, which will permit domestic politics to influence the court.[313]

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[305] *See id.*
[306] JCS REPORT, *supra* note 176, at A–5A (1982).
[307] *Id.*
[308] OPERATING CONCEPT, *supra* note 2, at 13.
[309] SOLIS, *supra* note 110, at 265–66.
[310] WHITE PAPER BY THE UNITED STATES ARMY SPECIAL OPERATIONS COMMAND, COUNTER–UNCONVENTIONAL WARFARE, B–3a (2014).
[311] Rome Statute, *supra* note 19, art. 38(3).
[312] *Id.* art. 42(4).
[313] *See* Rome Statute, *supra* note 19, art. 15(2) (specifying the prosecutor may enlist the assistance of non–governmental organizations (NGOs) in acquiring information); *id.* at art.

Additionally, the court allows *amicus curiae* submissions, a process States could use to shape the court's decisions.[314] On the other hand, these mechanisms by no means guarantee States' interests will prevail. For example, the *Bemba Gombo* decision was largely consistent with the flawed legal analysis of an *amicus curiae* submission from Amnesty International.[315]

B. The Consequences on the Battlefield

The *Bemba Gombo* decision is an illustration of how the ICC too can become detached from the realities that State military forces confront on the battlefield. There, the court's failure to detail how commanders have an "active duty" to secure knowledge of a subordinate's crime leaves commanders uncertain as to what their obligations are.[316] As commanders can be held liable for mere negligence in violating that unspecified duty, the impact of that decision could be to deter commanders and the forces they control from engaging in combat operations.[317]

The so called "Nangar Khel" incident illustrates it could take just one criminal investigation to deter servicemembers from doing their jobs and undermine morale.[318] The incident involved Polish forces in Afghanistan who, in August 2007, came under attack from a local village.[319] Their patrol returned fire with mortar rounds, one of which killed several civilians, including children and a pregnant woman.[320] A Polish prosecutor filed murder charges against seven of the soldiers and afterward the so–called "Nangar Khel Syndrome" set in, as the Polish soldiers came to believe they could no longer trust their leaders to protect them.[321] Sergeant First Class Nicolae Bunea, a U.S. soldier, who accompanied Polish units on patrol after the incident observed,

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44(4) (permitting the court to enlist the assistance of NGOs to "assist with work of any of the organs of the Court") .

[314] *See* Rules of Procedure and Evidence, Rule 103, UN Doc. PCNICC/2000/INF/3/Add.3 (2000).

[315] *Compare* Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ ¶ 429–34 (Jun. 15, 2009), *with* AI Submission, *supra* note 153, ¶ 5–11.

[316] Prosecutor v. Jean–Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant To Article 61(7)(1) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 433 (Jun. 15, 2009).

[317] *Id.* ¶ 429.

[318] Aleksandra Kulczuga, *Poland's "Vietnam Syndrome" in Afghanistan*, FOREIGN POLICY (July 7, 2011) http://foreignpolicy.com/2011/07/07/polands-vietnam-syndrome-in-afghanistan/.

[319] *Id.*

[320] *Id.*

[321] *Id.*

> If there was even a chance of killing a civilian, they wouldn't shoot . . . I would try to explain to them, "You're with me—if I shoot, you need to shoot too" . . . They were afraid of going to jail. They were always thinking about [Nangar Khel]. They would say, "You don't understand—I go to jail if I kill people."[322]

Colonel Martin Schweitzer, a Brigade Combat Team commander in Afghanistan at the time posited that the Polish team's actions were "proportional," "acceptable," and "not out of the norm," and commented that U.S. servicemembers have been involved in similar incidents.[323]

On the battlefield of the future, U.S. adversaries will pursue hybrid strategies specifically designed to inflict this "Nangar Khel Syndrome" that will also strike at the heart of the U.S.'s center of gravity. At least this is what can be deduced from a recent report authored by several retired U.S. Generals on the 2014 "Gaza War" between Israel and Hamas.[324] In that report, the authors explain that Hamas had "adopted and adapted the doctrine of unrestricted warfare in a manner that is likely to be studied by other nations and terrorist organizations."[325]

Part of Hamas's 2014 strategy was to deliberately provoke and exacerbate collateral damage caused by Israeli attacks,[326] damage created when Israel responded to Hamas launching indiscriminate rocket attacks on Israeli cities.[327] The strategy employed a sophisticated media campaign that included intimidating international journalists who attempted to film rocket launches from the Gaza Strip, while allowing the international media unrestricted access to hospitals to report causalities.[328] The strategy was part of an ultimately successful information campaign designed to depict Israeli responses as violating the LOAC and thereby undermine its "international legitimacy."[329] The report refers to this strategy as "death by a thousand casualties" and warns that it requires "regular and prolonged bouts of armed conflict" to succeed.[330] The report therefore concludes,

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322 *Id.*
323 *Id.*
324 *See generally* Jewish Institute for National Security Affairs, 2014 *Gaza War Assessment: The New Face of Conflict* (2015), http://www.jinsa.org/files/2014GazaAssessmentReport.pdf [hereinafter Gaza Report].
325 *Id.* at 31.
326 *Id.* at 9.
327 *Id.* at 19.
328 *Id.* at 50.
329 *Id.* at 9.
330 *Id.*

> When confronting such a foe, unnecessary greater restraint in U.S. military operations will not deliver victory. Therefore this Task Force recommends American political and military leaders take additional steps now to prepare to encounter this new face of war.[331]

Hamas recently gave consent for Palestine to join the ICC, underscoring the role the court could play in exasperating this "new face of war."[332] As no Israeli military personnel will likely be tried by the ICC,[333] Hamas has apparently determined the risks of the ICC prosecuting its indiscriminate rocket attacks[334] are outweighed by the perceived benefit that an ICC investigation could delegitimize Israel.[335] Professor Mike Schmitt has coined the phrase "Bully Syndrome" that likely explains Hamas's cost–benefit analysis.[336] According to Professor Schmitt, the syndrome is a product of the natural human desire to root for the "underdog" and hold a technologically superior "bully," for example, Israel in this case, to a higher standard in order to level the playing field.[337] Contributing to the syndrome is that most technologically advanced militaries come from democracies that facilitate transparent journalism as a matter of national values, which readily exposes their battlefield conduct.[338] Thus, a disproportionate number of the "bully's" violations are exposed, thereby distorting perceptions about their compliance with the law.[339] By contrast, the technologically disadvantaged parties like Hamas actively conceal their LOAC violations,[340] and even when exposed, their crimes receive scant attention.[341] According to Professor Schmitt, this "bully syndrome" explains why "[A]bu Ghraib somehow generates a greater visceral reaction than the kidnapping and beheading of innocent civilians."[342]

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331 *Id.* at 7.
332 *Id.* at 41.
333 THE INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx (last visited May 1, 2015) (listing all ICC member States, of whom Israel is not listed).
334 *See generally* Gaza Report, *supra* note 324, at 19.
335 *See* Rome Statute, *supra* note 19, art. 12.2(a). The Rome Statute's jurisdiction can be geographical. *Id.* Thus, if one State party has consented to ICC jurisdiction, then jurisdiction would extend to non–state parties for qualifying crimes that occur on the consenting party's territory. *Id.* Therefore, a risk to the Palestinians and Hamas is they too could be prosecuted for the war crimes they committed on Palestinian territory.
336 Schmitt, *supra* note 82, at 470.
337 *Id.*
338 *Id.* at 471.
339 *Id.*
340 Gaza Report, *supra* note 324, at 50.
341 Schmitt, *supra* note 82, at 471.
342 *Id.*

C. The Consequences for the U.S.

There are two core components of U.S. policy toward the ICC that appear ideally suited to address the perverse incentives the court's jurisdiction brings to conflicts like the 2014 Gaza War. First, U.S. law prohibits transferring U.S. personnel to the ICC for prosecution,[343] and the U.S. has Article 98 agreements with over 100 countries who also agree not to transfer U.S. personnel.[344] Second, the United States has implemented domestic legislation that authorizes the President of the United States to "use all means necessary to bring about the release" of U.S. servicemembers detained by the court.[345] In future conflicts, these two policy components can improve the U.S.'s prospects for victory in two ways. First, they inoculate servicemembers against "Nangar Khel Syndrome"—that is, the prospect of being prosecuted by the ICC is reduced, and with it, a reduced disincentive for U.S. servicemembers to use legitimate force against enemy combatants. Second, it protects civilians by lessening the incentives for enemy combatants to deliberately co–mingle military objectives among them, for example, with the aim of provoking a U.S. response that could be investigated by the ICC.

Off the battlefield, by contrast, the U.S. opposition to the ICC will have at least one negative effect—it will negatively impact the U.S.'s ability to shape the LOAC through the ICC which would directly impact state practice of its more than 120 member States.[346] For example, were the United States an ICC member State, it could nominate judges[347] and prosecutors[348] and could thereby ensure those nominees are experts in the LOAC. It could also use its diplomatic weight to convince other ICC member States to agree to amendments to the Rome Statute it believes are desirable.[349] Additionally, it could advocate for the removal of ICC judges and prosecutors[350] it believed were perpetuating politicized prosecutions, a concern often cited by U.S. opponents of the ICC.[351]

VI. Conclusion

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[343] 22 U.S.C. §7423(d) (2012) (prohibiting extradition of any person from the United States to the ICC).
[344] Elsea, *supra* note 70, at 26.
[345] *See* 22 U.S.C. §7427(a) (2012).
[346] THE INTERNATIONAL CRIMINAL COURT, http://www.icccpi.int/EN_Menus/icc/Pages/default.aspx (last visited May 1, 2015).
[347] Rome Statute, *supra* note 19, art. 36.4(a).
[348] *Id.* art. 42.4.
[349] *Id.* art. 121.1.
[350] *Id.* art. 46.2.
[351] Elsea, *supra* note 70, at 7.

The ICC's power to adjudicate war crime allegations and generate law through the issuance of decisions will reverberate across future battlefields. When those decisions differ from U.S. interpretations of the LOAC, it will increase the risk that U.S. operations could be delegitimized. In particular, it creates the risk that U.S. servicemembers could be investigated and indicted by the ICC for crimes that don't violate U.S. law, a risk this article has illustrated already exists in the context of command responsibility and the prohibition on disproportionate attacks. While ratifying the Rome Statute would certainly increase the U.S.'s ability to shape the court and by extension the LOAC, it would also bring with it a vulnerability. Ratification would necessarily mean the U.S. would abandon its current policy of opposing the ICC, a policy this article has argued is ideally suited to deal with the battlefield environments like the 2014 Gaza war, which may be the "new face of war."[352]

If the United States were to ratify the Rome Statute, it follows U.S. commanders would be loath to ignore ICC LOAC interpretations—to do so could risk indictment and prosecution. Thus, the ICC's law making ought to be the primary concern of the United States in deciding whether to ratify the Rome Statute. Even a cursory look at the Rome Statute's war crime provisions reveals that there is a great deal of room for the court to fundamentally transform the LOAC. For example, what does "taking direct part in hostilities" mean under the Rome Statute?[353] Does it mean that individuals assembling and storing improvised explosive devices cannot be targeted on that basis alone, as the ICRC has suggested?[354] How does the Rome Statute define military objective?[355] Would the ICC reject, as some scholars have, the U.S. interpretation of that phrase as including "war sustaining" objectives?[356] What about belligerent reprisals—are they permitted under the Rome Statute,[357] or does it virtually prohibit them like API?[358] Does the statute require belligerents to minimize harm to opposing forces—to wound or capture enemy forces rather than kill, as some have

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[352] Gaza Report, *supra* note 324, at 41.

[353] Rome Statute, *supra* note 19, arts. 8(b)(i), 8(e)(i).

[354] INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 54 (Nils Melzer Ed., 2009).

[355] Rome Statute, *supra* note 19, arts. 8(b)(ii), 8(b)(v), 8(b)(ix), 8(e)(iv).

[356] YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 95–96 (2d ed. 2010); Major Edward C. Linneweber, *To Target or Not to Target: Why 'Tis Nobler to Thwart the Afghan Narcotics Trade with Nonlethal Means*, 207 MIL. LAW REV. 155, 157 (2011).

[357] *See generally* Rome Statute, *supra* note 19. The Rome Statute does not address belligerent reprisals. *Id.*

[358] *See* API, *supra* note 9, art. 51(6) (prohibiting reprisals against civilians). *See also* API Commentary, *supra* note 245, ¶ 1398 ("Reprisals are no longer authorized, except in the conduct of hostilities, and even then they cannot be carried out arbitrarily.").

suggested the LOAC requires?[359] These questions are merely the tip of the iceberg, and underscore the fact that any discussion regarding the merits of ratifying the Rome Statute requires a discussion about the future of the LOAC.

[359] INTERPRETIVE GUIDANCE, *supra* note 354, at 77–82; Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 EUROPEAN J. INT'L L. 819, 822 (2013) ("Under the modern LOAC, the legal right to use armed force is limited to rendering individuals hors de combat . . . .").

BECOMING A HARDER TARGET: UPDATING MILITARY FIREARMS POLICIES TO COMBAT ACTIVE SHOOTERS

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> *When the first shots rang out, my hand reached to my belt for something that wasn't there [a gun]. Something that could have put a stop to the bloodshed, could have made it merely an "ugly incident" instead of the horrific massacre that I will surely remember as the darkest twenty minutes of my life . . . . Stripped of my God–given right to arm myself, the only defensive posture I had left was to lie prostrate on the ground, and wait to die. As the shooter kicked at the door, I remember telling myself, "oh well, this is it." It is beneath human dignity to experience the utter helplessness I felt that day. I cannot abide the thought that anyone should ever feel that again . . . . I shall conclude by restating my warning. This will happen again and again until we learn the lesson that suppressing the bearing of arms doesn't prevent horrific crimes, it invites them.*[1]

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[1] *Read the Powerful Letter a Fort Hood Soldier Penned Asking for his 'God–Given Right' to Arm Himself on Base*, BLAZE (Apr. 8, 2014) [hereinafter 1LT Cook Letter], http://www.theblaze.com/stories/2014/04/08/read-the-powerful-letter-a-fort-hood-solider-penned-asking-for-his-god-given-right-to-arm-himself-on-base/ (quoting First Lieutenant (1LT) Patrick Cook in Oliver Darcy). First Lieutenant (1LT) Patrick Cook narrowly survived the 2014 Fort Hood shooting. *Id*. He asked a fellow Soldier to read a letter at a Texas State Senate Hearing describing the shooting, and asking lawmakers to allow Soldiers to carry firearms, so they can defend themselves against attack. *Senate Comm. on Agriculture, Rural Affairs, and Homeland Security*, 83d Tex. Sen. (Apr. 9, 2014) (referring to the letter from 1LT Patrick Cook read by Christopher Coleman), https://www.youtube. com/watch.?v=8xOfa65JrcI. First Lieutenant Cook describes how his life was saved when a fellow Soldier, Sergeant First Class (SFC) Daniel Ferguson,

I. Introduction

If you work in a military office, ask yourself this question: If a gunman came into your work area and began shooting people, how long would it take for a Law Enforcement Officer (LEO) to arrive and stop them? The answer for most servicemembers is far too long.[2] Since 2009, eight minutes is the fastest time that military LEOs have responded to and stopped an ongoing active shooter incident on a military installation.[3] The slowest response time for military LEOs to stop an active shooter was sixty–nine minutes.[4] The recent shooting deaths of four marines and one sailor at the Chattanooga, Tennessee Naval Reserve Center highlight the additional challenge of protecting servicemembers stationed outside of regular military installations where armed military police (MP) and security forces are located.[5]

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barricaded a door when the shooting began. *Id.* After SFC Ferguson was seriously wounded, 1LT Cook described their efforts to keep SFC Ferguson alive: "I can still taste his blood in my mouth from when I and my comrades breathed into his lungs for twenty long minutes while we waited for a response from the authorities." *Id.*

[2] *See* U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, A STUDY OF ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES BETWEEN 2000 AND 2013, 11 (Sept. 16, 2013), http://www.fbi.gov/news/stories/2014/September/fbi-releases-study-on-active-shooter-incidents/pdfs/a-study-of-active-shooter-incidents-in-the-u.s.-between-2000-and-2013 [hereinafter FBI Active Shooter Study]. The Federal Bureau of Investigation (FBI) study found that of the 160 active shootings since 2000, in only 28%t of incidents did Law Enforcement Officers (LEOs) arrive on the scene in time to stop an active shooter from killing others. *Id*.

[3] *See infra* Appendix A: Active Shootings on Military Bases Since 2009. United States government agencies define an active shooter as "an individual [with a firearm] actively engaged in killing or attempting to kill people in a confined and populated area." FBI Active Shooter Study, *supra* note 2, at 5.

[4] *Id*. It took LEOs who responded to the 2013 Washington Navy Yard shooting sixty–nine minutes from the time of the 911 call to the time they found and killed the shooter. WASHINGTON D.C. METROPOLITAN POLICE DEPARTMENT, AFTER ACTION REPORT, WASHINGTON NAVY YARD 63 (Jul. 2014), http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc /publication/attachments/MPD%20AAR_Navy %20Yard_07-11-14.pdf [hereinafter Navy Yard AAR]. Nationwide, it typically takes LEOs more than eight minutes to arrive at the scene of a violent crime. U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2007 STATISTICAL TABLES 107 (Feb. 2010), http://www.bjs.gov/content/pub/pdf /cvus07.pdf [hereinafter DOJ Response Time]. Data compiled by the Department of Justice (DoJ) from a comprehensive study of crime reporting data indicates that for crimes of violence, police arrive on the scene between eleven minutes and one hour, 38% of the time, within six to ten minutes 28% of the time, and within five minutes 25% of the time. *Id.*

[5] *Minute–by–Minute Coverage of the Chattanooga Shooting that Killed Four Marines*, TIMES FREE PRESS (Jul. 16, 2015), http://www.timesfreepress.com/news/local/story/2015

The introductory quote at the beginning of this article was taken from a letter written by an Army Lieutenant who watched helplessly as a fellow soldier, Specialist (SPC) Ivan Lopez, murdered his fellow Soldiers with a handgun in a Battalion Headquarters building on Fort Hood in 2014.[6] The attack was the second major active shooting on Fort Hood in five years.[7] In the last six years, active shooters have killed thirty–seven servicemembers and civilians and wounded fifty–five others on military installations.[8]

Military personnel are vulnerable to active shooters primarily because of overly restrictive military firearms policies that prevent nearly all personnel from carrying firearms for unit or self–defense purposes.[9] To remedy this vulnerability, military firearms policies should be revised to authorize Armed Security Officer (ASO) positions to be created in each military unit. Armed Security Officers will provide commanders immediate response capability and transform the Army to being proactive in addressing the active shooter threat rather than reactive, as the current arming posture dictates.[10]

Military leaders regulate who has access to firearms on military installations by issuing Department of Defense Directives (DoDDs), Army Regulations

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/jul/16/breaking-shots-fired-tennessee-riverpark-chattanooga/314944/. Military personnel assigned to recruiting stations have historically been prohibited from carrying firearms. *Id*. DEP'T OF DEF., DIR. 5210.56, CARRYING OF FIREARMS AND THE USE OF FORCE BY DOD PERSONNEL ENGAGED IN SECURITY, LAW AND ORDER, OR COUNTERINTELLIGENCE ACTIVITIES 2 (Apr. 1, 2011) [hereinafter DoDD 5210.56]. The directive states, "Arming [Department of Defense] personnel with firearms shall be limited and controlled and essentially restricts firearms carry to only LEOs and personnel performing "security activities." *Id.*

[6] First Lieutenant Cook Letter, *supra* note 1.

[7] *See* FBI Active Shooter Study, *supra* note 2.

[8] *Id*.

[9] *See* U.S. DEP'T OF ARMY, REG. 190-14, CARRYING OF FIREARMS AND USE OF FORCE FOR LAW ENFORCEMENT AND SECURITY DUTIES para. 2-2 (Mar. 12, 1993) [hereinafter AR 190-14] (examining the governing Department of Defense Directive (DoDD) on arming servicemembers for unit and self–defense); *See also* 1LT Cook Letter, *supra* note 1 (asserting that military firearms policies essentially make military installations gun–free zones because all servicemembers not assigned to law enforcement or security positions are denied the ability to carry firearms for self–defense, *see infra* Part V).

[10] *See infra* Part VII. *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP para. 6-43 (Aug. 2012) [hereinafter FM 6-22]. The Army Leadership Field Manual proposes that "[p]reparing for the realities of combat is a direct leader's most important duty." *Id.* The essence of Force Protection is to take "preventative measures . . . to mitigate hostile actions against Department of Defense (DoD) personnel." DEP'T OF DEF., JOINT PUBLICATION 3-0, JOINT OPERATIONS para. III-30 (Aug. 11, 2011), http://www.dtic.mil/doctrine/new_pubs /jp3_0.pdf.

