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MOVING THE LAW OF OCCUPATION INTO THE TWENTY-FIRST CENTURY

Major Breven C. Parsons*

“IT SOMETIMES TURNS OUT THAT OCCUPYING IS HARDER THAN FIGHTING.” –
MICHAEL WALZER, 1935 - PRESENT.¹

I. INTRODUCTION

Despite occupation law’s originally relevant and useful framework, occupants have deliberately avoided applying it for nearly a century. Additionally, international law and its supporting rationale have evolved significantly in the past century. As a result, the law of occupation has become somewhat of an afterthought for both occupants and military planners, much like disregarded rules of etiquette, which are frequently dismissed as outdated or impractical.² But if they are adjusted to account for modern cultural norms, the

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¹ MICHAEL WALZER, ARGUING ABOUT WAR 168 (2004).

² See generally EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 3-189 (2004) (providing a thorough study of the law of occupation and case studies from World War I to modern times). See also Michael Ottolenghi, *Stars and Stripes In Al-Fardos Square: The Implications for the International Law of Belligerent Occupation*, 72 FORDHAM L. REV. 2177 (2004) (stating, “[t]he dormant nature of the law of occupation leads to questions about its scope,

rules of etiquette, like the law of occupation, may still be useful for regulating human behavior. This article will argue that, while portions of the law of occupation remain useful, the law must be updated to provide a viable framework for modern occupations. This article will also offer a basic framework for a proposed modern law of occupation.

Two developments over the course of the past century have rendered the law of occupation less practical and less effective. First, occupants have consistently ignored the law of occupation over the past century.³ Examples dating from Germany's occupation of Belgium during World War I to the American and British occupation of Iraq starting in 2003 set forth a thorough history of occupants who have failed to apply the law of occupation.⁴ When nations fail to apply international law, its status may be cast into doubt, and in the case of the law of occupation, the practice of avoiding the application of the law has caused it to lose legitimacy.⁵

Second, the philosophical underpinnings⁶ of the law of occupation have undergone significant changes, including a shift in the concept of sovereignty and an emerging debate over the application of human rights during times of international armed conflict or occupation. International law arguably now recognizes that a nation's sovereignty derives from the population and does not rest with the ruling party.⁷ That is, self-determination has emerged as a

application, and relevance to a modern occupation situation.”); Major Nicholas Lancaster, *Article, Occupation Law, Sovereignty, and Political Transformation: Should the Hague Regulations and the Fourth Geneva Conventions Still be Considered Customary International Law?*, 189 MIL. L. REV. 51 (2006) (arguing that the law of occupation as set forth in the Hague Regulations and the Fourth Geneva Convention has been systematically ignored since 1949 and therefore should not be considered customary international law).

³ At best, nations have applied the law in a highly selective fashion. *See, e.g.*, BENVENISTI, *supra* note 2, at 32-190 (illustrating with several case studies from the early 20th century to the early 21st century the failure of states to follow the law).

⁴ *See* discussion *infra* Part II.D.

⁵ *See, e.g.*, Lancaster, *supra* note 2, at 67-69 (discussing the question of how norms may lose their status as customary international law).

⁶ The law of occupation dates from the period of limited war and can be originally seen as a contract among elite ruling parties of nations to ensure those in power remained in power after the cessation of hostilities and any occupation. *See* discussion *infra* Part II.

⁷ *See* discussion *infra* Parts III, IV.

recognized human right.⁸ In turn, the right to self-determination has changed the way nations govern occupied territories, and has given occupants a rationale to justify transformative⁹ actions which do not comport with the law of occupation.¹⁰ For example, in Iraq, the United States and Britain, with U.N. approval, deviated from the strict application of the law of occupation's conservationist principle¹¹ (which forbids the occupant from making major or permanent changes to the occupied territories' governmental system, economic system or social institutions)¹² with the stated purpose of allowing the Iraqis to exercise their right of self-determination.

The growing debate over the importance of international human rights norms has also challenged one premise underlying the entire law of war, with the law of occupation as a subset. There is now some question whether human rights set forth in international treaty law not traditionally included as a part of the law of war must be applied during either international armed conflict or

⁸ This article will include self-determination as a subset of human rights. See Grant T. Harris, *The Era of Multilateral Occupation*, 24 BERKELEY J. INT'L L. 1, 17-18 (2006) (stating, "[t]he international human rights regime encompasses various rights, including the right to self-determination); *but see* BENVENISTI, *supra* note 2, at 30, 210 (referring to the emerging international recognition of individual and "communal rights" as two of the trends influencing the "discretion of the occupant in prescribing policies for the administration of the occupied territories.") The author, Professor Benvenisti, describes individual rights as personal rights, including human rights, while he describes self-determination and self-rule as "communal rights."

⁹ Professor Adam Roberts uses the term "transformative occupation" to describe occupations "whose stated purpose (whether or not actually achieved) is to change states that have failed, or have been under tyrannical rule," and those that, "in the name of creating the conditions for a more democratic and peaceful state . . . introduce[s] fundamental changes in the constitutional, social, economic, and legal order within an occupied territory." Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580 (2006).

¹⁰ As a result of these underlying changes, legitimate reasons for military intervention and occupation have arguably increased. Military forces now occupy territory for a variety of reasons including, among others, operations to provide humanitarian relief and even transform entire governmental systems. *See* discussion *infra* Parts III.D, IV.C.

¹¹ *See* discussion *infra* Part III.D.2.

¹² The conservationist principle also includes the proposition that the ousted ruling party returns to power upon the conclusion of hostilities. *See* discussion *infra* Part II.A-B.

military occupation, or whether the law of war still overrides these other human rights treaties during a time of war or occupation.¹³ Given these two developments, it is evident the law of occupation needs to be updated.

Part II of this article will outline the framework of the law of occupation and will highlight recent developments in the law, including the troubling questions surrounding the usefulness of the law of occupation and whether an updated treaty could remedy such concerns. Part III will use historical examples to illustrate the state practice of avoiding the law of occupation. These historical examples highlight the tension between the existing law and state practice and underscore the necessity to update the law of occupation. Part IV will discuss some of the proposed theories for changing the law of occupation and will argue for an international treaty built upon the current law, with four major components. Those components include: 1) creating a mechanism for multilateral international oversight of the occupant's activities, 2) requiring U.N. approval or other multilateral agreement for the system of administration of the occupation, 3) incorporating by reference certain human rights to solidify the application of those rights within the *lex specialis* of the law of occupation, and 4) allowing for departure from the conservationist principle in limited cases with legitimate transformative objectives.¹⁴

¹³ The majority view is that the law of war is a "*lex specialis*," or a specialized set of laws which apply to the exclusion of other international and domestic law during armed conflict. See Michael J. Dennis, *ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 141 (2005) (arguing that, "[t]he best reading of the interrelationship between the human rights treaties involving economic, social, and cultural rights and international humanitarian law is that international humanitarian law should be applied as the *lex specialis* in determining what a state's obligations are during armed conflict or military occupation.") Additionally, some human rights may be considered to have attained the status of customary international law. See discussion *infra* Part II.D.

¹⁴ For instance, in cases of great necessity, the law of occupation should be updated to provide a framework for internationally sanctioned humanitarian interventions resulting in U.N. monitored occupations. See discussion *infra* Part IV.B.

II. FRAMEWORK AND DEVELOPMENT OF THE LAW

Sometimes referred to as “belligerent occupation,”¹⁵ the law of occupation developed as a subset of the law of war and is derived from both customary international law¹⁶ and treaty law as set forth in the Hague Regulations of 1907,¹⁷ the Fourth Geneva Convention of 1949,¹⁸ and the 1977 Additional Protocols to the Geneva Conventions of 1949 (hereinafter Additional Protocols I and II).¹⁹ The Fourth Geneva Convention of 1949 supplemented the Hague Regulations of 1907 in the wake of widespread violations of the law and the perceived need to protect innocent civilian populations after World War II.²⁰

¹⁵ “Belligerent occupation” is a term of art under the law of war and was largely in use in the first half of the last century. See GERHARD VON GLAHN, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 774 (6th ed. 1992).

¹⁶ Customary international law is defined as “a general and consistent practice of states followed by them from a sense of legal obligation.” The definition contains two elements: 1) the widespread and uniform practice of states and 2) engagement in the practice out of a sense of legal obligation, also known as “*opinio juris*.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

¹⁷ Hague Convention No. IV Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 42-56, 36 Stat. 2277, 205 Consol. T.S. 277, (Oct. 18, 1907) [hereinafter Hague Regulations]. The Hague Regulations codified certain portions of the law of occupation that were already considered customary international law. See, e.g., Roberts, *supra* note 9, at 582 (discussing the prohibition against annexation as a rule of customary international law); BENVENISTI, *supra* note 2, at 8 (opining that Article 43 of the Hague IV was an expression of previously existing customary international law) (citing 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 253-54 (1947), also published in 41 AM. J. INT’L L. 172, 248-9 (1947)).

¹⁸ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 47-78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

¹⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 16 I.L.M. 1391 [hereinafter Additional Protocol I]; Protocol Additional 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, 16 I.L.M. 1492 [hereinafter Additional Protocol II].

²⁰ See discussion *infra* Part II.D.

Additional Protocols I and II to the Geneva Conventions of 1949 further updated the protections afforded to civilians.²¹ The Additional Protocols' focus on human rights also reflected the growing debate over the applicability of human rights laws during armed conflict or occupation.²² Finally, there is a growing scholarly discussion over the modern law of occupation and what it encompasses.