(ARs) and installation firearms regulations.[11] Department of Defense Directive 5210.56, *Carrying of Firearms and the Use of Force by DoD Personnel Engaged in Security, Law and Order, or Counterintelligence Activities,* is the governing directive on access to firearms in the military.[12] The directive requires that all access to firearms on military installations be limited and controlled.[13] Service and installation regulations further restrict access to firearms such that only LEOs and a small number of security personnel can carry firearms for unit or self–defense.[14]

In the aftermath of shootings on military bases, servicemembers who have survived the incidents are calling for changes to military firearms policies to allow them to carry weapons for self–defense.[15] Army leaders have historically responded to these requests by stating that military LEOs provide "adequate protection" from active shooters.[16] The recent Chattanooga, Tennessee

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[11] The Supreme Court has upheld the authority of military commanders to implement and enforce military regulations. *See* Greer v. Spock, 424 U.S. 828, 840 (1976). In *Greer,* political activists sought an injunction to bar the Fort Dix Installation Commander from enforcing a post regulation that prohibited political demonstrations. *Id.* The Supreme Court examined the inherent authority of military commanders to pass regulations and found that military installations are not a "public forum" for speech purposes and the government "has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id*. at 836.

[12] *See* AR 190-14, *supra* note 9.

[13] *Id*.

[14] *Id*. Army Regulation (AR) 190-14 significantly restricts the carry of firearms for all but LEOs and security personnel. *Id*. Army Regulation 190-11 directs "Senior Commanders" on military installations to establish Privately Owned Weapons (POWs) Regulations that strictly limit access to POWs. U.S. DEP'T OF ARMY, REG. 190-11, PHYSICAL SECURITY OF ARMS, AMMUNITION, AND EXPLOSIVES para. 1-10 (5 Sept. 2013) [hereinafter AR 190-11]. *See infra* Appendix B: Major Army Installation POW Regulation Comparison for references to installation firearms regulations.

[15] Michelle Tan, *Soldiers Want OK to Carry Concealed Weapons on Base*, ARMY TIMES (Apr. 8, 2014), http://www.armytimes.com/article/20140408/NEWS05/304080069/; *See* 1LT Cook Letter, *supra* note 1.

[16] *Authorization of Appropriations for Fiscal Year 2015 and the Future Years Defense Program: Hearing before the U.S. Senate Committee on Armed Servic*es, 113th Cong. 44 (2014) (statement of General Ray Odierno and Senator Lindsay Graham), http://www.armed-services.senate.gov/imo/media/doc/14-32%20-%204-3-14.pdf [hereinafter 2014 Senate Committee Meeting]. The Senate Armed Services Committee met on April 3, 2014 to discuss Department of Defense (DoD) appropriations but the conversation quickly turned into a discussion with the Secretary of the Army and the Army Chief of Staff (General Odierno) about the shooting at Fort Hood that occurred the previous day that left four dead and sixteen wounded. *Id*. General Odierno answered questions about the Army policy on soldier access to firearms, mental health policies, and whether soldiers should have access to concealed weapons. *Id.* In response to questions about Army leaders allowing soldiers to carry firearms for self–defense, General Odierno said, "[W]e have our military police and others that are armed, and I believe that is

shootings that left five servicemembers dead is pushing the Department of Defense (DoD) to reevaluate firearms policies.[17] In the days following the shooting, the governors of six states directed specific National Guard personnel to begin carrying weapons for self–defense, or in some states for personnel to be relocated to facilities with armed personnel.[18] Armed private citizens across the country have also entered the debate because, as one national news outlet highlighted, "gun–toting citizens are showing up at military recruiting centers around the country, saying they plan to protect recruiters."[19] Various

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appropriate. . . . I believe that that allows us the level of protection necessary." *Id.* at 44. Based on this response, Senator Lindsay Graham and General Odierno had the following dialogue:

> [Senator GRAHAM]: I would just ask you to keep an open mind, because in a deployed environment everyone has a weapon. It's a pretty stressful place in Iraq and Afghanistan, and I think people have been responsible in the military. I remember my last visit to Afghanistan that you could not be served chow unless you presented your weapon. I think the reason is you want everyone to have their weapon because of the insider threat; is that correct?
> [General ODIERNO responding]: That's correct, sir.
> [Senator GRAHAM]: I think our military at home is very much a target of terrorism . . . . I just hope you'd revisit this policy, because I think our military members are very responsible with firearms and we need to really look at having more capacity, not less, to deal with insider threats.

Id. at 44.

[17] *See Statement on Safety at Recruiting Centers*, DEP'T OF DEF. (Jul. 24, 2015), http://www.defense.gov/News/NewsReleases/NewsReleaseView/Article/612808/statement-on-safety-at-recruiting-centers. Eight days after the Chattanooga, Tennessee shooting a Pentagon spokesman announced that "Secretary of Defense Ash Carter is currently reviewing recommendations from the services for making our installations and facilities safer." *Id.*

[18] Barbra Starr & Thedore Schleifer, *Pentagon, Governors Boost Security for Military After Chattanooga Shooting*, CNN (Jul. 18, 2015), http://www.cnn.com/2015/07/17/politics/chattanooga-shooting-military-protection/. Texas Governor Greg Abbott ordered the arming of National Guard personnel at military facilities throughout the state and explained, "Arming the National Guard at these bases will not only serve as a deterrent to anyone wishing to do harm to our service men and women, but will enable them to protect those living and working on the base." *Id.* Oklahoma Governor Mary Fallin authorized the arming of certain full–time personnel in military installations throughout the state and said, "It is painful enough when we lose members of our armed forces when they are sent in harm's way, but it is unfathomable that they should be vulnerable for attack in our own communities." *Id.*

[19] Andrew Welsh–Huggins, *In a Switch, Civilians Guard Military*, US NEWS (Jul. 22, 2015), http://www.usnews.com/news/us/articles/2015/07/22/after-tennessee-shootings-

Congressional leaders have become heavily involved in the debate by questioning DoD leaders on firearms policies, making public statements, and introducing legislation requiring the DoD to allow servicemembers to carry firearms for self–defense.[20] Senator Lindsey Graham, a Senate Armed Services Committee Member, has voiced strong support for updating DoD firearms policies to allow servicemembers to carry firearms for self–defense on military installations.[21] In the week following the Chattanooga, Tennessee, shooting, a firestorm of legislation was introduced in Congress on the topic of firearms access for military personnel.[22] Should active shootings continue to claim the lives of servicemembers, it is becoming very likely that Congress will pass legislation requiring the DoD to revise military firearms policies to arm servicemembers for self–defense.[23]

Part I of this article examines the military firearms policy debate and the options military leaders have for addressing the active shooter threat. Part II recounts the tragic stories of the 2009 and 2014 Fort Hood shootings, the 2013 Washington Navy Yard shooting, and the 2015 Chattanooga Tennessee shootings. Part III presents lessons learned, but not yet implemented into the military from active shooter attacks. Part IV discusses how the active shooter threat is increasing, and how several planned active shooter attacks have been narrowly avoided. Also discussed is the fact that DoD firearms policies have remained largely unchanged for twenty–one years, despite the growing threat. Part V examines the over–reliance military leaders have on LEOs to stop active shooters, yet the reluctance military leaders have to allowing trained LEOs to carry firearms on DoD installations.[24] Part VI of this article examines how DoD

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armed-citizens-guard-recruiters. One volunteer outside an Ohio Recruiting center wearing a handgun told reporters, "What the government won't do, we will do." *Id.*

[20] *See also* The Safe Military Bases Act, H.R. 3199, 113th Cong. § 1 (2013). Texas Congressional Representative Steve Stockman introduced The Safe Military Bases Act shortly after the 2013 Navy Yard shooting, to require the DoD to let servicemembers trained in the use of firearms carry handguns for self–defense. *Id.* In the week following the Chattanooga, Tennessee shooting, ten bills were introduced in the House of Representatives or the Senate on the topic of firearms access for military personnel. *Id.*

[21] 2014 Senate Committee Meeting, *supra* note 16, at 44. Senator Lindsey Graham has voiced strong support for revising military firearms policies to arm servicemembers for self–defense. *Id.*

[22] *See, e.g.*, S.1819, 114th Cong. (2015-2016). In the week following the Chattanooga, Tennessee, shooting, ten bills were introduced in Congress on the topic of servicemember access to firearms. Senator Steve Daines introduced legislation requiring the DoD to allow servicemembers assigned as recruiters to carry a service issued sidearm for self–defense. *Id*.

[23] *See infra* Part VI(C). Congress can quickly make sweeping changes to military policies and programs through the annual National Defense Authorization Act.

[24] *See* Memorandum from Commander, Criminal Investigation Detachment Command to all Criminal Investigation Detachment Command personnel, subject: Policies Governing the Carry of Assigned Weapons and Credentials (25 Jun. 2014) [hereinafter CIDC

firearms policies have made military bases essentially gun–free zones which invite, rather than deter, active shooter attacks.[25]

Part VII examines how current military firearms policies can be changed to allow servicemembers to carry firearms for unit and self–defense.[26] This section also explores an avenue currently available to Army commanders to authorize Soldiers in their command to carry firearms for unit security purposes.[27] The importance of military leaders overcoming fear and bias against guns to establish good firearms policy is also highlighted.[28] Part VIII examines the current status of military active shooter training and highlights the fact that Soldiers receive essentially no training in how to react to an active shooter.[29] To combat this shortfall, this article recommends that active shooter training be standardized across the military.[30] Finally, Part IX supports the primary

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Firearms Memo]. The reluctance to let special agents freely carry their weapons is unfortunate because there have been "many incidents" where special agents may have been able to respond to active shootings on military installations but they were unarmed due to department firearms policies. *Id*.

[25] *See* John Lott, *Concealed Weapons Save Lives*, N.Y. DAILY NEWS (Jul. 25, 2012), http://www.nydailynews.com/opinion/concealed-weapons-save-lives-article-1.1121161. The research of economist John Lott, formerly chief economist for the United States Sentencing Commission, is powerful in substantiating the fact that gun–free zones are almost exclusively the location of the most deadly active shootings in America. *Id*. Lott found, "With a single exception, every multiple–victim public shooting in the [United States] in which more than three people have been killed since at least 1950 has taken place where citizens are not allowed to carry their own firearms." *Id*.

[26] These options include Congress acting to pass legislation requiring the change, DoDD 5210.56 being revised by the Secretary of Defense, or military commanders acting to arm servicemembers to perform security duty.

[27] *See* AR 190-14, *supra* note 9, para. 2-2.

[28] *See* Jacob Deakins, *Guns, Truth, Medicine, and the Constitution*, JOURNAL OF AMERICAN PHYS. AND SURG., 58 Vol. 13 (Summer, 2008). Physician Jacob Deakins wrote an insightful publication about how ignorant policy makers too often institute firearm policies based on "fearmongering" and bias rather than solid scientific evidence and a fair application of the Constitutional right to possess a firearm for self–defense. *Id*.

[29] *See* Jeff Schogol, *After Fort Hood Tragedy, Experts Recommend Changes to Active-Shooter Training*, ARMY TIMES (Apr. 3, 2014), http://www.armytimes.com/article /20140403/NEWS/304030050/After-Fort-Hood-tragedy-experts-recommend-changes-active-shooter-training. LEOs receive training in responding to active shooters and some installations conduct limited active shooter training, but there is no DoD–wide training for how to respond to an active shooter. *Id*. One security expert, John Curnuff, Director of Training for Advanced Law Enforcement Rapid Response Training at Texas State University, believes a major problem with the DoD response is that there is no standardized active shooter response program and departments "are all coming up with their own thing" when what is needed is an interdisciplinary approach. *Id.*

[30] *Id*. Experts have recommended that the DoD train servicemembers in how to respond to active shooters but DoD leaders have limited training to primarily LEOs and first responders. *Id*. Correcting this shortfall is critical because servicemembers are not being

proposal that DoD leaders should create an Armed Security Officer Program (ASOP) modeled after the Federal Flight Deck Officer Program, to arm select servicemembers to respond to active shooters.[31] Implementing such a program is the best course of action to protect DoD employees from future active shooter attacks.

II. Active Shootings on Military Installations (2009–2015)

> *Most of the people in our society are sheep. They are kind, gentle, productive creatures who can only hurt one another by accident . . . . Then there are the wolves . . . and the wolves feed on the sheep without mercy . . . there are evil men in this world and they are capable of evil deeds. The moment you forget that or pretend it is not so, you become a sheep. There is no safety in denial.*[32]

The shootings at Fort Hood in 2009 and 2013, Washington Navy Yard in 2013, and Chatanooga, Tennessee, in 2015, have resulted in the death of thirty–three DoD personnel, the wounding of fifty–four others, and psychological and emotional trauma to hundreds of family members and first–responders.[33]

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trained regarding what to do if they hear gunfire. *Id.* A delay in responding can cost someone in close proximity to an active shooter their life. *Id.*

[31] *See Federal Flight Deck Officers*, TRANS. SEC'Y ADMIN. (Jan. 2, 2015), http://www.tsa.gov/about-tsa/federal-flight-deck-officers. The Armed Security Officer Program (ASOP) or a unit security program could be modeled after the successful Federal Flight Deck Officer (FFDO) Program that has armed thousands of pilots and crew members across America to safeguard aircraft from terrorist attack. *Id.*

[32] DAVE GROSSMAN & LOREN W. CHRISTENSEN, ON COMBAT 180 (2008).

[33] *See* Catherine Herridge, *New Move Underway to Award Purple Heart and its Benefits to Survivors of Fort Hood Massacre*, FOX NEWS (Feb. 6, 2015), http://www.foxnews.com/politics/2015/01/06/new-move-underway-to-award-purple-heart-and-its-benefits-to-survivors-ft-hood/. It is important to recognize that some survivors of military active shooting incidents experience greater Post Traumatic Stress Disorder (PTSD) and survivor guilt than non–military active shooting survivors because servicemembers are trained to defend themselves and were victimized. *See* 1LT Cook Letter, *supra* note 1. *See also* email from 1LT Patrick Cook, (Dec. 29, 2014) (on file with author). In email correspondence, 1LT Cook told me, "I can tell you with 100% certainty that I could have ended the shooting had I been armed, and I personally believe that the presence of guns in our building would have prevented it from ever taking place. Instead, it spanned three separate locations and killed three, four including the gunman himself. Sixteen were wounded, and a hundred or more including myself have to deal with PTSD now." *Id.* Congress appears to be more sympathetic than DoD leaders to the plight of survivors of the 2009 Fort Hood shooting. *See* Schogol, *supra* note 29. As part of the 2015 National Defense Authorization Act (NDAA), Congress voted to allow survivors of terrorism–motivated attacks like the 2009 Fort Hood shooting to be recognized by award of the

A. The Fort Hood Massacre (2009)

Former Major Nidal Hasan was an Army Psychiatrist with a lengthy record of poor duty performance.[34] In early 2009, while he was completing a psychiatry training program at Walter Reed National Military Medical Center, Hasan began communicating with Anwar al–Awlaki, a Muslim cleric openly hostile to the American war effort in Iraq.[35] Hasan began to embrace "violent Islamic extremis[t]" views, and fellow officers described him as a "ticking time bomb."[36] After completing his psychiatry training, Hasan was stationed at Fort Hood, Texas, and given notice that he would deploy to Iraq.[37] Hasan, however, had other intentions and began planning an attack on his fellow Soldiers.[38] He told one friend just before the attack, "Muslims shouldn't be in the U.S. military, because obviously Muslims shouldn't kill Muslims."[39]

On July 31, 2009, Hasan visited a local gun store outside of Fort Hood and asked for "the most technologically advanced weapon on the market and the one with the highest standard magazine capacity."[40] He purchased a Fabrique Nationale d'Herstal (FN) 5.7 millimeter handgun.[41] Over the next few weeks he

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Purple Heart and subsequent Veterans benefits despite "stiff resistance" by DoD leaders to the proposal. *Id*. *See also* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 571 (2014).

34 Senate Committee on Homeland Security and Governmental Affairs, S. REP. A TICKING TIME BOMB: COUNTERTERRORISM LESSONS FROM THE U.S. GOVERNMENT'S FAILURE TO PREVENT THE FORT HOOD ATTACK, 29 (2011), http://www.hsgac.senate.gov//imo/media/doc/Fort_Hood/Fort HoodReport.pdf [hereinafter Ticking Time Bomb].

35 *Id*. at 28. Major Hasan was described as "very lazy," as a student that "failed to attend his classes properly," and a man who had become a "religious fanatic." *Id*. Investigation revealed that the FBI was aware of MAJ Hasan's communications with Anwar al–Awlaki, but mistakenly concluded that he had no intentions of violence. David Johnson & Scott Shane, *U.S. Knew of Suspect's Tie to Radical Cleric*, N.Y. TIMES (Nov. 9, 2009), http://www.nytimes.com/2009/11/10/us/10inquire.html?_r=0.

36 Ticking Time Bomb, *supra* note 34, at 29.

37 Julian Barnes & Andrew Zajac, *Fort Hood Shooting Suspect was to Deploy to Iraq Soon*, L.A. TIMES (Nov. 6, 2009), http://articles.latimes.com/2009/nov/06/nation/na-fort-hood-profile6.

38 *Id*.

39 Bob Drogin & Faye Fiore, *Retracing Steps of Suspected Fort Hood Shooter, Nidal Malik Hasan*, L.A. TIMES (Nov. 7, 2009), http://articles.latimes.com/2009/nov/07/nation/na-fort-hood-hasan7.

40 Scott Huddleston, *Hasan Sought Gun With High Magazine Capacity*, MY SAN ANTONIO (Oct. 21, 2010, 10:54 AM), http://blog.mysanantonio.com/military/2010/10/hasan-sought-gun-with-high-magazine-capacity/.

41 *Id*.

also purchased sixteen twenty–round magazines and 3000 rounds of ammunition.[42] He then began to train regularly at a local shooting range and became proficient at rapidly firing and reloading the weapon.[43]

On the morning of November 5, 2009, Hasan entered the Fort Hood Soldier Readiness Processing Center (SRPC) and made his way to a briefing room.[44] Shortly after the briefing began, he jumped up and yelled, "Allahu Akbar" and began shooting the soldiers around him.[45] Eyewitnesses described Hasan's rate of fire as "pretty much constant shooting . . . it sounded like an M16," and "He reloaded so quickly, very efficiently."[46] Hasan methodically walked through the SRPC, murdering and seriously wounding the soldiers around him.[47] Investigators determined that he fired 146 times in the SRPC.[48] Hasan then left the center and went outside and began shooting the Soldiers retreating from the building. He fired sixty–eight more times outside the SRPC before civilian police officers arrived at the scene and shot him.[49] When the shooting was over, Hasan had killed twelve soldiers and one civilian, and wounded thirty–two others in just ten minutes.[50]

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[42] *Id*. To highlight the level of premeditation Hasan went to in planning the attack, the lead prosecutor on the case, Colonel Steve Hendricks, told panel members during closing argument at the court–martial that on the day of the attack, Hasan wrapped the loaded magazines in paper towels prior to placing them in his cargo pockets so they would not "bang together" and alert anyone of his impending attack. Jennifer Hlad, *Premeditation at Heart of Closing Remarks in Hasan Case*, STRIPES (Aug. 22, 2013), http://www.stripes.com/news/premeditation-at-heart-of-closing-remarks-in-hasan-case-1.236719.

[43] Scott Huddleston, *Hasan Sought Gun With High Magazine Capacity*, MY SAN ANTONIO (Oct. 21, 2010, 10:54 AM), http://blog.mysanantonio.com/military/2010/10/h.asan-sought-gun-with-high-magazine-capacity/.

[44] U.S. DEP'T OF DEF., PROTECTING THE FORCE: LESSONS FROM FORT HOOD (Jan. 2010), http://www.defense.gov/pubs/pdfs/dod-protectingtheforce-web_security_hr_13jan10.pdf [hereinafter PROTECTING THE FORCE].

[45] *Fort Hood Shootings: The Meaning of Allahu Akbar*, TELEGRAPH (Nov. 6, 2009), http://www.telegraph.co. uk. /news/worldnews/northamerica/usa/6516570/Fort-Hood-shootings-the-meaning-of-Allahu-Akbar.html. Allahu Akbar is translated as "God is great." *Id.*

[46] *Hasan Hearing Blog Tuesday Oct. 19, 2010*, KWTX (Oct. 19, 2010), http://www.kwtx.com/news/ misc/105303923.html.

[47] Charley Keyes, *Fort Hood Witness Says He Feared There Were More Gunmen*, CNN (Oct. 20, 2010, 6:10 PM), http://www.cnn.com/2010/CRIME/10/20/texas.fort.hood. shootings/index.html?hp'[t=T1.

[48] *Id.*

[49] Ashley Powers, *Death Toll Rises to 13 in Fort Hood Shootings*, L.A. TIMES (Nov. 7, 2009), http://articles.lat imescom/2009/nov./07. /nation/na-fort-hood-shootings7. Hasan was wounded by the responding LEOs. *Id*.

[50] *Id*. *See also* PROTECTING THE FORCE, *supra* note 44, at 1.

After the shooting, investigators determined that two Soldiers died and one civilian was wounded trying to disarm Hasan in the SRPC.[51] Just after the shooting began, an Army Captain located near Hasan charged him in an effort to stop the attack, but he was shot and killed before he could reach him.[52] Another man, a physician's assistant, realized that there was no way to escape the gunfire, so he picked up a chair and charged at Hasan.[53] He was also shot and killed.[54] A third attempt to stop Hasan failed when a Department of the Army (DA) civilian threw a folding table at Hasan, but Hasan spotted him and shot him.[55] These heroic, but unsuccessful, efforts illustrate that unarmed people have a high probability of dying or suffering serious injury if they actively resist an active shooter.

One soldier, who narrowly survived the attack after being shot seven times, told reporters that if personnel in the SRPC were allowed to carry firearms someone would have been able to stop Hasan instead of him "shoot[ing] the whole place up."[56] Military firearms policies, however, required that everyone in the SRPC be unarmed.[57] Hasan exploited this vulnerability to a tragic end.[58] In the aftermath of the shooting, critics of DoD firearms policies argued that

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[51] Gregg Zorya, *Witnesses Say Reservist was a Hero at Hood*, ARMY TIMES (Nov. 25, 2009), http://archive. army.times.com/article/20091125/NEWS/911250307/Witnesses-say-reservist-was-a-hero-at-Hood; *See also Testimony Begins in the Fort Hood Shooting*, NPR (Oct. 13, 2010), http://www.npr.org/templates/story/.story.php?storyI d=130543304.

[52] Zoryya, *supra* note 51.

[53] *Id*.

[54] *Id*.

[55] *Wounded Fort Hood Soldier: Blood Just Everywhere*, CNN (Nov. 12, 2009), http://www.cnn.com/ 2009/US/11/12/fort.hood.wounded.soldier/index.html.

[56] Eric Pratt, *Arm the GI's and Stop Inviting Tragedy*, GUN OWNERS OF AMERICA (Nov. 10, 2014), http://gunowners.org/news11102014.htm. The soldier that survived, Sergeant Alonzo Lunsford, told reporters, "I think more guns is (sic) the answer . . . . If everybody has a gun, [the shooter] might hit one but he won't be able to shoot the whole place up." *Id*.

[57] DoDD 5210.56, *supra* note 5, at 2; AR 190-11, *supra* note 9, para. 1-10; *see infra* Appendix B. The only way someone could have been armed if they were following these regulations is if they were a LEO or a person performing security duties. As Part VII, *infra*, discusses, commanders can arm soldiers to perform security duties provided there is "a reasonable expectation that life or Department of the Army (DA) assets will be jeopardized if firearms are not carried." AR 190-14, *supra* note 9, para. 1-5.

[58] *See* Grossman, *supra* note 32, at 180. This is a potent reminder of the truth Lieutenant Colonel Retired Grossman declared, when he said, "[T]here are evil men in this world and they are capable of evil deeds. The moment you forget that or pretend it is not so, you become a sheep. There is no safety in denial." *Id*.

guns are "so feared that government regulation even tries to keep them out of the hands of trained Soldiers."[59]

B. The Washington Navy Yard Shooting (2013)

The next major military shooting incident occurred in 2013. The perpetrator was Aaron Alexis, a thirty–four year old Navy contractor with a lengthy record of misconduct, including two incidents of unlawfully discharging firearms.[60] After the shooting, investigators found that Alexis also had "early behaviors of potential mental instability."[61] This instability eventually resulted in his attack on his fellow DoD employees. Just days before his attack, Alexis typed the following message on one of his electronic devices: "An ultra–low frequency attack is what I've been subject to for the last three months, and to be perfectly honest, that is what has driven me to this."[62] The "this" he was referring to was his plan to purchase a gun and kill his coworkers.[63]

Just prior to his attack, Alexis was working for a private company that had a contract to provide computer support to the Washington Navy Yard.[64] Alexis began working at the Navy Yard on September 9, 2013, just one week before his attack.[65] Four days into the job, Alexis's supervisors counseled him for a "performance issue."[66] The very next day, Alexis traveled to a gun store in

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[59] *Editorial: End Clinton-era Military Base Gun Ban*, THE WASH. TIMES (Nov. 11, 2009), http://www.washingtontimes.com/news/2009/nov/11/end-clinton-era-military-base-gun-ban/.

[60] Frank Heinz, *Aaron Alexis' History of Gun Incidents*, NBC NEWS (Apr. 3, 2014), http://www.nbcdfw.com/ news/local/Aaron-Alexis-Fort-Worth-Arrest-Report-22395 3911.html. In 2004, Alexis was arrested for shooting the tires on another man's vehicle during what Alexis described as an "anger–fueled blackout." *Id*. In 2010, Alexis was arrested in Fort Worth, Texas for unlawfully discharging a weapon within city limits; however, Alexis reported that he accidently fired the gun while handling it. *Id*. Alexis was not prosecuted for either offense. *Id*.

[61] *See* DEP'T OF DEF., INT. REV.OF THE WASH. NAVY YARD SHOOTING 18 (Nov. 20, 2013), http://www.defense.gov/pubs/DoD-Internal-Review-of-the-WNY-Shooting-20-Nov-2013.pdf [hereinafter DoD Washington Navy Yard Review]. The indicators of instability cited were prior criminal behavior, anger management issues, and delinquent debts. *Id*.

[62] Peter Hermann & Ann E. Marrimow, *Navy Yard Shooter Aaron Alexis Driven by Delusions*, WASH. POST (Sept. 25, 2013), http://www.washingtonpost.com /local/crime/fbi-police-detail-shooting-navy-yard-shooting/2013/09/25/ee321abe-2600-11e3-b3e9-d97fb087acd6_story.html.

[63] *Id*.

[64] *See* DoD Washington Navy Yard Review, *supra* note 61, at 1. In addition to being a Navy contract employee, Alexis was also a member of the Navy Individual Ready Reserve. *Id*. at 2.

[65] Hermann, *supra* note 62.

[66] *Id.* The precise nature of the issue was not reported. *Id*.

Lorton, Virginia and purchased a Remington 870 Express shotgun and two boxes of ammunition.[67] He also purchased a saw, which he used to modify the shotgun to make it more concealable.[68]

Three days later, Alexis brought the shotgun onto the Navy base in a backpack in preparation for his attack.[69] He carried the backpack into Building 197, where he was working the previous week, and entered a bathroom on the fourth floor of the building.[70] He then assembled the shotgun and came out of the bathroom into the hallway and began shooting his coworkers.[71] The first call to a 911 operator went out at 8:17 A.m.; just one minute after the shooting began.[72] In the five minutes that followed, Alexis walked through several offices on the third and fourth floor of the building and shot and killed ten DoD civilian employees and contractors.[73]

At 8:28 A.m, a mass email was sent out by leaders on the Navy base, instructing everyone to "shelter in place."[74] Navy Captain Christopher Mercer was located in the building, not far from where the shooting began.[75] He and other employees in his section took refuge in his office by slamming the door and piling furniture behind it as a barricade.[76] According to Mercer, Alexis "set up camp right in front of my office . . . . He kept reloading and firing at cubicles . . . . I could see his shadow through the glass pane in my door . . . it was just so utterly violent."[77]

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[67] Tom Jackman, *Inside Sharpshooters, The Newington Gun Store Where Aaron Alexis Bought His Shotgun*, WASH. POST (Sept. 18, 2013), http://www.washingtonpost.com/blogs/local/wp/2013/09/18/inside-sharpshooters-the-newington-gun-store-where-aaron-alexis-bought-his-shotgun/.

[68] Hermann, *supra* note 62.

[69] *What Happened Inside Building 197?*, WASH. POST (Sept. 25, 2013), http://www.washingtonpost.com/wp-srv/special/local/navy-yard-shooting/scene-at-building-197/.

[70] *Id*.

[71] *Id*.

[72] Navy Yard AAR, *supra* note 4, at 12.

[73] *Id*. at 14. Approximately 3000 employees work in Building 197. *Id*. at 56.

[74] *Id*. at 56.

[75] Aaron Davis, *Hiding Under His Desk In Building 197, Navy Captain Helped Police Teams Track Shooter*, WASH. POST (Sept. 18, 2013), http://www.washingtonpost.com/local/hiding-under-his-desk-in-building-197-navy-captain-helped-police-teams-track-shooter/2013/09/18/ccf71b84-204b-11e3-8459-657e0c72fec8 _story.html.

[76] *Id*.

[77] *Id*. Had Captain Mercer been armed, he would have had a chance to defend himself and his co–workers. *Id.* Instead, all he had was his Blackberry, which he used to email commanders about the location of the gunman. *Id*. Captain Mercer heard Alexis flee down an emergency stairwell and heard two shots, one of which killed a maintenance worker. *Id*. Alexis returned to the third floor minutes later and was shot by LEOs. *Id*.

Military LEOs did not arrive and enter the building until 8:27 A.m., ten minutes after the first 911 call.[78] Over the next sixty–nine minutes that followed, 117 LEOs entered the building to search for Alexis before he was finally located and shot outside of Captain Mercer's office.[79] One team of LEO responders rushed to the Navy Yard and arrived within five minutes of the call, only to discover that the access gate to the installation was locked according to base emergency protocols, and no one was present to let them onto the base.[80]

In addition to coordination challenges in the response, the security personnel who worked in the building were ineffective in responding to the shooter. The security guard assigned to monitor the 160 cameras in the building locked himself in the control room and did not try to contact anyone after the shooting began.[81] Alexis surprised and shot another security guard.[82] These facts highlight that in this case, the contract security guards were easily overcome by the shooter.

After the incident, the Secretary of Defense (SecDef) ordered a review of the shooting, similar to the review conducted after the 2009 Fort Hood shooting.[83] Unfortunately, neither review contained any discussion about whether armed military personnel could have stopped the attacks earlier or the value of arming military personnel to deter future active shooters.[84]

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[78] Navy Yard AAR, *supra* note 4, at 11.
[79] *Id*. at 15.
[80] Navy Yard AAR, *supra* note 4, at 16.
[81] Peter Hermann & Clarence Williams, *Confusion Marred Police Response to Navy Yard Shooting*, WASH. POST (Jul. 11, 2014), http://www.washingtonpost.com /local/crime/navy-yard-shooting-report-details-coordination-problems/2014/07/11/4fda6ce8-08e7-11e4-8a6a-19355c7e870a_story.html.
[82] *Twelve Victims Killed, Eight Wounded in Shooting at D.C. Navy Yard, Suspected Gunman Killed*, NBC NEWS (Sept. 17, 2013), http://www.nbcwashington.com /news/local/Confirmed-Shooter-at-Navy-Yard-One-Person-Shot-223897891.html.
[83] Shaun Walterman, *Hagel Orders Review of Security Procedures After Navy Yard Massacre*, WASH. TIMES (Sept. 18, 2013), http://www.washingtontimes.com /news/2013/sep/18/hagel-orders-review-security-procedures-after-navy/.
[84] The author was unable to locate any discussion in the DoD reviews of the shootings that considered these important questions. *See, e.g.*, DoD Washington Navy Yard Review, *supra* note 61. Reviews discuss a multitude of force protection issues but fail to mention the topic of arming servicemembers within DoD facilities to shorten or deter future active shooter attacks. *See, e.g.*, Walterman, *supra* note 83. This would appear to be a rather obvious topic of discussion for DoD investigations of major active shootings but no consideration was given to the topic; *See* Protecting the Force, *supra* note 44.

After the Navy Yard shooting, gun control advocates cited the attack as another example of why additional gun control legislation is necessary.[85] The existing regulations in place on the Navy Yard at the time, however, prohibited Alexis from bringing the shotgun onto the base.[86] It is doubtful, therefore, that additional gun control legislation, short of completely prohibiting the sale of firearms, would have prevented the attack.

Approaching the problem from an entirely different perspective, Congressman Steve Stockman introduced legislation in Congress ten days after the shooting that would require the DoD to allow servicemembers trained in the use of firearms to carry weapons for self–defense.[87] While the legislation has not moved out of Congressional Committee review, it demonstrates a recognition that entirely prohibiting the carrying of firearms for self–defense is not the best solution for protecting personnel from active shooters.[88]

C. The Second Fort Hood Shooting (2014)

Four years after MAJ Hasan shot forty–two Soldiers on Fort Hood, another active shooter terrorized the installation.[89] The perpetrator was Specialist (SPC)

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[85] Denis. J. O'Malley, *A Day after D.C. Shooting Newtown Activists Head to Washington*, NEWS TIMES (Sept. 16, 2013), http://www.newstimes.com/local/article/A-day-after-D-C-shooting-Newtown-activists-head-4819135.php.

[86] U.S. DEP'T OF NAVY, U.S. NAVY REGULATIONS, 1990, art. 1159 [hereinafter Navy Reg. 1159]. Navy Regulation 1159 prohibits the carry of any weapons on Navy installations if a person is not a LEO or has another authorized purpose to possess a weapon. *Id*. *See also* Tina Mehr & Adam Winkler, *The Standardless Second Amendment*, AMERICAN CONSTITUTIONAL SOCIETY FOR LAW AND POLICY 1 (Oct. 2010), https://www.acslaw.org/sites/default/files/Mehr_and_Winkler_Standardless_Second_Amendment.pdf. The authors observed that it is commonly recognized that there are over 20,000 gun control laws in the United States. *Id*.

[87] H.R. 3199, *supra* note 20. *See infra* Part VI.C for a discussion on the merits of H.R. 3199.

[88] Representative Steve Stockman, *Soldiers as Soft Targets*, USA TODAY (Apr. 8, 2014), http://www.usatoday.com/story/opinion/2014/04/08/rep-steve-stockman-safe-military-bases-act-editorials-debates/7486225/. Representative Stockman describes military firearms policies restricting servicemembers' ability to carry firearms on military installations as "a [twenty] year experiment that failed and places servicemembers in danger . . . . [R]ather than mak[ing] bases safer, stripping trained servicemembers of weapons has turned them into soft targets for mass killers." *Id*. *See infra* Part VI.A.

[89] *Fort Hood Shooter Snapped Over Denial of Request for Leave, Army Confirms*, FOX NEWS (Apr. 7, 2014), http://www.foxnews.com/us/2014/04/07/fort-hood-shooter-snapped-over-denial-request-for-leave-army-confirms/.

Ivan Lopez, a thirty–four year old truck driver with a history of behavioral and mental health issues.[90]

In the months leading up to the shooting, Lopez received regular psychiatric treatment for depression, anxiety, and PTSD.[91] Also, his mother and grandfather passed away just months before his attack.[92] In March of 2014, just one month before the shooting, Lopez posted on his Facebook page that he was the victim of a robbery.[93] He said, "My spiritual peace has just gone. Full of Hate. Now I think I'll be damned."[94] Lopez also commented about Adam Lanza, the Newtown Elementary School shooter, and said, "[Lanza] pretends to be a victim of a mental illness . . . he sought . . . international attention [and] a minute of fame as a villain."[95] About the same time, Lopez purchased a forty–five caliber handgun from the on–post Army and Air Force Exchange Service (AAFES) store.[96] This was the same gun he later used in his attack.[97]

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[90] *Fort Hood Shooting: What We Know About Ivan Lopez*, HUFFINGTON POST (Apr. 3, 2014, 1:19 PM), http://www.huffingtonpost.com/2014/04/03/who-is-ivan-lopez_n_5084315.html. Lieutenant General Mark Milley disclosed that SPC Lopez had mental health issues and was being treated. *Id*.

[91] Meghan Keneally & Mia De Graff, *Fort Hood Officials Confirm Shooter Had a Psychiatric Disorder and Got In a Verbal Altercation Just Before Shooting 19 People on Army Base*, DAILY MAIL (Apr. 4, 2014), http://www.dailymail.co.uk/news/article-2596105/PICTURED-The-gunman-treated-PTSD-opened-fire-Fort-Hood-injuring-16-killing-three-turning-gun-himself.html. Department of Defense officials reported that while Lopez had deployed to Iraq, he "did not have any recorded combat experience." *Id*. Lopez did, however, self–report that he had a Traumatic Brain Injury (TBI). *Id.*

[92] Bryan Llenas, *Fort Hood Shooter's Friends Think Mom's Death May Have Played a Part in Rampage*, LATINO FOX NEWS (Apr. 3, 2014), http://latino.foxnews.com/latino/news/2014/04/03/alleged-fort-hood-shooter-rampage-could-have-been-triggered-by-deaths-in-family/.

[93] Ray Sanchez, *Fort Hood Gunman Vented on Facebook about Sandy Hook Shooter*, CNN (Apr. 5, 2014), http://edition.cnn.com/2014/04/05/us/fort-hood-gunman-facebook/.

[94] *Id*.

[95] *Id.* It is ironic that Lopez criticized Adam Lanza but then became an active shooter himself. The fact that Lopez posted comments about Lanza indicates that he was thinking about Lanza's involvement in the Newtown Elementary School shooting that killed twenty children and six adults. *Id.*

[96] Chris McGuinness, *Shooting Report Could Spark Change to Fort Hood's Gun Policy*, KDH NEWS (Jan. 25, 2015), http://kdhnews.com/military/shooting-report-could-spark-change-to-fort-hood-s-gun/article_1531a40c-a456-11e4-89ca-875214898bf3.html.

[97] Lisa Garza & Eileen O'Grady, *Verbal Altercation May Have Led to Fort Hood Rampage*, REUTERS (Apr. 4, 2014), http://www.reuters.com/article/2014/04/04/us-usa-shooting-forthood-idUSBREA3129C20140404.

On the afternoon of April 2, 2014, Lopez drove to his Battalion Headquarters to pick up his leave paperwork to "attend to family matters."[98] He then discovered that his leave request had not been processed and he began arguing with soldiers in the office.[99] Witnesses described him as "irate" when he stormed out of the building.[100] Lopez then drove off post and retrieved the handgun he purchased the previous month.[101] He then drove back on post and returned to the Battalion Headquarters building.[102] Lopez entered the building and shot the two Non–Commissioned Officers (NCOs) he had just argued with minutes before.[103] He then proceeded to shoot eleven other Soldiers in the building before departing to attack other targets on the installation.[104]

One of the survivors of the attack was 1LT Patrick Cook, who wrote the chilling description of the attack cited in the introductory quote to this article.[105] First Lieutenant Cook believes that he and fourteen other soldiers survived the attack because one mortally wounded soldier managed to hold a door closed to the office they were located in long enough for Lopez to move on to other targets.[106]

After leaving the Battalion Headquarters, Lopez got into his car and drove to the unit motor pool. As he was driving, he saw two soldiers near the road and stopped to shoot at them.[107] He wounded one of them.[108] Lopez arrived at the motor pool office and shot three other soldiers he worked with.[109] One of the soldiers was killed in the act of trying to calm Lopez down.[110]

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98 Manny Fernandez & Alan Binder, *Army Releases Detailed Account of Base Rampage*, N.Y. TIMES (Apr. 7, 2014), http://www.nytimes.com/2014/04/08/us/officials-give-account-of-fort-hood-shooting.html.

99 *Fort Hood Shooter Snapped over Denial of Request for Leave, Army Confirms*, FOX NEWS (Apr. 7, 2014), http://www.foxnews.com/us/2014/04/07/fort-hood-shooter-snapped-over-denial-request-for-leave-army-confirms/.

100 Fernandez, *supra* note 98.

101 *Id*.

102 *Id*.

103 *Id*.

104 *Id*. Almost miraculously, only one of the eleven soldiers shot in the Headquarters Building, Sergeant First Class Daniel Ferguson, was mortally wounded. *Id*. Sergeant First Class Ferguson died barricading the door where 1LT Cook and fourteen other soldiers were taking shelter after the shooting began. 1LT Cook Letter, *supra* note 1.

105 First Lieutenant Cook Letter, *supra* note 1.

106 *Id*.

107 Fernandez, *supra* note 98.

108 *Id*.

109 *Id*.

110 Peter Baker & Manny Fernandez, *Again, Obama Offers Comfort at Fort Hood After Soldiers are Killed*, N.Y. TIMES (Apr. 9, 2014), http://www.nytimes.com/2014/04/10/us/fort-hood-shooting.html?_r=2.

Lopez got back into his car and drove to the Medical Brigade Headquarters (MBH) building. As he drove down Motor Pool Road, he fired into a passing car, wounding the driver.[111] After arriving at the MBH building, Lopez shot one soldier who was standing outside the building.[112] He entered the building and shot two more soldiers, killing the soldier manning the front desk.[113] Lopez then got in his car and drove to a parking lot near the Battalion Headquarters, where the shooting initially began.[114] It was there that a female MP finally arrived on the scene and confronted him.[115] The MP fired at Lopez, who then put his handgun to his head and killed himself.[116] In just eight minutes, Lopez shot nineteen soldiers in three different buildings.[117]

This shooting highlights several important observations related to military firearms regulations. First, like the 2009 Fort Hood shooting and the 2013 Navy Yard shooting, each of the soldiers Lopez shot was restricted from carrying firearms for self–defense.[118] First Lieutenant Cook's vivid explanation of how he reached for his gun when the shooting began highlights how vulnerable the soldiers in the Battalion Headquarters building were because no one had a firearm to stop Lopez.[119] Instead, as 1LT Cook explained, "many more died because of the fatally misguided restrictions on the carrying of arms, which obviously the madman did not respect."[120]

Second, the position endorsed by Army leaders that LEOs can provide "adequate protection" from active shooters was demonstrated to be incorrect. [121] Lopez was able to shoot nineteen soldiers in multiple locations before LEOs responded. As 1LT Cook explained, the shooting could have been stopped if just one soldier in the Battalion Headquarters had been armed.[122]

Third, depending on the circumstances, the DoD practice of instructing personnel to "shelter in place" during an active shooting can make

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111 Fernandez, *supra* note 98.
112 *Id*.
113 *Id.*
114 William M. Welch, *Fort Hood Gunman Fired Thirty-Five Shots, Including From Car*, USA TODAY (Apr. 7, 2014), http://www.usatoday.com/story/news/nation/201 4/04 /07 /fort-hood/7433415/.
115 *Id*.
116 *Id*.
117 *Id*.
118 DoDD 5210.56, *supra* note 12, at 2; AR 190-14, *supra* note 9, para. 2-2; AR 190-11, *supra* note 14, para. 1-10; *See infra* Appendix B.
119 *See* 1LT Cook email, *supra*, note 33 (referring to the PTSD 1LT Cook and others have experienced in the wake of the shooting).
120 *Id*.
121 *See* 2014 Senate Committee Meeting, *supra* note 16, at 44.
122 1LT Cook Email, *supra* note 33.

servicemembers stationary targets and easier to kill.[123] If military leaders are telling personnel to "shelter in place" during an active shooting, then servicemembers need to be provided firearms so they can protect themselves. If servicemembers are to be left unarmed, the message from military leaders during an active shooting should be to "hide out," a term more likely to get servicemembers to take positions of concealment, rather than simply remaining stationary.[124] Finally, 1LT Cook's words about feeling "utterly helpless" when the shooting began should prompt every military leader to pause and consider whether the military firearms policies governing their workspace are effective in protecting their servicemembers from active shooters, or if they are counterproductive.[125]

D. The Chattanooga Tennessee Recruiting and Reserve Center Shooting (2015)

On July 16, 2015, a twenty–four year old man named Mohammad Abdulazeez attacked an Armed Forces Recruiting Center and a U.S. Navy Reserve Center in Chattanooga, Tennessee, with a rifle and a handgun.[126] The

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123 *See* Dana Fort, *Four Dead, Including the Shooter*, CNN (Apr. 3, 2014), http://www.cnn.com/2014/04/02/ us/fort-hood-shooting/. During the shooting, personnel on Fort Hood were instructed to "shelter in place" during the incident. *Id.* During the Washington Navy Yard shooting, a mass email was sent to personnel on the installation instructing them to "shelter in place." *See What Happened in Building 197?*, *supra* note 69. The standard steps to take during an active shooting are as follows: 1) Evacuate if possible; 2) Hide Out; or 3) If necessary, take action against the active shooter. U.S. DEP'T OF HOMELAND SECURITY, ACTIVE SHOOTER HOW TO RESPOND 4 (Oct. 2008), [hereinafter DHS Active Shooter Response]. The DoD phrase "shelter in place" appears to convey the same idea as "hide out," but in reality, the two phrases have different meanings because to "hide out" implies an attempt to conceal oneself, but sheltering in place implies remaining in one area. Active shooters can easily kill a large number of people grouped in close proximity to one another, as the 2009 Fort Hood shooting and the 2013 Newtown Elementary School shooting demonstrated. *See* Keyes, *supra* note 47; *See also* MATTHEW LYSIAK, NEWTOWN: AN AMERICAN TRAGEDY 99 (2013).

124 *See* Tan, *supra* note 15. Instructing servicemembers who are trained in handling firearms to hide out during an active shooter attack is a very unpopular idea. *Id*. That may be one reason why DoD leaders have not yet implemented active shooter training across the military. *See infra* Part VIII.

125 *See* 1LT Cook Letter, *supra* note 1. Maintaining unit security is a fundamental principle of command responsibility, but it is difficult to identify any measurable steps military leaders are taking to protect servicemembers from future active shooter attacks. *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 1-5 (6 Nov. 2014) [hereinafter AR 600-20].

126 Caitlin Dickerson, *Chattanooga Shooting Victims: IDs of 4 Marines Become Known*, NEWS YAHOO (Jul. 17, 2015), http://news.yahoo.com/details-emerge-about-chattanooga-shooting-victims-141434804.html.

attack resulted in four marines and a sailor being killed. Another marine and a local police officer were also wounded in the attack.[127]

Abdulazeez was born in Kuwait and immigrated with his Palestinian parents to the United States when he was six years old.[128] Abdulazeez's parents described themselves as living a strict conservative Muslim lifestyle.[129] Abdulazeez was raised in Hixon, Tennessee, just eight miles from the location of the Chattanooga shootings.[130] According to family members, Abdulazeez struggled to keep a job due to his being a manic depressive and having bipolar disorder.[131] His family also reported that he had a considerable history of drug abuse.[132]

Abdulazeez visited the country of Jordan on multiple occasions in the years before his attack and maintained a blog expressing his hard–line religious beliefs.[133] In the search to understand his motive for the killings, investigators discovered multiple writings belonging to Abdulazeez where he wrote about losing his job due to drug use and his desire to "become a martyr."[134]

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[127] Greg Botelho, *Chattanooga Shootings: Gunman Shot After he Rams Gate, Then Kills 5*, CNN (Jul. 22, 2015), http://www.cnn.com/2015/07/22/us/chattanooga-shooting/.

[128] *Four Marines Killed in Chattanooga: Gunman was Born in Kuwait, Naturalized U.S. Citizen*, FOX (Jul. 16, 2015), htttp://www.q13fox.com/2015/07/16/4-marines-killed-in-rampage-at-chattanooga-tennessee-military-centers/.

[129] *Marines' Killer Set off no Red Flags*, WASH. POST (Jul. 18, 2015), https://washingtonpost.com/world/national-security/gunman-in-marine-slayings-described-life-as-prison-days-before-rampage/2015/07/17/86d1f988-2c67-11e5-a250-42bd812efc09_story.html?story.hpid=z1.

[130] *Minute–by–Minute Coverage of the Chattanooga Shooting that Killed Four Marines*, TIMES FREE PRESS (Jul. 16, 2015), http://www.timesfreepress.com/news /local/story/2015/jul/16/breaking-shots-fired-tennessee-riverpark-chattanooga/314944/.

[131] Scott Zamost, *Chattanooga Shooting: New Details Emerge About the Gunman*, CNN (Jul. 20, 2015), http://www.cnn.com/2015/07/20/us/tennessee-naval-reserve-shooting/.

[132] *Id.* According to family sources, the drugs included "party drugs" and marijuana. *Id.*

[133] Morgan Winsor, *Mohammod Youssuf Abdulazeez Radicalized in Jordan? Islamic Extremism Rising in Middle Eastern Kingdom*, IB TIMES (Jul. 17, 2015), http://www.ibtimes.com/mohammod-youssuf-abdulazeez-radicalized-jordan-islamic-extremism-rising-middle-2013871. News sources report that just three days before the attack, Abdulazeez posted the message "life is short and bitter" and Muslims "should not miss an opportunity to submit to Allah." Rich McKay, *Suspected Gunman Blogged About Islam Days Before Tennessee Shooting: Report*, REUTERS (Jul. 16, 2015), http://www.reuters.com/article/2015/07/16/us-usa-shooting-tennessee-suspect-idUSKCN0PQ2RO20150716.

[134] Brian Ross, *Chattanooga Shooter Researched Religious Justification for Violence: Official*, ABC NEWS (Jul. 20, 2015), http://www.abcnews.go.com/us/chattanooga-shooting-fbi-recovers-gunmans-disturbing-diary/story?id=32558310. Abdulazeez did online searches for guidance on committing violence that he may have believed would wipe away his sins in the afterlife. *Id.*

Investigators also determined that Abdulazeez was "displeased with the U.S. government, particularly its war on terrorism."[135] Abdulazeez's father was also investigated on two occasions for possible terrorism ties, and was temporarily on a terrorist watch list.[136]

Despite evidence of exposure to radical Islamic viewpoints, and sympathy for them, the U.S. National Counterterrorism Center reported that Abdulazeez had no known connections with any terrorist groups and appeared to have acted on his own in carrying out the attack.[137] A text message from Abdulazeez to a friend just hours before the shooting provides insight into his motives for the attack. Abdulazeez texted a friend an Islamic verse that read, "Whosoever shows enmity to a friend of mine, then I have declared war against him."[138] In any event, radical religious philosophy appears to have been a significant factor in motivating Abdulazeez to become an active shooter.

Sometime prior to the attack, Abdulazeez acquired four firearms, an AK–47 style rifle, a shotgun, a handgun, and another rifle.[139] He also purchased, and wore on the day of the attack, a load–bearing vest that enabled him to carry extra ammunition.[140] Abdulazeez was discovered to have frequented gun ranges to practice marksmanship, and just a month prior to the attack, he told coworkers that he practiced at a local gun range.[141] Investigators also found surveillance

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[135] Scott Zamost, *Chattanooga Shooting: New Details Emerge about the Gunman*, CNN (Jul. 20, 2015), http://www.cnn.com/2015/07/20/us/tennessee-naval-reserve-shooting/. Investigators discovered writings from Abdulazeez from 2013 showing that he agreed with the teachings of Anwar al–Awlaki, a known Al–Qaeda terrorist killed in a U.S. drone strike in 2014. *See* Barbara Starr, *Pentagon, Governors Boost Security for Military After Chattanooga Shooting*, CNN (Jul. 18, 2015), http://www.cnn.com/2015/07/17/politics/chattanooga -shooting-military-protection/.

[136] *Marines' Killer Set off no Red Flags*, *supra* note 129. Abdulazeez's father was investigated in 1994 and 2002. *Id.*

[137] Caitlin Dickerson, *Chattanooga Shooting Victims: IDs of 4 Become Known*, NEWS YAHOO (Jul. 17, 2015), http://news.yahoo.com/details-emerge-about-chattanooga-shooting-victims-141434804.html.

[138] Manny Fernandez, *In Chattanooga, a Young Man in a Downward Spiral*, N.Y. TIMES (Jul. 20, 2015), https://nytimes.com/2015/07/21/us/chattanooga-gunman-wrote-of-suicide-and-martyrdom-official-says.html.

[139] Greg Botelho, *Four Guns Seized After Chattanooga Shooting, Official Says*, CNN (Jul. 18, 2015), http://www.cnn.com/2015/07/17/us/tennessee-naval-reserve-shooting/. LEO officials told reporters that "some of the weapons were purchased legally and some of them may not have been." *Id*.

[140] *Id*.

[141] *Chattanooga Gunman Talked of Frequenting Gun Range*, CBS NEWS (Jul. 18, 2015), http//www.cbsnews.com/news/Chattanooga-shooting-gunman-muhammad-yousseff-abdulazeez-gun-range/.

video from a local Walmart showing Abdulazeez and two other men purchasing ammunition just five days prior to the attack.[142]

On the morning of July 16, just before 10:51 A.m., Abdulazeez drove a rented silver Ford Mustang to the Armed Forces Career Center (Recruiting Station) located in a strip mall on Lee Highway in Chattanooga, Tennessee. He remained inside the car and took out an AK–47 style rifle and fired twenty–five to thirty rounds into the station, wounding one Marine Recruiter.[143] The remainder of the personnel in the office took shelter in a back office and barricaded the door.[144] The gunfire lasted approximately one minute according to witnesses.[145] Abdulazeez then fled the scene in his car and was pursued by local police to a Navy and Marine Corps Reserve Center, located seven miles away from the Recruiting Station.[146] Abdulazeez rammed his car through the security gate to gain entrance to the facility.[147] Abdulazeez approached the Reserve Center, carrying a rifle, handgun, and several magazines.[148] A Naval Officer assigned to the center, Lieutenant Commander Tim White, saw him approaching and secured a personally owned handgun in his possession and began firing at Abdulazeez.[149]

It is unclear whether Lieutenant Commander White hit Abdulazeez, because his attack continued as he entered the Reserve Center, shooting Navy Specialist Second Class Randall Smith three times in the abdomen and the arm.[150]

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142 Matt Jaworowski, *Authorities Investigate Abdulazeez's Personal Life, Mental, Drug Issues*, WATE (July 20, 2015), http//www.wate.com/2015/07/20/fbi-recovers-chattanooga-gunmans-disturbing-diary/.

143 *UPDATE*: *No Motive Known for Gunman Opening Fire on Marines*, WRCBTV (Jul. 17, 2015), https://www.wrcbtv.com/story/29563843/officer-involved-shooting-at-us-naval-reserve.

144 Shelly Bradbury, *Minute by Minute: A Timeline of the Chattanooga Attack Revealed*, TIMES FREE PRESS (Jul. 23, 2015), http://www.timesfreepress.com/news/local/story/2015/jul/23/minute-minute-timeline-abdulazeezs-attack/316028/.

145 *Id*.

146 Drew Galloway, *Investigators Reveal New Details About Chattanooga Attack, Say Police Killed Abdulazeez*, WHNT (Jul. 17, 2015), http://whnt.com/2015/07/17/investigators-reveal-new-details-about-chattanooga-attack/.

147 Meghan Keneally, *How the Chattanooga Shooting Unfolded*, ABC NEWS (July 17, 2015), http://abcnews.go.com/US/chattanooga-shooting-unfolded/story?id=32516133.

148 Greg Botelho, *Chattanooga Shootings: Gunman Shot at After He Rams Gates, Then Kills Five*, CNN (Aug. 11, 2015), http://www.cnn.com/2015/07/22/us/chattanooga-shooting/.

149 Andy Sher, *Navy: Officer Has Not Been Charged for Firing Personal Weapon at Chattanooga Gunman*, TIMES FREE PRESS (Aug. 3, 2015), http://www.timesfreepress.com/news/local/story/2015/aug/03/navy-officer-has-not-been-charged-firing-personal-weapon-chattanooga-gunman/317947/.

150 Melissa Chan, *Sailor Randall Smith Dies from Injuries in Chattanooga Shooting: Family*, N.Y. DAILY NEWS (July 19, 2015), http://www.nydailynews.com/news/

Abdulazeez then moved through the Reserve Center firing his rifle at anyone he saw and exited the back of the building into a fenced motor pool area where several servicemembers were located. Investigators recovered approximately 100 shell casings in and around the Reserve Center.[151] After reaching the motor pool area, Abdulazeez spotted several personnel and shot and killed four marines.[152] Lieutenant Commander White and another unidentified servicemember then opened fire on Abdulazeez with personally owned weapons to "provide cover" for other marines climbing over a fence to escape from the facility.[153] This resistance forced Abdulazeez to reenter the Reserve Center, where awaiting Chattanooga Police officers shot him several times, killing him.[154]

Similar to other active shooter incidents discussed above, the attack at the Reserve Center occurred quickly, lasting only three to five minutes from the time Abdulazeez arrived to the time he shot the five personnel.[155] Police officers were on the scene within five minutes of Abdulazeez arriving at the Reserve Center, but that was because they were already pursuing Abdulazeez from the scene of the first shooting.[156] Had officers not already been pursuing Abdulazeez it could have taken much longer before they arrived on the scene, giving Abdulazeez time to shoot additional servicemembers.[157]

Both the Recruiting Station and the Reserve Center were located in civilian locations, off military installations. As a result, no regularly armed military personnel or security guards were available to respond to the active shooter.[158]

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national/randall-smith-5th-victim-chattanooga-shooting-dies-article-1.2296310. Specialist Randall Smith died of his wounds two days later on July 18, 2015. *Id.*

[151] Bradbury, *supra* note 144.

[152] Botelho, *supra* note 148.

[153] *FBI Explains how Chattanooga Shooting Played out, how Mohammad Abdulazeez was Killed*, TIMES FREE PRESS (July 22, 2015), http://www.timesfreepress.com/news/local/story/2015/jul/22/live-updates-press-conference-chattanooga-shootings /315906/.

[154] Botelho, *supra* note 148.

[155] Bradbury, *supra* note 144.

[156] *See* Drew Galloway, *Investigators Reveal New Details About Chattanooga Attack, Say Police Killed Abdulazeez*, WHNT (July 17, 2015), investigators-reveal-new-details-about-chattanooga-attack.

[157] *See* David Larter, *Sources: Navy Officer, Marine Fought to Take Out Chattanooga Gunman*, NAVY TIMES (Jul. 24, 2015), http://www.navytimes.com/story/military/2015/07/21/sources-navy-officer-marine-shot-chattanooga-gunman/30426817/. An FBI spokesman told reporters that local police officers were "close behind" Abdulazeez when he arrived at the Naval Reserve Center. *Id*.

[158] *See* Greg Richter, *Ex–Navy Seal: Chattanooga Marines Could be Alive if Armed*, NEWS MAX (Jul. 16, 2015), http://www.newsmax.com/Newsmax-Tv/Chattanooga-Marines-Carl-Higbie-armed/2015/07/16/id/657562/. Carl Higbie, a former Marine and Navy Seal told reporters that policies prohibiting Marines and other servicemembers from carrying firearms are a "product of bureaucracy in administration." *Id*.

The exception was Lieutenant Commander White and another unidentified servicemember who possessed and used personally owned weapons (POWs), in this case handguns, to engage Abdulazeez outside the center.[159] An FBI spokesman told reporters that a separate investigation would look into why servicemembers were in possession of POWs when they were prohibited in the Reserve Center.[160] In response to questions by reporters, Marine Corps Major General Paul Brier did not get into specifics about the two servicemembers who had POWs, but he told reporters, "I can tell you that our Marines reacted the way you would expect."[161]

While Lieutenant Commander White and the other servicemember with a POW were not authorized to possess their POWs in the Reserve Center, is appears that by firing their weapons at Abdulazeez, they delayed his advance and provided extra time for Marines who fled the building to escape over the back fence of the Reserve Center.[162] Their actions in possessing weapons and returning fire may have saved the lives of other servicemembers by influencing Abdulazeez to return to the Reserve Center where waiting police officers shot and killed him.[163] Lieutenant Commander White and the other servicemember who possessed a POW in the Reserve Center violated DoDD 5210.56 and could have faced criminal prosecution for possessing the weapons in violation of the service regulations implementing the Directive.[164] Had Lieutenant Commander White and the other servicemember been formally armed and trained to respond to an active shooter attack, the internal response to Abdulazeez's attack would likely have been more effective.[165]

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[159] Andy Sher, *Navy: Officer Has Not Been Charged For Firing Personal Weapon at Chattanooga Gunman*, TIMES FREE PRESS (Aug. 3, 2015), http://www.timesfreepress.com /news/local/story/2015/aug/03/navy-officer-has-not-been-charged-firing-personal-weapon-chattanooga-gunman/317947/. *See also* Associated Press & Staff, *FBI Explains How Chattanooga Shooting Played Out, How Mohammad Abdulazeez was Killed*, TIMES FREE PRESS(Jul. 22, 2015),http://www.timesfreepress.com/news/local/story/2015/jul/22/live-updates-press-conference-chattanooga-shootings/315906/.

[160] *See* Associated Press, *supra* note 159.

[161] *Id*.

[162] *Id*.

[163] *See id*. Investigators have not yet determined if Lieutenant Commander White, or the other servicemember who had a POW, hit Abdulazeez with any return fire. *Id.*

[164] Michelle Jesse, *Here's an Update on Chattanooga Hero That Will Make You Cheer*, ALLEN B. WEST (Aug. 7, 2015), http://allenbwest.com/2015/08/heres-an-update-on-that-chattanooga-hero-that-will-make-you-cheer/. There were initial media reports that Lieutenant Commander White would face criminal charges for possessing a POW in the center; however, subsequent reports stated that Lieutenant Commander White would not face criminal charges. *Id.*

[165] The author was unable to find any evidence that Lieutenant Commander White or the other servicemembers being armed compromised the security of the Reserve Center in any way, but there is evidence that being armed may have slowed Abdulazeez down and helped bring about his death. *See* Associated Press, *supra* note 160. Training and arming

III. Lessons Learned From the Shootings and a Call to Action

One of the chilling observations from the shootings discussed above is that the shooters encountered very little difficulty in bringing a firearm onto the military installations before their attacks.[166] Gaining access to a military installation is relatively easy for non–DoD members, and is virtually automatic for DoD Identification Card (ID) holders.[167] Based on this reality, future active shooters in possession of a DoD ID card will likely have little difficulty in bringing firearms onto military bases prior to a planned attack because only very small numbers of personnel are searched before they enter a military base.[168] Under current DoD arming policies, satellite recruiting offices and small Reserve Centers, like those in Chattanooga, will continue to be uniquely vulnerable to active shooter attacks until DoD weapons policies are updated. These facts lend powerful support to the argument that military leaders need to

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servicemembers to respond to active shooters is the major point of the Armed Security Officer Program highlighted *infra* part IV.

[166] *See infra* Appendix A. In each of the shootings, the shooter brought a non–registered weapon onto the installation prior to the attack. *Id*. By doing so, the shooters violated federal statute and service or installation regulations. *See* 18 U.S.C. § 930 (2014); *See also infra* Appendix B. It logically follows that if a servicemember has planned and prepared to murder his fellow servicemembers and takes action to bring a weapon onto the installation for that purpose, the shooter is likely not concerned about violating punitive firearms regulations. The author was unable to find any information indicating that MAJ Hasan, SPC Lopez, or Aaron Alexis ever considered that they were violating installation firearms regulations when they brought unregistered weapons onto the military installations prior to their attacks. *See infra* Parts V and VI of this article for discussion of how military firearms policies are keeping guns out of the hands of the servicemembers that need them most for unit and self–defense.

[167] Manny Fernandez & Serge Kovaleski, *Soldier's Attack at Base Echoed Rampage in 2009*, N.Y. TIMES (Apr. 3, 2014), http://www.nytimes.com/2014/04/04/us/fort-hood-security-problems.html?_r=0. In the wake of the 2014 Fort Hood shooting, Lieutenant General Mark Milley told reporters, "Fort Hood is a big installation. We've got a population well over 100,000 here. It would not be realistic to do a pat–down search on every single Soldier and employee on Fort Hood for a weapon on a daily basis." *Id*.

[168] *Id*. It is also important to realize that America is a heavily armed nation, with an estimated 310 million firearms. *See* WILLIAM J. KROUSE, CONG. RESEARCH SERV., RL32842, GUN CONTROL LEGISLATION 8 (2012). "[T]he estimated total number of firearms available to civilians in the United States had [by 2009] increased to approximately 310 million: 114 million handguns, 110 million rifles, and eighty–six million shotguns." *Id*. Just a few of these weapons falling into the hands of terrorists or persons intent on hurting others can have a devastating impact if the shooter cannot be quickly stopped. *See infra* Appendix A.

arm servicemembers within individual units to provide immediate response capability against the active shooter threat.[169]

After the 2014 Fort Hood shooting, President Obama attended a memorial service at Fort Hood to comfort the victims and outline his strategy to prevent future attacks.[170] He said,

> [P]art of what makes this so painful is that we've been here before. Once more Soldiers who survived foreign war zones were struck down here at home, where they're supposed to be safe . . . . As a military we must continue to do everything in our power to secure our facilities and spare others this pain.[171]

The reality is that until DoD leaders accept that "securing our facilities" includes arming servicemembers in military units with firearms, active shootings will continue to occur. As 1LT Cook warned after the 2014 Fort Hood attack, "This will happen again, and again until we learn the lesson that suppressing the bearing of arms doesn't prevent horrific crimes, it invites them."[172] Sadly, the shootings in Chattanooga, Tennessee, appear to confirm this assertion. Had Hasan, Elder, Alexis, Lopez, or Abdulazeez known that there were armed servicemembers in the military offices they planned to attack, it may have deterred them from attacking those locations.[173]

IV. The Growing Threat of Active Shooters in the United States

The frequency of active shooter incidents in the United States is rising. The Department of Justice (DoJ) estimates that there were 160 active shooter incidents in the United States from 2000 to 2013.[174] From 2000 to 2006, the number of active shooter incidents nationwide averaged 6.4 incidents per year, but between 2007 and 2013, the number of incidents per year rose to 16.4, a 56% increase.[175] Active shooter incidents on military bases are also becoming

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169 *See infra* Part VII.

170 Baker, *supra* note 100.

171 *Id*.

172 1LT Cook Letter, *supra* note 1.

173 *See infra* Section VI. Numerous studies have verified the fact that active shooting events have historically occurred almost exclusively in areas where firearms are prohibited. *Id.* Having armed personnel in a given area is a potent deterrent to active shooters. *Id.*

174 FBI Active Shooter Study, *supra* note 2, at 9.

175 *Id*. The FBI active shooter study reports the number of active shootings but does not examine the basis for the significant statistical increase in the rate of active shootings between the two time periods. *Id*. It is noteworthy that while the number of active shooter incidents has been increasing nationwide, the overall violent crime rate in the

more frequent. There has been an average of one active shooter incident per year for the last five years on military installations.[176]

In addition to the number of completed active shooter incidents on military bases, a number of planned attacks have also been narrowly avoided.[177] In 2007, for example, five Islamic extremists were caught attempting to purchase weapons for an attack on Fort Dix, New Jersey.[178] Their plan was to "kill as many soldiers as possible."[179] A similar attack was also prevented in 2008 when seven men were arrested and charged in a plot to attack the marine base in Quantico, Virginia.[180]

The threat toward military family members is also growing.[181] In 2014, the Army issued a warning to Soldiers to "be vigilant" because Islamic State militants had "called on their supporters to scour social media for addresses of [soldiers'] family members—and to show up [at their homes] and slaughter them."[182] The increase in the rate of active shootings, combined with the number of attacks that have been narrowly avoided, is a potent reminder that DoD policies need to evolve to meet the growing threat.[183]

United States has been falling for several decades to reach "the lowest homicide death toll since the mid–1950s." *FBI: Violent Crime Rates in the U.S. Drop, Approach Historic Lows*, NBC NEWS (Jun. 11, 2012), http://usnews.nbcnews.com/_news/2012/06/11/12170947-fbi-violent-crime-rates-in-the-us-drop-approach-historic-lows?lite. It is also noteworthy that as violent crime and property crime rates have been falling nationwide, the number of firearms sold in the United States has increased to record levels. *Id*. In 2013, there were 21,093,273 firearm background checks performed, a record number. Awr Hawkins, *FBI Report Confirms Crime Fell While Gun Purchases Soared in 2013*, BREITBART (Nov. 10, 2014), http://www.breitbart.com/Big-Government/2014/11/10/FBI-Report-Confirms-Crime-Fell-While-Gun-Purchases-Soared-In-2013. These facts lend support to the conclusion put forth by a leading researcher on firearms that as a general rule, more guns equals less crime. *See* JOHN R. LOTT, MORE GUNS LESS CRIME 194 (2d ed. 1998).

[176] *See infra* Appendix A.

[177] Ticking Time Bomb, *supra* note 34. The rise of "violent Islamic extremism" has been cited as a significant growing threat in America. *Id*.

[178] Dale Russakoff & Dan Eggen, *Six Charged in Plot to Attack Fort Dix*, WASH. POST (May 9, 2007), http://www.washingtonpost.com/wpyn/content/article/2007/05/08/AR2007050800465.html?hpid=moreheadlines (last visited February 10, 2015).

[179] *Id*.

[180] Ticking Time Bomb, *supra* note 34, at 20.

[181] U.S. DEP'T OF ARMY, ARMY THREAT INTEGRATION CENTER (ARTIC) SPECIAL ASSESSMENT: ISIL THREATS AGAINST THE HOMELAND (Sept. 29, 2014), https://publicintelligence.net/artic-isil-threats-homeland/.

[182] *Id*.

[183] THE WHITE HOUSE, U.S. NATIONAL STRATEGY FOR COUNTERTERRORISM 8 (June, 2011). "The most solemn responsibility of the President and the United States Government is to protect the American people, both at home and abroad." *Id.* Revising

Sadly, leaders have disregarded the greatest asset in the Army able to confront an active shooter: the armed servicemember.[184] Soldiers who have survived active shootings have great difficulty understanding why military leaders will not trust them to carry firearms for self–defense domestically like they were trusted to carry firearms while deployed overseas.[185] It is telling to consider that in the last ten years more soldiers have been killed by fellow soldier active shooters in the United States than by active shooters on military installations in combat zones during the same time period.[186] A foreign land may be referred to as a combat zone but to the ninety–two servicemembers and civilians shot or killed by active shooters in the United States in the last six years, the experience was just as deadly as combat. It is time for

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counterproductive firearms policies to protect America's military personnel from active shooters will reinforce the National Counter Terrorism strategy and let servicemembers know that DoD leaders are genuinely concerned for their welfare. *See also* FM 6-22, *supra* note 10, para. 2-10.

[184] The author has been unable to locate discussion of the possibility of arming non–LEO servicemembers to respond to the active shooter threat in any DoD publications.

[185] *See* Tan, *supra* note 15. As one Soldier who survived the 2014 Fort Hood attack said,

> When you're deployed, you have your weapon issued to you, and it's mandatory that you carry it. When you come back home and you come onto post . . . the only people who are going to have weapons are military police . . . and those who don't care about the law . . . . It's ridiculous. All they do is put a Band–Aid on it, check the block . . . . The briefing told us to shut the door, turn off the light and hide behind a desk. And do what? Pray that someone with a gun comes to save me?

Id. Staff Sergeant (SSG) Jacob Wiley made this statement during an interview after the 2014 Fort Hood shooting. *Id*. The domestic posture of being unarmed and untrained in how to confront active shooters stands in stark contrast to the training and arming soldiers receive prior to deploying to a combat zone overseas, where they are expected to defend themselves. *See* Headquarters, Combined Joint Task Force–1, Gen. Order No. 1, para. 5 (May 21, 2011) [hereinafter CJTF–1 Gen. Order No. 1].

[186] *See U.S. Soldier Charged with Murder in Iraq Shooting Deaths*, CNN (May 11, 2009), http://www.cnn.com /2009/WORLD/meast/05/12/iraq.soldiers.killed/. The author searched for reported active shooter incidents that occurred in the Iraq or Afghanistan combat zones on a U.S. controlled installation from 2004 to 2014 and only found one incident where an American soldier shot and killed more than three fellow Soldiers. *Id*. That incident was the 2009 Camp Liberty, Iraq shooting. *Id*. During the attack, Sergeant John Russell shot and killed five soldiers at a mental health clinic. *Id*. The practice at the clinic was for soldiers to check their firearms into a locked room upon arrival which resulted in soldiers not having their weapons when Russell attacked. Elliot Smith, *Military Mental Health Crisis Exposed with Camp Liberty Killings*, BLOOMBERG (Aug. 1, 2012), http://www.bloomberg.com/news/2012-08-01/military-mental-health-crisis-exposed-with-camp-liberty-killings.html. *See infra* Appendix A illustrating military active shooters in the United States since 2009.

servicemembers in the United States to be given the means to defend themselves here at home, just as they could while they were deployed overseas.[187]

Department of Defense leaders appear to have decided that servicemembers in the United States do not face *enough* of a threat to justify arming anyone but LEOs for protection.[188] This appears to be a mistaken assumption, considering the significant number of casualties on military installations in the last five years from active shooters. If ninety–two shooting casualties are not enough to bring about a change in DoD firearms policy, it is rather alarming to consider how many servicemembers must die at the hands of active shooters before firearms policies are updated.

In addition to the growing threat by violent Islamic extremists, there are several other factors that may drive a significant increase in the number of future active shooter casualties on military installations. First, a large number of servicemembers have Post Traumatic Stress Disorder (PTSD) stemming from overseas deployments, and PTSD is associated with an increase in violent behavior.[189] Second, young people in America who will become the servicemembers of tomorrow are watching more violence than ever before in the media.[190] Watching violence is associated with an increase in violent

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[187] *See* Herridge, *supra* note 30. The fact that Congress passed legislation to allow survivors of the 2009 Fort Hood attack to receive the Purple Heart demonstrates that Congress acknowledges that survivors of active shooter attacks that are motivated by terrorism deserve the same recognition as servicemembers who were wounded in a foreign combat zone. *See id*. The firsthand accounts of soldiers who have survived military active shooters are a chilling reminder that the terror and death of a combat zone are realized when just one active shooter begins firing. *See* 1LT Cook Letter, *supra* note 1. One survivor of the 2009 Fort Hood shooting said, "I could hear people screaming, brass hitting the ground. I could smell the smoke . . . . I could see all the blood, the crumpled uniforms . . . shell casings. It was just carnage." Lieutenant Colonel Retired Randy Royer's testimony in United States v. Hasan, Fort Hood, TX, Aug. 28, 2013, (pending final action). Lieutenant Colonel (Ret.) Royer was shot in the leg and the forearm by Major Hasan on November 5, 2009. Due to his injuries from the shooting, he required a cane to walk to the witness stand to testify at the trial. Eric M. Johnson & Lisa Maria Garcia, *Hell Broke Loose Witness Says of 2009 Fort Hood Massacre*, REUTERS (Aug. 12, 2013), http://www reuters.com/article/2013/08/12/us-usa-crime-forthood-idUSBRE97B0S820130812.

[188] *See* DoDD 5210.56, *supra* note 12, at 2. *See* 2014 Senate Committee Meeting, *supra* note 15, at 44.

[189] Sonya Norman, *Research Findings on PTSD and Violence*, U.S. DEP'T. OF VETERANS AFFAIRS (last visited Dec. 12, 2014), http://www.ptsd.va.gov/professional/co-occurring/resear. ch_on_ptsd_and_violence.asp. *See also* K.B. Jordan, *Problems in Families of Male Vietnam Veterans with Posttraumatic Stress Disorder*, J. CONS. & CLIN. PSYC. 60, 916-26 (1992).

[190] Eugene Beresin, *The Impact of Media Violence on Children and Adolescents: Opportunities for Clinical Interventions*, THE AMERICAN ACADEMY OF CHILD &

behavior.[191] Finally, increases in magazine capacity and improvements in weapon design and accessories are enabling the production of more deadly firearms.[192] As the threat potential increases, military leaders need to implement greater threat reduction measures to protect the force. Unfortunately, as the next section highlights, military leaders are relying too heavily on a small number of responders to confront the growing active shooter threat.

V. Policy Failures: Overreliance on Law Enforcement Officers

All DoD firearms regulations are founded on the premise that military installations are secure when only LEOs and security personnel carry firearms.[193] This section highlights the flawed nature of this assumption and the problems inherent with exclusive reliance on LEOs to stop active shooters.

A. The High Cost of Waiting for a Law Enforcement Officer Response

At any given time on a military installation, there are only a few armed personnel capable of stopping an active shooter.[194] These are on–duty LEOs and armed security personnel.[195] Department of Defense leaders rely on these personnel exclusively to protect the force from active shooters.[196] The active shooter attacks reviewed in Part II, however, painfully demonstrate that LEOs normally require a significant amount of time to respond to an active shooter

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ADOLESCENT PSYCHIATRY, https://www.aacap.org/aacap /Medical_Students_and_Residents/Mentorship_Matters/DevelopMentor/The_Impact_of_Media_Violence_on_Children_and_Adolescents_Opportunities_for_Clinical_Interventions.aspx (last visited Aug. 29, 2015). The average American child, for example, will view an estimated 16,000 murders on television before turning age eighteen. *Id.*

191 *See* Barbra J. Wilson, *Media and Children's Aggression, Fear and Altruism*, FUTURE OF CHILDREN (Spring 2008), http://futureofchildren.org/publications/journals/article/index.xml?journalid=32&articleid=58&sectionid =270.

192 *See* Brad Plumer, *Study: The U.S. Has Had One Mass Shooting Per Month Since 2009*, WASH. POST (Feb. 2, 2013), http://www.washingtonpost. com/blogs/wonkblog/wp/2013/02/02/study-the-u-s-has-had-one-mass-shooting-per-month-since-2009/.

193 *See* DoDD 5210.56, *supra* note 12, at 2. *See infra* Part VI for examination of the data showing that areas where only LEOs and security personnel are allowed to carry firearms coincide with the greatest number of active shooting incidents.

194 *See* DoDD 5210.56, *supra* note 12, at 2; *See also* AR 190-14, *supra* note 9, para. 2-2; *See also infra* Appendix B.

195 *See* AR 190-14, *supra* note 9, para. 2-2; *See also supra* Part II highlighting the LEO response to three prior military active shootings.

196 *See* 2014 Senate Committee Meeting, *supra* note 16, at 44.

attack.[197] During this crucial "LEO response window," ninety–two DoD employees or civilians have been wounded or killed.[198] Seven people were shot in the estimated seven minutes it took LEOs to respond and stop Mr. Abdulazeez in Chattanooga, Tennessee, earlier this year.[199] During the 2014 Fort Hood attack, SPC Lopez shot nineteen people between the time of the 911 call and the military LEOs' response, eight minutes later.[200] During the Washington Navy Yard shooting, Alexis shot ten people between the time authorities were alerted and when LEOs actually engaged Alexis, sixty–nine minutes later.[201] Most notoriously, in 2009, MAJ Hasan shot forty–two Soldiers and civilians before LEOs could respond and stop him, ten minutes after the shooting began.[202] These lengthy response times demonstrate that DoD policies relying on LEOs to stop active shooters are not an effective solution to the active shooter threat.[203] Military leaders must begin to trust more than just LEOs with firearms if active shooter attacks are to be deterred and lives are to be saved.[204]

B. Reluctance of Army Leaders to Allow LEOs to Carry Firearms

A significant challenge to the DoD's approach to relying on LEOs to protect servicemembers from active shooters is the fact that military firearms policies even restrict a large number of LEOs from carrying firearms on military installations.[205] For example, only on–duty MP officers assigned to patrolling

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[197] *See infra* Appendix A. The response times for the shootings highlighted speak for themselves. When a gunman is actively shooting people, every second of delay is another moment a life could be lost.

[198] *Id.*

[199] Bradbury, *supra* note 144.

[200] Rebecca Kaplan, *Experts: Societies' Problems Don't Stop at Military Bases' Gates*, CBS NEWS (Apr. 3, 2014), http://www.cbsnews.com/news/expert-societys-problems-dont-stop-at-military-bases-gates/ (last visited Oct. 23, 2015).

[201] Navy Yard AAR, *supra* note 4, at 61.

[202] Powers, *supra* note 49; *See also Timeline: Fort Hood Shootings*, BBC NEWS (Nov. 12, 2009), http://news.bbc.co. uk/2/hi/americas/8346315.stm.

[203] Exclusively relying on LEOs as the only armed responders will ultimately stop active shooters, but as military active shootings demonstrate, a large number of casualties will occur before LEOs can respond. *See infra* Appendix A.

[204] *See infra* Part VII. There is a large number of personnel within the DoD with significant firearms experience that could be utilized to help protect the force from active shooters. *See* 2014 Senate Committee Meeting, *supra* note 16, at 44. This group ranges from Special Operations personnel to personnel with extensive civilian marksmanship experience. *Id.* Screening and arming personnel within this group would provide a valuable deterrent against would–be attackers. *See* Hawkins, *supra* note 175; John R. Lott, Jr., *The Cruelty Of Gun Free–Zones*, NATIONAL REVIEW (Jan. 31, 2014), http://www.natio nalreview.com/article/370014/cruelty-gun-free-zones-john-r-lott-jr.

[205] *See* AR 190-14, *supra* note 10, para. 1-5 and para. 2-2.

duties are allowed to carry firearms on military installations for self–defense.[206] After their shift is over, the MPs sign their weapons back into the unit arms room.[207] The result of this practice is that the MPs are then unable to respond to an active shooting incident the rest of the time they are on the military installation. Meanwhile, MP commissioned officers are not allowed to carry firearms on military installations unless there is a situation that justifies them to be armed.[208] State and local police officers are also normally not allowed to carry firearms on military installations unless they are responding to an active call for assistance on the installation.[209] The end result is that off–duty MPs and local civilian and state LEOs that happen to be on a military installation for a non–emergency purpose are unable to respond to an active shooting.

Retired military LEOs also face considerable challenges in obtaining DoD authorization to carry firearms both on and off a military installation. For example, Congress passed the Law Enforcement Safety Officers Act (LEOSA) in 2004, allowing both active and retired LEOs to carry firearms while off–duty in any state in the nation, but the DoD did not begin implementing the legislation until 2014.[210] It ultimately took a retired Criminal Investigation Command (CID) Special Agent filing suit in federal court to force the DoD to comply with LEOSA.[211] These examples illustrate the entrenched reluctance DoD policymakers have to allowing trained LEOs carry firearms. The impact of these policy restrictions is that many LEOs are walking around on military installations unarmed and unable to respond to an active shooting. As one leader in the firearms industry said, "The only thing that stops a bad guy with a gun is a good guy with a gun."[212] A law enforcement officer without a gun is of little value in an active shooter situation.

In June 2014, following the second active shooter attack at Fort Hood, the Army Criminal Investigation Detachment Command (CIDC) acknowledged that special agent firearms policies were counterproductive to protecting soldiers

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[206] *See* Christopher Bean, *Fort Hood FAQ*, SLATE (Nov. 6, 2009), http://www.slate.com /articles/news _and_politics/explainer/2009/11/fort_hood_faq.html. The policy of only allowing MPs to carry firearms for self–defense stems from the erroneous belief of senior DoD leaders that MPs can adequately protect servicemembers from active shooters. *See* 2014 Senate Committee Meeting, *supra* note 16, at 44.

[207] Email from MP Officer, to author (Apr. 17, 2014) (on file with author).

[208] *Id*.

[209] Bean, *supra* note 153; *See also infra* Appendix B.

[210] *See* DEP'T OF DEF. INSTR. 5525.12, IMPLEMENTATION OF THE AMENDED LAW ENFORCEMENT OFFICERS SAFETY ACT OF 2004 (LEOSA) para. 1 (Feb. 15, 2014), [hereinafter DoDI 5525.12].

[211] Gibbon v. Hagel, No. EDCV13-02144, 2013 U.S. Cen. Dist. CA, (Nov. 21, 2013).

[212] Wayne Lapierre, *NRA Press Conference*, NRA (Dec. 21, 2012), http://home.nra.org/pdf/Transcript. _PDF.pdf. Wayne Lapierre is the Executive Vice President of the National Rifle Association.

from active shooters.[213] In a memorandum to Special Agents, the command acknowledged, "There have been . . . [m]ultiple incidents . . . across the Army where Special Agents were . . . without their assigned weapon . . . [and they] could have potentially protected [innocent bystanders] if armed with their weapon[s]."[214]

Military firearms policies also significantly restrict the ability of state and local LEOs who serve in the Army Reserve and the Army National Guard from carrying firearms on military installations.[215] A large number of military LEOs serve in the Reserve Component (RC) and perform monthly training on military installations.[216] Installation Privately Owned Weapon (POW) policies on active duty Army bases curtail the ability of RC LEOs from reporting for drill duty with their service weapons on their person or in their vehicles.[217] The impact of these restrictions is that RC LEOs must travel to and from drill duty without their LEO weapons.[218] Without their firearms, these LEOs are unable to properly respond to a crime in progress or other emergencies both on and off the installation.[219] These outdated firearms policies impose significant restrictions on qualified LEOs. It is time to fully empower LEOs to protect military installations from active shooters.[220]

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[213] Criminal Investigation Detachment Command (CIDC) Firearms Memo, *supra* note 24, para. 3. In the same memorandum some modifications were made to firearms carry policies while CID agents are on approved leave. *Id.*

[214] *Id*.

[215] *See infra* Appendix B for an examination of firearms policies on the five largest Army bases in the United States.

[216] *See* U.S. ARMY RESERVE, http://www.usar.army.mil/Commands.aspx (last visited Dec. 16, 2015). There are a total of three Army Reserve Component (RC) Military Police (MP) Commands, eight RC MP Brigades, and five independent RC MP Battalions. *Id*. A number of these units operate on Active Duty Army installations. *Id*. Local and state civilian LEOs also serve in the RC in other than RC MP units. *Id.*

[217] *See infra* Appendix B.

[218] *Id*.

[219] *Id*. When installation regulations restrict a LEO from storing their service weapons in their vehicle they must leave their service weapons at home or attempt to attempt to store them in the unit arms room. *Id*. This course of action is frequently a significant challenge because storing a non–military issued firearm in a unit arms room is burdensome. *See infra* Appendix B. The commander of the unit must give approval, and unit arms room personnel must be available and willing to store and retrieve the weapon. *Id*.

[220] *See infra* Part V.B. Army MP Officers, and retired officers, have not yet been issued Law Enforcement Officer Safety Act (LEOSA) credentials so they can carry concealed firearms under the act. Email from an MP Officer, to author (Nov. 17, 2014) (on file with author). The Air Force, however, has begun issuing LEOSA credentials to Security Forces so they can carry firearms nationwide under LEOSA. *See* Director, Security Forces, U.S. Air Force, Brigadier General Allen Jameson (Nov. 27, 2014), https://www.facebook.com/video.php?v.=1033764979983148&fref= nf.

VI. The Danger of Military Installations as Gun–Free Zones

> *Are we at last brought to such humiliating and debasing degradation, that we cannot be trusted with arms for our defense? . . . [I]n whose hands can they be trusted with more propriety, or equal safety to us, as in our own hands?*[221]

Military installations have become essentially "gun–free zones" (GFZs) which invite, rather than deter, active shooters.[222] The term "gun–free zone" was developed after Congress passed legislation in 1990 that prohibited the possession of a firearm within 1000 feet of a school.[223] Since then, the term "gun–free zone" has been applied to any area where only LEOs are allowed to carry firearms.[224] DoD installations basically fit this description because only LEOs and a few security personnel are allowed to carry firearms for self–defense.[225] As Part II highlighted, military firearms policies prohibiting the carry of weapons did not stop MAJ Hasan, SPC Lopez, or Mr. Alexis from bringing a gun onto a military base and killing others. Policies that can be, and are, ignored by criminals deprive law abiding citizens of the ability to protect themselves are ineffective and must be revised.[226]

A. Gun–Free Zones (GFZ) Invite Attack

> *With a single exception, every multiple–victim public shooting in the [United States] in which more than three people have been killed since at least 1950 has taken place where citizens are not allowed to carry their own firearms.*[227]

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[221] Patrick Henry, *The American Revolution*, MADISON BRIGADE (last visited Oct. 29, 2014), http://www.mad isonbrigade.com/p_henry.htm. Patrick Henry is regarded as one of the great orators of the American Revolution and is widely known for his famous speech, "Give me liberty, or give me death." *Id*.

[222] *See* Glenn H. Reynolds, *Column: Gun Free Zones Provide False Sense of Security*, USA TODAY (Dec. 14, 2012), http://www.usatoday.com/story/opinion/2012/12/14/connecticut-school-shooting-gun-control/1770345/. *See also infra* Appendix A.

[223] Crime Control Act of 1990, 101st Cong. (Nov. 29, 1990).

[224] *See* Reynolds, *supra* note 222.

[225] *See* DoDD 5210.56, *supra* note 12, at 2; AR 190-14, *supra* note 5, para. 2-2; AR 190-11, *supra* note 14, para. 1-10; *See infra* Annex A.

[226] 1LT Letter, *supra* note 1. *See supra* note 9, and accompanying text.

[227] Lott, *supra* note 25. John Lott was a former chief economist for the United States Sentencing Commission. *Id*.

According to the FBI, all of the most deadly active shooting incidents in the United States have occurred in GFZs.[228] Private research has confirmed the same finding: virtually all active shooter incidents occur in GFZs.[229] Gun–free zones have been called a "magnet[] for mass shooters" because people in these areas are defenseless against an armed attack.[230] Experts on firearms violence have warned that GFZs do not protect people, but instead identify the area as a target–rich environment for killers.[231] According to one expert,

> Policies making areas "gun–free" provide a sense of safety to those who engage in magical thinking, but in practice, of course, killers aren't stopped by gun–free zones. As always, it's the honest people—the very ones you want to be armed—who tend to obey the law . . . . Gun–free zones are premised on a lie: that murderers will follow rules, and that people like my student [a concealed carry permit holder] are a greater danger to those around them than crazed killers. That's an insult to honest people. Sometimes, it's a deadly one.[232]

There is a growing body of evidence showing that some of the most deadly active shooters specifically planned their attacks where there was a higher probability that their victims would be unarmed, and where their attack would get the greatest amount of media coverage.[233] If future active shooters use

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[228] Federal Bureau of Investigation Active Shooter Study, *supra* note 2, at 7. As of October 2015, the two most deadly active shooter attacks in America have occurred in schools: Sandy Hook Elementary School (twenty–seven killed and two wounded) and Virginia Polytechnic Institute (thirty–two killed and seventeen wounded). *Id.* The 2009 Fort Hood Shooting is the third most deadly attack in American history (thirteen killed and thirty–two wounded), followed by the 2012 Aurora, Colorado Movie Theater Shooting (twelve killed and fifty–eight wounded). *Id.*

[229] *See* Lott, *supra* note 204; *See also* CRIME RESEARCH PREVENTION CENTER, THE MYTHS ABOUT MASS PUBLIC SHOOTINGS: ANALYSIS 10 (Oct. 9, 2014), http://crime preventionresearchcenter.org/wp-content/uploads/2014/10/CPRC-Mass-Shooting-Analysis-Bloomberg2.pdf. A detailed study of active shootings since 2009 revealed that 92% of mass public shootings occurred inside a gun–free zone. *Id.*

[230] Lott, *The Cruelty of Gun Free–Zones*, *supra* note 229.

[231] *Id*.

[232] Reynolds, *supra* note 222. Policymakers who support gun–free zones are similar to the "sheep" LTC (Ret.) Grossman described in his book *On Killing*. GROSSMAN, *supra* note 33, at 180. These policy makers failed to remember that "there are the wolves . . . and the wolves feed on the sheep without mercy . . . . The moment you forget that or pretend it is not so, you become a sheep. There is no safety in denial." *Id.*

[233] Lott, *supra* note 229. James Holmes, the Aurora, Colorado, Movie Theater shooter, for example, selected for attack the only theater in his geographical area posting signs that banned concealed weapons over theaters that were closer to his apartment or that had larger auditoriums. *Id*. Adam Lanza, who perpetrated the Sandy Hook Elementary school shooting that killed twenty children and six adults spent two years planning and

similar criteria in planning an attack, a military base or a recruiting office are an alluring target.[234]

While the active shooter attacks on military installations have been tragic, the DoD has been fortunate that each active shooting thus far has involved only one gunman.[235] It is sobering to consider, for example, how many soldiers *could* have died if the six men who planned to attack Fort Dix and "kill as many soldiers as possible" had succeeded.[236] Major Hasan, for example, killed thirteen and wounded thirty–two others in the span of just ten minutes.[237] Had another shooter accompanied him, the casualty figures could have been much higher. When it comes to future attacks, DoD leaders need to prepare for the worst and implement programs and policies that prepare for attacks that may involve more than one gunman.

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preparing for his attack. *Id*. Lanza went so far as to create a seven–by–four foot spreadsheet where he studied historical active shooter attacks and listed the weapons used in the attack, the number of people killed, and even how much media coverage each shooting received. *Id*. Police officers likened "his careful study to a doctoral dissertation." *Id*. *See also* CRIME RESEARCH PREVENTION CENTER, *supra* note 229, at 10.

[234] *See infra* Appendix A (illustrating that media coverage of the three major active shootings listed was significant). Historically, schools have been the location of the most deadly active shooting incidents. *See* Lott, *supra* note 175. An active shooter incident in a DoD school on a military installation would likely generate intense media and political attention for a terrorism–motivated attacker. *See* Mushtaq Yusufzai, *Death 'All around Me': Victims Relive Pakistan School Massacre*, NBC NEWS (Dec. 16, 2014), http://www.nbcnews com/storyline/pakistan-school-massacre/death-all-around-me-victims-relive-pakistan-school-massacre-n269011. The 2014 killing of 132 Pakistani children and ten teachers in a Peshawar Army school by Taliban militants is a chilling example of an attack generating intense media interest. During the attack, terrorists targeted the children of Pakistani military personnel after they were unable to defeat the Soldiers on the battlefield. *Id*. Pakistani officials have taken action in the aftermath of the attack to arm teachers and other school officials to deter future active shooter attacks. *Peshawar Massacre: Pakistan Replies With 'Weaponizing' Teaching*, BBC NEWS (Jan. 26, 2015), http://www.bbc.com/news/world-asia-30947615.

[235] *See infra* Appendix A. The Pakistani school shooting (142 killed) and the Kenya Westgate Mall shooting (sixty–seven killed) are sobering examples of the dramatic increase in the number of casualties that can occur when more than one active shooter is involved. *See* Yusufzai, *supra* note 234, and accompanying text. *See* Russakoff, *supra* note 178, and accompanying text.

[236] *Id*. An organized attack on a United States military installation, similar to the 2013 Westgate Mall shooting in Kenya which killed at least sixty–seven people, could result in potentially hundreds of casualties. *See NYPD Report: Just Four Al-Shabab Gunmen With AK–47s Staged Kenya Westgate Mall Attack*, CBS NEWS (Dec. 13, 2013), http://www.cbsnews.com/news/nypd-4-al-shabab-gunmen-ak-47s-kenya-westgate-mall-attack/.

[237] Keyes, *supra* note 47.

B. Prohibiting All Privately Owned Weapons for Self–Defense

Military firearms policies restrict servicemembers from carrying both Government Owned Weapons (GOWs) and Privately Owned Weapons (POWs) for self–defense on military installations.[238] These restrictions apply regardless of whether a servicemember has a state–issued concealed weapons permit (CWP) or not.[239] Access to POWs on military installations is strictly controlled by punitive regulations governing POW use, storage, and transportation.[240] Servicemembers and family members living in on–base housing are restricted from using a POW for self–defense because POWs must be stored in a separate locked container from the ammunition, and installation regulations do not allow discharging a firearm for self–defense purposes.[241]

In 2008, the United States Supreme Court examined a case involving a firearm storage requirement imposed on residents of the District of Columbia mandating all firearms be kept in an "inoperable" condition. [242]The Court ruled that the legislation was unconstitutional under the Second Amendment because it prevented residents from having ready access to a firearm for self–defense.[243]

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[238] A combination of federal statutory authority, DoDDs, ARs, and local installation regulations prohibit servicemembers from carrying POWs on military installations. *See generally* AR 190-14, *supra* note 9. Federal statute prohibits the "knowing[] possess[ion] of firearms in federal facilities." 18 U.S.C. § 930 (2014). Department of Defense Directive 5210.56 directs that access to firearms will be "limited and controlled." DoDD 5210.56, *supra* note 5, at 2.

[239] AR 190-11, *supra* note 9, para. 1-10. Army installation commanders have enacted general regulations that prohibit the carry of POWs for self–defense. *See infra* Appendix B. One example is Fort Campbell Regulation 190-1 which states, "Civilian firearm Conceal Carry Permits (CCP) are not authorized/approved on the Fort Campbell Installation."! ! U.S. DEP'T. OF ARMY, FT. CAMPBELL REG. 190-1, FORT CAMPBELL'S PHYSICAL SECURITY PROGRAM para. 2.9.1 (1 Jul. 2008) [hereinafter CAM 190-1].

[240] *See infra* Appendix B for an example of POW Regulations for the five largest Army bases.

[241] *Id*.

[242] United States v. Heller, 554 U.S. 570, 591 (2008).

[243] *Id*. The Court examined the question of whether the District of Columbia could prohibit residents from obtaining a permit to possess a handgun in their home for self–defense purposes and requiring that the firearm be kept inoperable. *Id*. at 591. The Court ruled that the Second Amendment protects "the individual right to possess and carry weapons in case of confrontation." *Id*. The Court also held that "[t]he District of Columbia's requirement . . . that firearms in the home be rendered and kept inoperable at all times makes it impossible for citizens to use them for the core lawful purpose of self–defense and is hence unconstitutional under the Second Amendment." *Id*. at 630. The author was unable to locate any cases where military POW regulations have been challenged under *Heller*. The language in *Heller* suggests that a viable challenge may exist when regulations having the effect of law require that a handgun intended for self–defense purposes be stored in an inoperable condition. *Id*.

Military firearms storage policies, while intending to make military installations safer, restrict responsible gun owners living on the installation from using a firearm for self–defense or defense of their family.[244] These restrictions are rather alarming, considering the fact that "some of America's military towns have crime levels that place them among the country's most dangerous neighborhoods."[245] For example, Schofield Barracks, Hawaii, had a property crime rate in 2009 "more than twenty times that of the national average" and Fayetteville, North Carolina, the area around Fort Bragg, has the fifth highest property crime rate in the nation, the sixth highest crime rate in burglaries, and the eight highest crime rate in larcenies.[246]

C. Legislation Allowing the Carry of POWs on Military Installations

In an effort to protect servicemembers from future active shooter attacks, in the days following the 2013 Washington Navy Yard shooting and the recent Chattanooga, Tennessee, shooting, Congressional representatives have introduced eleven bills on the topic of servicemember access to firearms for self–defense.[247] To explore the potential impact of legislation on the military, the bill introduced by Texas Congressman Steve Stockman is highlighted because it would rescind all "law[s], rule[s] [and] regulations . . . that prohibit military personnel trained in firearms from carrying officially issued or personally owned firearms on military bases."[248] This revolutionary bill, or a similar one, if passed, would clear the way for any servicemember "trained in firearms" to carry a handgun for self–defense on a military installation.[249]

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[244] *See id.* at 630. Safely storing firearms is an essential component of responsible gun ownership. *See NRA Gun Safety Rules*, NRA, http://training.nra.org/nra-gun-safety-rules.aspx (last visited Oct. 23, 2015). While storing firearms safely is essential, overly restricting access to firearms when they are needed for self–defense is unconstitutional. *See Heller*, 554 U.S. at 630. Military firearms policies, rather than requiring that firearms and ammunition be stored in separate locked containers, could be revised to require that firearms and ammunition be stored in a single locked container. This would allow the owner to keep the firearm secure but at the same time have ammunition readily available for self–defense purposes.

[245] Bruce Watson, *High Crimes, Military Towns are Among the Country's Most Dangerous*, DAILY FINANCE (Nov. 16, 2009), http://www.dailyfinance.com/2009/11/16/most-dangerous-military-towns/.

[246] *Id*. *See also* Greg Barnes, *Fayetteville Crime Rate Ranks Near Worst in US*, ABC NEWS (Jun. 24, 2013), http://abc 11.com/archive/9150922/.

[247] *See* H.R. 3199, *supra* note 20 and accompanying text. Each of the ten currently pending bills will require Congressional action over the next few months which will continue to highlight the issue of servicemember access to firearms.

[248] H.R. 3199, *supra* note 20.

[249] *Id*. Servicemembers are currently prohibited from carrying POWs for self–defense on military installations. *See* AR 190-11, *supra* note 9, para. 1-10; *See infra*, Appendix B. The language in the legislation does not address whether servicemembers could carry

While passing House Resolution 3199 offers significant benefits that may protect servicemembers from active shooters, the legislation also has the potential to backfire if firearms are placed into the wrong hands. Consider, for example, the fact that the majority of soldiers (servicemembers in the other branches of the military are likely similarly situated) in the Army do not receive any training on the use of a handgun.[250] Second, a large number of junior soldiers in the Army lack the maturity to responsibly carry a handgun.[251] While H.R. 3199 takes a step in the right direction by arming more servicemembers to combat the active shooter threat, putting firearms in the hands of immature servicemembers could have the undesired consequence of increasing firearms violence on military installations.[252] A much more prudent course of action is to carefully select who is authorized to carry a firearm by implementing an Armed Security Officer Program (ASOP) as described in Part IX. Empowering commanders to oversee the selection and training of a small number of servicemembers or DoD civilian employees in their unit to carry firearms for unit protection is a more cautious and controllable solution. Properly implemented, an ASOP would provide commanders with an armed asset to combat the active shooter threat, yet carefully control who has access to firearms.[253]

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firearms openly or in a concealed manner. H.R. 3199, *supra* note 20. Currently, Army Regulation allows only LEOs or personnel performing security duties to carry concealed firearms "if carrying firearms openly would compromise the mission." AR 190-14, *supra* note 9, para. 2-8.

[250] *See* U.S. DEP'T OF ARMY STP, 21-1- SMCT, SOLDIER'S MANUAL OF COMMON TASKS para. 3-1 (Apr. 14, 2014) [hereinafter SMCT]. Paragraph 3-1 outlines the task to engage a hostile threat with the M16/M4 rifle. *Id*. Soldiers receive this training during Initial Entry Training (IET) and annual weapons qualification. *Id*. Normally only officers, MPs, and Special Forces personnel receive any training on the use of a handgun. *Discovering the Weapons Used in Basic*, MILITARY.COM (last visited Jan. 9, 2015), http://www.military. com/join-armed-forces/discovering-the-weapons-used-in-basic.html. It would be inappropriate, therefore, to infer that because servicemembers have some training in firearms they are competent to carry and use a handgun.

[251] *See* Martha Raddatz & Kirit Radia, *U.S. Army Stressed after Nearly a Decade of War*, ABC NEWS (Jul. 29, 2010), http://abcnews.go.com/Politics/army-stressed-decade-war/story?id=11277253. Study has shown that junior soldiers are prone to significantly higher rates of suicide and misconduct than more mature soldiers. *Id*.

[252] *Id*. The heart of the issue with crafting successful firearms policies is keeping guns out of the hands of untrained and unreliable people. *See infra* Part IX.

[253] *See infra* Part IX. An ASOP allows DoD leaders to prudently manage each of the challenges discussed above in arming servicemembers, yet ensure that firearms are not put into the wrong hands. *Id.*

VII. Updating Firearms Policies to Address the Modern Threat

While the number of active shooter attacks on military installations has increased in recent years, Army and DoD firearms policies have not been updated for more than twenty years.[254] Department of Defense Directive 5210.56, the governing DoD firearms directive, was issued in 1992 and remains unchanged.[255] The Army implemented the 1992 directive as AR 190-14 in 1993.[256] It has also remained unchanged despite increased active shooter attacks. As the attacks discussed in Part II demonstrate, DoD firearms policies are not protecting the force from active shooters. The time has come for DoD leaders to update firearms policies to cope with the modern threat.

A. Avenues to Update Military Firearms Policies

Three legal avenues are available to authorize servicemembers or DoD civilian employees to carry firearms for unit and self–defense. First, Congress could enact legislation requiring the DoD to let personnel carry firearms for self–defense.[257] Second, the SecDef could revise DoDDs to authorize military personnel to carry firearms for unit and self–defense.[258] Or third, military commanders could begin to revise or implement service regulations in a manner where servicemembers have greater access to firearms for force protection.

As an illustration of the third strategy, AR 190–14 allows Army commanders to arm soldiers in their command for "security duties" when "there is a reasonable expectation that life or Department of the Army assets will be jeopardized if firearms are not carried."[259] In essence, if a commander determines that the personnel in his unit face a greater threat from an active shooter attack if none of his Soldiers is armed, then he could authorize soldiers

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[254] *See* DoDD 5210.56, *supra* note 12, at 1; *See* AR 190-14, *supra* note 9, title page. *See also* Oliver Darcy, *This is Why Most Military Personnel Aren't Armed on Military Bases—And It's Not Clinton's Fault*, THE BLAZE (Sept. 13, 2013), http://www.theblaze.com/stories/2013/09/17/this-is-why-most-military-personnel-are-disarmed-on-military-bases-and-its-not-clintons-fault/. Army Regulation 190-14 was published in 1993. *See* AR 190-14 *supra* note 14.

[255] *See* DoDD 5210.56, *supra* note 5, at 3 (25 Feb. 1992). This version indicated that DoD policy was to "limit and control the carrying of firearms by DoD military and civilian personnel." *Id*. In 2001, the 1992 version of the directive was cancelled and reissued without changing the policy to "limit and control" access to firearms. *Id.* at 2.

[256] *See* AR 190-14, *supra* note 9, title page. *See* Darcy, *supra* note 252.

[257] *See* H.R. 3199, *supra* note 20.

[258] 10 U.S.C. § 113 (2014). The Secretary of Defense, by statute, has "authority, direction and control over the Department of Defense." *Id*.

[259] AR 190-14, *supra* note 9, para. 1-5.

in his command to carry firearms for unit defense under AR 190–14.[260] Arming soldiers under this authority is an available option because it is a command driven initiative and no Congressional or Secretary of Defense authorization is required.[261]

Based on the growing active shooter threat discussed in Part IV, combined with the fact that ninety–two people have been shot by active shooters on military installations in the last six years, there is a strong argument that the requirements of AR 190–14 have been satisfied and Army commanders could arm unit personnel to perform security duties.

B. The Challenge of Arming Soldiers for Self–Defense

Continuing the example discussed above, arming Soldiers to perform unit security duties is relatively straightforward under AR 190–14. Provided a commander believes that there is a reasonable expectation that unit personnel or assets will be jeopardized if personnel are not armed, Soldiers can be authorized to carry weapons for security duties.[262] When it comes to arming Soldiers for self–defense or "personal protection," however, AR 190–14 imposes an exacting set of requirements.[263] Army Regulation 190–14 states,

> [Department of the Army] military and civilian personnel may be authorized to carry firearms for personal protection when the responsible intelligence center identifies a credible and specific threat against DA personnel in that regional area. Firearms will not be issued indiscriminately for that purpose. Before individuals are authorized to carry a firearm for personal protection under this regulation, the authorizing official must evaluate—
> (1) The probability of the threat in a particular location.
> (2) The adequacy of support by DA or DOD protective personnel.
> (3) The adequacy of protection by U.S. or host nation authorities.

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[260] Individual installation firearms regulations may also impose additional regulatory requirements before servicemembers could be armed for security duties or self–defense.

[261] Absent explicit authorization from a senior commander, many commanders would likely be very risk averse in approving the carry of firearms for unit defense even if they concluded that unit personnel would be placed in jeopardy if no personnel were armed. This reluctance to arm servicemembers is the byproduct of a culture that has insisted that access to firearms be "limited and controlled." *See* DoDD 5210.56, *supra* note 14, at 2.

[262] AR 190-14, *supra* note 9, para. 1-5.

[263] *Id.* para. 2-1, 2-2.

> (4) The effectiveness of other means to avoid personal attacks.[264]

Army Regulation 190–14 created this four–part test by apparently borrowing the language of DoDD 5210.56, para. 1(b)(2)(e).[265] The borrowed language, however, concerns arming DoD personnel stationed overseas, not in the United States. The drafters of AR 190–14 imposed a more stringent requirement for arming Soldiers in the United States for self–defense than what the DoD requires. Not only is this four–part analysis very difficult to satisfy, but it requires commanders to consider relying on non–DoD personnel (U.S. or host nation authorities) for security before they can arm their own soldiers for self–defense.[266]

Requiring commanders and servicemembers to rely on outside organizations for security could be considered a "fatally misguided restriction" because ensuring unit security is an essential element of command responsibility.[267] Firearms policies that restrict a commander from allowing a servicemember to carry a firearm for unit or self–defense appear to compromise a commander's authority "[t]o promote and safeguard the morale, the physical well–being, and the general welfare of the officers and enlisted persons under their command or charge."[268]

This sense of vulnerability is likely the reason why Lieutenant Commander White, the Officer in Charge of the Chattanooga, Tennessee, Reserve Center violated DoD policy and brought a POW to work so he could defend the personnel under his command from an attack.[269] It is also poignant that two

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[264] *Id*.

[265] *See* DoDD 5210.56, *supra* note 12, at 2.

[266] *See* AR 190-14, *supra* note 9, para. 2-2. Finding a responsible intelligence center that will identify a "credible and specific threat" in a regional area is very difficult, if not impossible. *See* Email from a judge advocate to author (Dec. 10, 2014) (on file with the author). One illustration of how difficult it is for a soldier to obtain approval to carry a firearm for self–defense occurred in 2013 on a major Army installation. The soldier was a military judge. A high publicity court–martial was underway and the military judge overseeing the trial received several death threats. *Id*. The threats caused the judge enough concern that the judge requested authorization to carry a firearm for self–defense on the military installation. The request was essentially denied when reviewing officials asked the judge to provide additional justification that included submitting to a criminal background check and a credit score examination before they would process the judge's request. *Id*.

[267] *See* 1LT Cook Letter, *supra* note 1; AR 600-20, *supra* note 125, para. 1-5.

[268] *Id*.

[269] *See* Larter, *supra* note 157. The fact that LCDR White and another servicemember in the office were willing to put their military careers at risk by possessing POWs in

state governors have ordered certain National Guard personnel under their command to carry firearms for self–defense in spite of DoD policy to the contrary.[270] Preserving the authority of commanders to safeguard their servicemembers is a vital reason why an Armed Security Officer Program (ASOP) is needed to empower commanders and safeguard servicemembers.

Based on the growing threat from active shooters, AR 190–14 should be updated to give commanders greater discretion to arm unit personnel to perform security duties. Due to the inherent risk many commanders face in taking action without explicit authorization, AR 190–14 should be updated to recognize that the threat from active shooters is great enough that a commander can authorize unit personnel to carry firearms for unit defense. Army Regulation 190–14 should also be updated to make it easier for commanders to arm specially trained Soldiers in their command for self–defense when warranted by the circumstances.[271]

C. Risk Management and Overcoming Bias in Firearms Policy Decisions

> *The medical and public health case against the right to self–defense with firearms . . . is primarily based on fear, buttressed by repetition of unfounded assertions or biased statistics.*[272]

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violation of DoD policy reveals the vulnerability servicemembers feel as a result of current DoD firearms policies.

[270] *See* Star, *supra* note 18. The governors of Texas and Oklahoma have spoken plainly on the importance of arming National Guard personnel for self–defense. *Id*. National Guard personnel in a Title 32 status are considered part of the militia of the United States and fall under the dual control of federal and state authority. 10 U.S.C. § 311 (2014). State governors exercise primary command authority over National Guard personnel. *Id.*

[271] *See* U.S. DEP'T OF DEF., CJCSI 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE para. 3.a, (Jun. 13, 2005) [hereinafter CJCSI]. The governing policy concerning individual self–defense in the United States is contained in the Standing Rules for the Use of Force (SRUF) which direct, "Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self–defense in response to a hostile act or demonstrated hostile intent." *Id*. While the SRUF may allow for self–defense, the right is virtually meaningless without the means to exercise the right (access to a firearm). *See* Timothy Hsiao, *Bearing Arms in Self Defense: A Natural Law Perspective*, JOURNAL ON FIREARMS AND PUBLIC POLICY 114 (Fall 2013). When it comes to the right of self–defense on military installations, self–defense appears to have become a "mere ornament with no real value" because servicemembers are completely restricted from carrying firearms for self–defense. *Id*.

[272] Deakins, *supra* note 28, at 60.

Arming servicemembers for unit or self–defense will require convincing military leaders that responsible servicemembers can carry firearms without injuring innocent people or engaging in conduct that discredits the military.[273] Leaders may also have concerns about firearm storage, compliance with local laws, and the cost of training and arming personnel. Fortunately, established firearms storage policies are available to use as a resource, along with readily available training ranges and ammunition.[274] Storing firearms in a manner that is secure, yet readily available will require storing weapons outside of traditional arms rooms. Arms rooms are normally labor–intensive when issuing and receiving firearms from personnel, making them ineffective for this purpose. This is a novel idea for non–LEO personnel stationed in the United States; however, while deployed, servicemembers commonly implement alternative firearms storage protocols.[275] Army Criminal Investigation Detachment Command firearms policies also provide useful guidance for properly securing weapons while still having them readily available.[276]

The methods to ensure that servicemembers selected as Armed Security Officers will safely handle firearms should be three fold: 1) proper screening of personnel; 2) proper training; and 3) responsible leadership.[277] Military Police and CID special agents carry firearms safely every day because these principles guide all their operations.[278] If these same methods are employed within an Armed Security Officers Program, the residual risk of arming servicemembers for unit security duty and self–defense will be reduced to an acceptable level.[279]

Before real progress can be made to arm servicemembers for unit or self–defense, military leaders need to overcome bias and fear that firearms will hurt

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[273] 2014 Senate Committee Meeting, *supra* note 16, at 44. Senator Graham said it this way: "I think our military members are very responsible with firearms and we need to really look at having more capacity, not less, to deal with insider threats." *Id*.

[274] *See* CJTF–1 Gen. Order No. 1, *supra* note 185, para. 5.

[275] *See Id*. Soldiers deployed to Afghanistan in the footprint of CJTF–1 in 2011, for example, could secure their weapons "behind two locked doors (e.g. a locked wall locker inside a locked room)." *Id*.

[276] U.S. DEP'T OF ARMY, CID REG. 195-1, U.S. ARMY CRIMINAL INVESTIGATION COMMAND REGULATION OPERATIONAL PROCEDURES para. 3.13 (4 Mar. 2014) [hereinafter CIDR 195-1]. For example, Agents can, under certain circumstances, secure firearms in their office or their vehicle when necessary. *Id*.

[277] *See* AR 190-14, *supra* note 9, para. 1-4 and 2-5.

[278] *Id*.

[279] Incorporating these principles in the Risk Assessment of an ASOP as discussed in Part IX can bring the residual risk to an acceptable level. *See* U.S. DEP'T OF ARMY, APD 5-19 C1, RISK MANAGEMENT App. A (Sept. 8, 2014), http://armypubs.army.mil /doctrine/dr_pubs/dr_a/pdf/atp5_19.pdf. *Infra* Part VIII reviews in detail the ASOP proposal and the many benefits military units will derive from having ASOs available.

more people than they help.[280] When leaders step back and make firearm policy decisions in light of sound research data and sound force protection principles, instead of fear and bias, the balance weighs heavily in favor of arming responsible servicemembers to help protect military units from active shooters.[281]

VIII. Active Shooter Training for All DoD Personnel

From the moment military members enter the service, they are taught that training saves lives.[282] Military members train on a multitude of different tasks deemed essential by leaders, but when it comes to the topic of what to do in an active shooter situation, there is no standard military training.[283] Everyone knows what to do when a fire alarm goes off, but when it comes to an active shooter situation, most people do not know what to do.[284] A few Army installations have tried to fill this void by conducting annual active shooter training, but installation leaders have normally only included LEOs and other first responders in the training.[285] In the rare instances of non–LEO Soldiers receiving active shooter training, it is normally comprised of only a briefing, rather than an exercise like a fire drill, or a battle drill where an active response

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[280] S*ee* Lott *supra* note 25; *See generally* Lott, *supra* notes 175, 229, and accompanying text, *and supra* Part VI to examine the significant public health and statistical research supporting the carry of firearms by law–abiding citizens.

[281] *See* Deakins, *supra* note 28, at 58. Fearmongering is illogically inflating fears and using bias to drive policy. *Id.* Gun–control advocates frequently promote the fear that if people are given access to firearms, crime rates will skyrocket and society will plunge into chaos. *See* Larry Bell, *Disarming the Myths Promoted by the Gun Control Lobby*, FORBES (Feb. 21, 2012), http://www.forbes.com/sites/larrybell/2012/02/21/disarming-the-myths-promoted-by-the-gun-control-lobby/. The reality is that when responsible people carry firearms, crime rates fall and people are empowered to defend themselves against attack. *Id*. Sadly, these facts are almost never reported because mainstream media sources have a distinct bias against firearms. JOHN LOTT, THE BIAS AGAINST GUNS: WHY ALMOST EVERYTHING YOU'VE HEARD ABOUT GUN CONTROL IS WRONG 23 (2003).

[282] *See* FM 6-22, *supra* note 10, para. 4-50. "The Army wins because it fights hard and with purpose. It fights hard because it trains hard. Tough training is the path to winning at the lowest cost in human sacrifice." *Id.*

[283] *See* Schogol, *supra* note 29. Army *OneSource* has a brochure on Active Shootings and what steps a Soldier should take when confronted by an active shooter. ARMY ONESOURCE ANTITERRORISM ACTIVE SHOOTER COMMUNITY RESPONSE, http://www.myarmyonesource.com/cmsresources/Army%20OneSource/Media/PDFs/Family%20Programs%20and%20Services/iWatch%20Program/ActiveShooterBrochureHQ.pdf (last visited Oct. 23, 2015).

[284] *Id*.

[285] Wallace McBride, *Fort Jackson Offers Active Shooter Response Training*, ARMY.MIL (Apr. 11, 2014), http://www.army.mil/article/123906/Fort_Jackson_offers_active_shooter_response_training/. *See* Tan, *supra* note 15.

is rehearsed.[286] In the aftermath of the 2014 Fort Hood shooting, one soldier commented about the active shooter training his unit received by saying, "It's ridiculous . . . . All they do is put a Band–Aid on it, [and] check the block."[287]

According to one security expert, the problem with military active shooter training is that soldiers are not trained to "leave the area immediately if they hear gunshots rather than waiting to investigate."[288] Evacuating the area is recognized as the first step that an unarmed person should take to survive an active shooter situation.[289] Should leaving the area not be possible, the second step experts recommend is to "hide out" from the shooter.[290] If hiding out is not possible, the final option is to try to take action to stop the shooter.[291] The three men who attempted to stop MAJ Hasan, and were shot in the process are a potent reminder that extreme danger exists when unarmed personnel try to stop an active shooter.[292] When one cannot escape or hide, however, fighting back is the last option for survival.

Regardless of whether military firearms policies change to allow non–LEO personnel to carry firearms to respond to active shooters, everyone in the DoD should receive practical scenario–based training similar to fire alarm drills in how to react to an active shooter. Until this training becomes a reality, unnecessary casualties will occur in every active shooting.[293]

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[286] *See* Tan, *supra* note 15.

[287] *Id*.

[288] Schogol, *supra* note 29. Chris Grollneck, a security expert with Countermeasure Consulting Group reports that too often, instead of running away, people freeze when they hear gunfire. *Id*.

[289] *See id.*; DHS Active Shooter Response, *supra* note 123, at 3.

[290] DHS Active Shooter Response, *supra* note 123, at 3.

[291] *Id.* at 3. The author has been unable to locate any U.S. government publication where the step of "take action" includes a person using a firearm to engage the active shooter. This is the step that immediately comes to mind for Soldiers, but is prevented by military firearms policies. 1LT Cook Letter, *supra* note 1.

[292] *See generally* Zorya, *supra* note 51, *and Wounded Fort Hood Soldier*, *supra* note 55.

[293] *See* FM 6-22, *supra* note 10, para. 6-43. Inasmuch as "[p]reparing for the realities of combat is a direct leader's most important duty," failing to prepare servicemembers to respond to deadly threats, like active shooters, a domestic form of combat, is failing to provide critical leadership. *Id*.

IX. Implementing an Armed Security Officer Program (ASOP)

> *The only thing that stops a bad guy with a gun is a good guy with a gun. Would you rather have your 911 call bring a good guy with a gun from a mile away . . . or a minute away?*[294]

The Armed Security Officer Program is a suggested program that DoD or Army leaders could utilize to create organized, immediate response capability to combat active shooters. The ASOP would be composed of specially selected and screened personnel that are trained to respond to active shooters. Much like any additional duty to which servicemembers are frequently assigned, a commander would screen unit personnel and assign a predetermined number of servicemembers or DA civilians to serve as Armed Security Officers (ASOs).[295]

Commanders would use background investigations, criminal records screening, and psychological evaluations to ensure that only mature and responsible servicemembers are selected as ASOs. After screening, ASOs would receive training from experts on active shootings and LEOs about how to respond to an active shooter and other threats to unit personnel. Armed Security Officers would then be armed and perform their normally assigned duties, but have the powerful advantage of being equipped to rapidly respond to an active shooter event or other threats to unit personnel.[296]

Armed Security Officers would provide commanders two important benefits to help mitigate the active shooter threat. First, they would dramatically cut the response time from when an active shooter incident begins, to when a responder with a gun arrives on the scene to engage the shooter.[297] Second, they would provide a powerful deterrent to potential active shooters and other criminals

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[294] Lapierre, *supra* note 158.

[295] *See supra* Part IX. One of the significant advantages of the ASOP is that the program fits within the regulatory framework of DoDD 5210.56 and AR 190–14 in recognizing that Soldiers performing security duties can be armed. AR 190-14 *supra* note 9.

[296] *See supra* Part II. As studies of the 2009 and 2014 Fort Hood shootings and the 2013 Navy Yard shooting indicate, there were opportunities for servicemembers, had they been armed, to intervene and likely end the shootings much earlier than the LEO response. *Id*. When it comes to active shootings, there is simply no substitute for having trained and armed responders on scene as quickly as possible.

[297] *See infra* Appendix A; *see also* Schogol, *supra* note 29. Department of Defense LEOs responded to the 2009 and 2014 Fort Hood shootings faster (ten minutes and eight minutes, respectively) than the average national response time for active shootings (fourteen minutes), but the shooter still had enough time to kill or wound a large number of people. *See infra* Appendix A; Schogol, *supra* note 26.

because overwhelming evidence shows that when people in a given area are known to have firearms, would–be attackers are far less likely to attack them.[298]

One important consideration impacting the visibility of ASOs is whether they would carry firearms in an open carry or a concealed carry fashion.[299] Servicemembers carrying firearms in an open carry fashion would carry their weapon similar to a uniformed police officer, in a holster on their belt. Servicemembers carrying their weapon in a concealed carry fashion would carry their weapon in a holster underneath their clothing, similar to how CID special agents carry their weapons. Each type of carry configuration involves different policy considerations.

The armed Federal Flight Deck Officer (FFDO) program provides a valuable template for how a military ASOP could work.[300] The FFDO program was implemented after the September 11, 2001 attacks, to provide additional protection against aircraft being hijacked.[301] The FFDO program allows flight crew members to volunteer and be carefully screened, trained, and armed to

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[298] *See* Lott, *supra* note 175, at 50. Lott conducted a massive study of the FBI's yearly crime data for all 3054 U.S. counties over eighteen years (1977–1992) and found that violent crime rates dramatically fall when law abiding citizens are allowed to carry concealed weapons. *Id*. Lott also found "[w]ith a single exception, every multiple–victim public shooting in the United States in which more than three people have been killed since at least 1950 has taken place where citizens are not allowed to carry their own firearms." Lott, *supra* note 25. Several researchers have analyzed Lott's findings and confirmed the premise that the carry of concealed weapons results in lower violent crime rates. Florenz Plassmann & John Whitley, *Confirming More Guns, Less Crime*, 55 STAN. L. REV. 4, 1313 (2003). It is also very significant that since 1991, twenty–four states have recognized the deterrent value Concealed Weapons Permit (CWP) holders bring to the table and have passed "shall–issue" legislation to allow law abiding citizens to carry concealed weapons. *Right to Carry 2012*, NRA ILA (Feb. 28, 2012), https://www.nraila.org/articles/20120228/right-to-carry-2012.

[299] *See generally* AR 190–14, *supra* note 9, para. 2-8. According to the regulation, "[m]ilitary or civilian personnel may carry concealed firearms while performing law enforcement or security duties if carrying firearms openly would not compromise the mission." *Id.* It is also noteworthy that the Army uniform regulation does not prohibit the carry of firearms while in uniform in an open or a concealed carry fashion. U.S. DEP'T OF ARMY, REG. 670–1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (Sept. 15, 2014) [hereinafter AR 670–1]. Installation firearm regulations may contain restrictions on the carry of Government Owned Weapons (GOWs), depending on the installation. *See infra* Appendix B. The carry of POWs is restricted by both Army regulations and installation regulations. AR 190–14, *supra* note 9, para. 2-6; Appendix B.

[300] *Federal Flight Deck Officer*, TRANSP. SECURITY ADMIN. (Jan. 2, 2015), http://www.tsa gov/about-tsa/federal-flight-deck-officers.

[301] *Id*.

carry a firearm in the cockpit to protect the crew of the aircraft from attack.[302] FFDO applicants are screened by the Transportation Safety Administration (TSA) and receive training at the Federal Law Enforcement Training Center (FLTC) in Glynco, Georgia.[303] Since 2003, thousands of FFDOs have been trained and each month, Federal Flight Deck Officers (FFDO) provide protection for over 100,000 domestic flights at a cost of only 2.5% of the cost of the Federal Air Marshall Service (FAMS).[304] The TSA acknowledges that the FFDO program provides a critical "counterterrorism" layer of security to the public.[305]

A military ASOP could shadow the FFDO program in utilizing personnel that are organic to the force structure. Similar to the FFDO, the cost of an ASOP would be a fraction of the cost of dramatically increasing the number of LEOs within the military.[306] Personnel serving as ASOs would have unique advantages over LEOs in responding to active shooter incidents because they would be located in the building of the incident, and know the building layout. Large buildings, like Building 197 where the Washington Navy Yard shooting occurred, present a complex challenge for responding LEOs who are unfamiliar with the building. [307] The size, layout, and number of employees in large buildings can make the LEOs response very lengthy or cumbersome, even if there are a large numbers of responding LEOs.[308] Armed Security Officers organic to a unit would solve this problem because they would be located within the building and have defined areas they are responsible for protecting.

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[302] *Id.*

[303] *Fact Sheet on the Federal Flight Deck Officer Program: A Model of Effectiveness and Efficiency in a Government/Industry Partnership*, ALPA.ORG. (Apr. 2013), http://www.alpa.org/portals/alpa/deptpages/gov.taffairs/issues/FactsheetFFDO_4-2013.pdf [hereinafter Fact Sheet FFDO Program].

[304] *Id.* The Federal Flight Deck Officer (FFDO) budget has remained static at twenty–five million dollars compared to the Federal Air Marshall Service (FAMS) cost of one billion dollars annually. *Id.* The overall cost to have an FFDO on board each flight is only seventeen dollars compared to $3000 for a FAMS officer.

[305] *Layers of Security*, TRAN. SEC'Y ADMIN. (Jul. 23, 2014), http://www.tsa.gov/about - tsa/layers-security.

[306] Fact Sheet FFDO Program, *supra* note 303. Significantly increasing the number of military LEOs may be able to decrease LEO response times to active shootings, but the cost would be much greater than implementing an ASOP. *Id.*

[307] Navy Yard AAR, *supra* note 4, at 16. Gaining access to Building 197 where the Washington Navy Yard shooting occurred was a challenge for several LEOs who responded to the shooting. *Id.*

[308] *Id.* at 16. During the Washington Navy Yard shooting, for example, it took LEOs sixty–nine minutes to find and shoot the attacker despite 117 officers entering the building to look for the shooter. *Id.*

In addition to knowing the building layout, ASOs will be familiar with unit personnel. Armed Security Officers will be in a position to keep an eye on unit personnel who may be showing signs of stress or troubling behavior.[309] Consider, for example, if ASOs had been present in the Battalion Headquarters building Specialist Lopez attacked. After Lopez became irate and stormed out of the building, unit personnel could have asked for an ASO to respond as a preventive measure. In the event that Lopez returned and attacked unit personnel, an armed responder would have been immediately available. On a similar note, had ASOs been located in the Soldier Readiness Clinic MAJ Hasan attacked, or Building 197 where Mr. Alexis attacked, many lives could have been spared. As previously discussed, if Lieutenant Commander White or other personnel in the Chattanooga, Tennessee, Reserve Center been formally trained and had rehearsed how to react to an active shooter attack, they may have been able to stop Mr. Abdulazeez before he killed five Marines.[310]

It is noteworthy that of the six active shooter incidents that have occurred on military installations since 2009, five were perpetrated by personnel with a history of mental health treatment.[311] Commanders have, by function of being in command, access to medical information relating to a servicemember's fitness for duty.[312] Having access to this important information, commanders are in a position to locate ASOs to be responsive to potential threats from servicemembers receiving mental health counseling that may be showing signs of stress or instability. To summarize, preparing servicemembers to survive hostile threats should be a military leader's highest priority.[313] The presence of

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309 *See* Fernandez, *supra* note 98.

310 *See Honor our Servicemembers who Used Their Personal Firearms to Fight Back Against the Terrorist Attacker in Chattanooga*, PETITIONS WHITE HOUSE (Jul. 29, 2015), www.petitions.whitehouse.gov. Following the shooting at Chattanooga, a petition was filed with the White House to "honor our brave men by presenting medals for bravery to LCDR White and all of the servicemembers, including the fallen, who saved lives by returning fire." *Id.* The petition received 25,713 signatures but fell short of the 100,000 needed to be officially reviewed by the White House. *Id*.

311 *See infra* Appendix A.

312 *See* DEP'T OF DEF. REGULATION 6025.18–R, DOD HEALTH INFORMATION PRIVACY REGULATION para. C7.11.1.3.1 (Jan.24, 2013). An exception exists in the Health Insurance Portability and Accountability Act (HIPAA) that allows commanders to talk to physicians to obtain health information relating to a servicemembers's fitness for duty. *Id*. Servicemembers who are being treated for Post–Traumatic Stress Disorder, such as SPC Lopez prior to the shooting, who then have incidents where they become unreasonably irate are at greater risk of becoming violent than other servicemembers. *See* Norman, *supra* note 189. *See also Fort Hood Shooting*, *supra* note 90.

313 *See* FM 6-22, *supra* note 10, para. 6-43. "[P]reparing for the realities of combat is a direct leader's most important duty." *Id.* NATIONAL STRATEGY FOR COUNTERTERRORISM, *supra* note 183, at 8. "The most solemn responsibility of the President and the United States Government is to protect the American people, both at home and abroad." *Id.*

ASOs located within military units will give commanders a powerful tool to confront the active shooter threat.

X. Conclusion

Current DoD firearms policies are ineffective in protecting servicemembers from active shooter attacks because they prohibit nearly all servicemembers on military installations from the ability to carry firearms for unit or self–defense. The fact that active shooters on military installations have killed or wounded ninety–two DoD and civilian personnel since 2009 is strong evidence supporting this conclusion.[314]

Military firearms policies should be revised to place firearms in the hands of carefully screened and trained servicemembers so they can immediately confront active shooters.[315] Implementing an ASOP will allow military commanders to respond to the active shooter threat with a carefully managed program using DoD assets organic to their unit. The recent Chattanooga, Tennessee, shootings vividly demonstrate the significant vulnerability to active shooter attacks faced by servicemembers stationed in isolated offices. Arming servicemembers in these locations will give them the ability to fight back if attacked, and will send the message to potential attackers that military personnel are no longer defenseless.

In addition to updating firearms carry policies, a serious need exists in the DoD for servicemembers and all DoD employees to be trained in responding to an active shooter.[316] Currently, there is no practical and realistic DoD or Army–led training on this essential skill that can determine whether someone lives or

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[314] *See supra* Part II; *infra* Appendix A. This article has primarily examined the numbers of DoD employees shot by active shooters since 2009. What this article did not examine, but warrants further study, is the psychological impact of these active shootings on first responders, family members, care providers, and others who were impacted by the shootings. Medical costs could be quantified but the intangible impact on these personnel will last a lifetime. *See* 1LT Cook Letter, *supra* note 1; Email from 1LT Patrick Cook, *supra* note 119.

[315] The ideal course of action to achieve this end is for the SecDef to revise DoDD 5210.56 to implement an ASOP across the military. Absent this course of action, there is a basis in law and regulation for commanders to arm soldiers within their units to perform security duties to protect soldiers within their unit. *See supra* Part VII.B.

[316] One convenient forum to begin training DoD personnel in how to respond to an active shooter situation would be to include the training in the mandatory online Anti–Terrorism Awareness Course. *See Level I Antiterrorism Awareness Traning*, JKO, http://jko.jten .mil/courses/atl1/launch.html (last visited Oct. 23, 2015). That said, live exercises similar to fire drills should be included to better prepare DoD personnel for the life and death reality of confronting an active shooter.

dies during an active shooting.[317] The chilling prediction of 1LT Cook, the Soldier who narrowly survived the 2014 Fort Hood shooting when soldiers all around him were killed, is a potent reminder that servicemembers are, and will continue to be, highly vulnerable to active shooter attacks until military firearms policies are updated.

> I knew this was going to happen. I had been saying for five years that Fort Hood was a tinderbox of another massacre waiting to happen. It had to happen, because our leaders failed to learn the obvious lesson of five years ago. Worse yet, I know it will happen again. More will die, more will be wounded, and more families will be torn apart, needlessly. It happened again, and will happen again, because Fort Hood is a gun–free zone."[318]

The ultimate result of revising military firearms policies and implementing an ASOP is that the Army will transform from being a reactive organization to becoming proactive in countering the active shooter threat.

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[317] *See supra* Part VIII. One potent illustration provided by one security expert is that too often people freeze when they hear gunfire instead of running from the threat. *See* Shogol, *supra* note 29.

[318] 1LT Cook Letter, *supra* note 1.

Appendix A:

Active Shootings on Military Bases Since 2009

Incident	Date	Description	Dead or Wounded	Time to LEO Response	Other Factors
Abdulazeez Chattanooga Reserve Center Shooting	7/16/2015	Shooter had a history of depression/bi polar disorder[319] and exposure to Islamic extremism[320]	5 killed, 2 wounded (shooter killed by LE)[321]	Estimated 10 minutes from the 911 call to LE stopping the shooter[322]	Military Police were stationed at the targeted locations
SPC Lopez Fort Hood Shooting	4/2/2014	Shooter had a history of mental health treatment and became irate following the denial of a request for leave[323]	3 killed, 16 wounded (shooter killed by self–inflicted gunshot)[324]	8 minutes from the 911 call to an armed LE response[325]	Shooter shot Soldiers in three different buildings[326] Several Soldiers were injured jumping out of windows to escape[327]

[319] Scott Zamost, *Chattanooga Shooting: New Details Emerge about the Gunman*, CNN (Jul. 20, 2015), http://www.cnn.com/2015/07/20/us/tennessee-naval-reserve-shooting/.

[320] Morgan Winsor, *Mohammod Youssuf Abdulazeez Radicalized in Jordan? Islamic Extremism Rising in Middle Eastern Kingdom*, IB Times (Jul. 17, 2015), http://www.ibtimes.com/mohammod-youssuf-abdulazeez-radicalized-jordan-islamic-extremism-rising-middle-2013871.

[321] Barbra Starr & Thedore Schleifer, *Pentagon, Governors Boost Security For Military After Chattanooga Shooting*, CNN (Jul. 18, 2015), http://www.cnn.com/2015/07/17/politics/chattanooga-shooting-military-protection/.

[322] Bradbury, *supra* note 144.

[323] *Fort Hood Shooter Snapped Over Denial of Request for Leave*, FOX NEWS (Apr. 7, 2014), http://www.foxnews.com/us/2014/04/07/fort-hood-shooter-snapped-over-denial-request-for-leave-army-confirms/.

[324] *Id*.

[325] Kaplan, *supra* note 200.

[326] Fernandez, *supra* note 98.

[327] *Id*. The video link within the online story reports that several Soldiers were injured by "lacerations from jumping through glass windows sustained [while] trying to escape the gunman." *Id.*

Aaron Alexis Washington Navy Yard Shooting	9/16/2013	A Navy contractor attacked coworkers based on delusional thoughts of mind control [328]	12 killed, 4 wounded (shooter killed by LE)[329]	69 minutes before shooter killed by LEO[330]	Security guard manning cameras failed to participate and shooter overcame another security guard.[331]
Sgt. Eusebio Lopez Quantico Shooting	3/23/2013	Sgt. Lopez, previously treated for mTBI and PTSD, shot and killed two fellow Marines at the Quantico Marine Corps Base[332]	2 killed (shooter killed by self–inflicted gunshot)[333]	5 minutes but the two Marines and shooter were already dead[334]	
SPC Ricky Elder Fort Bragg Shooting	7/2/2012	SPC Elder, a Soldier with a history of mental health illness and violent behavior, shot and killed his Battalion Commander during a unit safety briefing[335]	2 Killed, 1 wounded (shooter killed by self–inflicted gunshot)[336]		SPC Elder was pending a Court–Martial for the theft of a $1700 toolkit[337]

328 Hermann, *supra* note 62.

329 Navy Yard AAR, *supra* note 4, at 12.

330 *Id*. at 12.

331 *See* Hermann, *supra* note 62.

332 Alyssa Newcomb, *Quantico Marine Base Shooting Victims, Gunman Identified*, ABC NEWS (Mar. 24, 2013), http://abcnews.go.com/US/quantico-marine-base-shooting-victims-gunman-identified/story?id=18802277; Hope H. Seck, *Investigation into Quantico murder–suicide reveals barracks security failures*, MARINE CORPS TIMES (Nov. 25, 2013), http://archive.marinecorpstimes.com/article/20131125/NEWS/311250019/Investigation-into-Quantico-murder-suicide-reveals-barracks-security-failures.

333 Newcomb, *supra* note 275.

334 *Id*.

335 Drew Brooks, *Fort Bragg Soldier who Shot Commander Dies of Self Inflicted Wounds*, CBSNEWS (Jul. 2, 2012), http://www.cbsnews.com/news/spc-ricky-g-elder-fort-bragg-soldier-who-shot-commander-dies-of-self-inflicted-wounds/; Drew Brooks, *Nine–Soldier Crime Ring Linked to Death of Lt. Col. Roy Tinsdale*, FAY. OBSERVER (Feb. 10,

MAJ Hasan Fort Hood Shooting[338]	11/05/2009	MAJ Hasan acted on terrorist ideology to plan and execute an attack on a Soldier Readiness Center[339]	13 killed, 32 wounded or injured (shooter wounded by LE)[340]	10 minutes after 911 was call a LE officer off-post responded and shot MAJ Hasan.[341]	Socially isolated, vocally opposed to the wars in Iraq and Afghanistan, contact with terrorists[342]
Total			37 killed, 55 wounded		

2014), http://www.fayobserver.com/news/crime_courts/nine-soldier-crime-ring-linked-to-death-of-lt-col/article_ c1c4b459-34d4-587d-906d-46061ed31f31.html.

336 Brooks, *supra* note 336.

337 Drew Brooks, *Nine–Soldier Crime Ring Linked to Death of Lt. Col. Roy Tinsdale*, FAY. OBSERVER (Feb. 10, 2014), http://www.fayobserver.com/news/crime_courts/nine-soldier-crime-ring-linked-to-death-of-lt-col/article_ c1c4b459-34d4-587d-906d-46061ed 31f31.html.

338 Protecting the Force, *supra* note 44, at 1.

339 Ticking Time Bomb, *supra* note 34, at 29.

340 *Id*.

341 Keyes, *supra* note 47.

342 Internal Review, *supra* note 6,1 at 15.

Appendix B:

Major Army Installation POW Regulation Comparison

LOCATION	Punitive Reg.	Compliance with State law	Register before entry	Time to register	Storage	Transportation	Reserve Law Enforcement	Other
FORT BRAGG[343]	Yes	Yes	Yes	Before entry	Separate locked containers for firearms and ammo	Unloaded, open view, or in a case transport of POWs	May possess POWs only while engaged in official duties	Preapproval required for hand gun purchases under state law.
FORT CAMPBELL[344]	Yes	Yes	Yes, but exception for newly arrived Soldiers	72 hours	No storage requirement	Unloaded and encased	As approved by the Installation Commander POWs can be carried	No reg. required for hunters
FORT HOOD[345]	Yes	Yes	Yes, Soldiers SSG and below must obtain approval.	Before entry	Unit arms room or separate locked contai	Firearms must be declared before entering post.	Cannot carry POWs on their person but can	SSG and below commander approval for weapo

[343] HEADQUARTERS, XVIII AIRBORNE CORPS AND FORT BRAGG, FORT BRAGG REG. 190-11-1, PRIVATELY OWNED WEAPONS, AMMUNITION CONTROL AND PROHIBITED WEAPONS (June 1, 2015).
[344] U.S. DEP'T OF ARMY, FORT CAMPBELL REG. 190-1, FORT CAMPBELL'S PHYSICAL SECURITY PROGRAM (July 1, 2008).
[345] HEADQUARTERS, III CORPS AND FORT HOOD, FORT HOOD, TEXAS, III CORPS & FORT HOOD REG. 190-11, MILITARY POLICE WEAPONS (July 31, 2014).

					ners for ammo	Transport unloaded in the trunk or a gun rack	store in their POV for up to 72 hours	ns reg.
FORT BENNING[346]	Yes	Yes	Yes, but exception for newly arrived Soldiers	10 days if residing on-post	Separate locked containers for firearms and ammo	Firearms must be unloaded and cased and stored in the trunk. No plain view storage or gun racks.	May not possess firearms unless authorized. No exceptions for weapons storage in vehicles.	First line supervisors are responsible for ensuring employees are familiar with the regulation
FORT DRUM[347]	Yes	Yes	Yes, but exception for newly arrived Soldiers	72 hours if residing on-post	Separate locked containers for firearms and ammo but ammo must be stored in a gov.	Firearms must be cased, unloaded, and not left unattended	Only if approved by the Installation Commander	All handguns must be turned into the unit arms room until a NY pistol license is obtain

[346] HEADQUARTERS, U.S. ARMY MANEUVER CENTER OF EXCELLENCE, FORT BENNING, GEORGIA, MCOE REG. 190-11, PHYSICAL SECURITY OF PRIVATELY OWNED ARMS, AMMUNITION, AND EXPLOSIVES (Aug. 27, 2012).

[347] HEADQUARTERS, U.S. ARMY GARRISON FORT DRUM, FORT DRUM REG. 190-6, CONTROL OF PRIVATELY OWNED FIREARMS, AMMUNITION, AND OTHER DANGEROUS WEAPONS (Apr. 2, 2012).

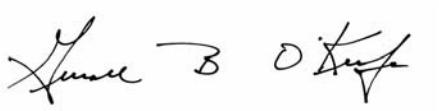
					facility			ed
JOINT BASE LEWIS-MCCHORD [348]	Yes	Yes	Yes, but exception for newly arrived Soldiers	72 hours if residing on-post	Weapons stored in unit billets, BEQ, BOQ must be stored in a separate locked container	Firearms must be unloaded and stored in the trunk or away from the driver	Can carry concealed weapons in an official capacity or if approved by the Installation Commander	Soldiers living off-post can only store weapons for other Soldiers with command approval. Reloading prohibited

[348] HEADQUARTERS, JOINT BASE LEWIS–MCCHORD, JOINT BASE LEWIS–MCCHORD REG. 190-11, PHYSICAL SECURITY OF ARMS, AMMUNITION AND EXPLOSIVES (July 21, 2014).

By Order of the Secretary of the Army:

MARK A. MILLEY
General, United States Army
Chief of Staff

Official:



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