A. Original Framework of the Law of Occupation

The starting point for the traditional law of occupation²³ is the framework set forth in the Hague Regulations of 1907.²⁴ Once the factual test for occupation as defined by Article 42 of the Hague Regulations is met, the full body of the law of occupation, including treaty law and customary international law, is triggered and applies to the occupant. Article 42 states that, “[t]erritory 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.”²⁵

Amplifying guidance for this threshold test is set forth in the United States Department of the Army Field Manual 27-10, *The Law of Land Warfare* (hereinafter *Field Manual 27-10*).²⁶ *Field Manual 27-10* states that the law of

²¹ See Lancaster, *supra* note 2, at 62-63.

²² See BENVENISTI, *supra* note 2, at 188.

²³ The “traditional law of occupation” is used here in juxtaposition to the separate legal doctrines of “*debellatio*” and modern United Nations (U.N.) sanctioned occupations (sanctioned either by U.N. Security Council Resolution or by consent of the occupied nation) which will be discussed below in Part III and which fall outside the law of occupation framework. Although *debellatio* and U.N. authorized occupations are legal regimes that fall outside the traditional law of occupation, factually, they appear to trigger the application of the Hague Regulations. These legal regimes have also allowed the occupant to make sweeping transformational changes to the government, economic system and political systems that are precluded by the traditional law of occupation discussed in this section. It is questionable whether this traditional law of occupation still exists. See discussion *infra* Parts II.D, III.

²⁴ Hague Regulations, *supra* note 17, art. 42.

²⁵ *Id.*

²⁶ U.S. DEP’T OF ARMY, *FIELD MANUAL 27-10, THE LAW OF LAND WARFARE* para. 351– 448 (18 July 1956) [hereinafter *FM 27-10*]. *FM 27-10* establishes detailed guidance for military occupations for the U.S. military with specific citations to the applicable Hague Regulations and Geneva Conventions. Notably, *FM 27-10* states that “[t]he rules set forth in this chapter apply of their

occupation is triggered by a hostile invasion, “as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority and . . . successfully substituted its own authority.”²⁷ Whether the invading force has crossed the threshold from mere invader to occupant is a question of fact.²⁸ To be an occupant, and not a mere invader, the would-be occupant must take “firm control of the area with the intention of holding it.”²⁹ Moreover, the occupation must be “actual and effective.”³⁰ In other words, the amount of territory under occupation is determined by the occupant’s ability to effectively exercise authority.

Once the law of occupation is triggered under Article 42 of the Hague Regulations of 1907, an occupant is subject, at a minimum, to the requirements set forth in that document and the Fourth Geneva Convention of 1949.³¹ Article 43 of the Hague Regulations of 1907, sometimes referred to as the mini-constitution of the law of occupation,³² reflects two concepts: 1) the recognition that sovereignty does not pass to the occupant³³ and 2) the requirement for the

own force only to belligerently occupied areas, but they should, as a matter of policy, be observed as far as possible in areas through which troops are passing and even on the battlefield.” *Id.* para. 352.

²⁷ *Id.*, para. 355.

²⁸ *Id.*

²⁹ *Id.* para. 352.

³⁰ FM 27-10, para. 356. FM 27-10 also sets forth factors for determining whether occupation is “actual and effective.” The factors include, among others, the defeat of organized resistance in the area, the establishment of measures to exercise authority by the occupant, and the ability to send troops to make authority felt within a reasonable time in the occupied district (the amount required is not dispositive – merely enough to exert control). Also, the “mere existence of” a fort or local resistance groups do “not render occupation ineffective.” *Id.*

³¹ Hague Regulations, *supra* note 17, art. 42-56; GC IV, *supra* note 18, art. 47-78. The occupant is also arguably subject to the applicable provisions of Additional Protocols I and II depending on the nation and whether it has ratified those treaties, and depending on which provisions are considered customary international law. *See* discussion *infra* Part II.C.

³² BENVENISTI, *supra* note 2, at 9 (stating, “Article 43 is a sort of miniconstitution for the occupation administration; its general guidelines permeate any prescriptive measures or other acts taken by the occupant.”)

³³ The limitation on the passing of sovereignty is blandly stated in the first phrase, “[t]he authority of the legitimate power having in fact passed into the hands of the occupant.” *See* BENVENISTI, *supra* note 2, at 8; Hague Regulations, *supra* note 17, art. 43.

occupant to “take all measures in his power to restore and ensure, as far as possible, public order and safety,”³⁴ while respecting, unless absolutely prevented, the laws in force in the country.”³⁵ As Part III below will show, occupants have often invoked the exception to the second requirement (contained in the phrase “unless absolutely prevented”) to circumvent the prohibition against changing the indigenous laws in force prior to the occupation.³⁶

B. Philosophical Bases for the Law of Occupation under the Hague Regulations of 1907

Prior to the Fourth Geneva Convention of 1949, the Hague Regulations of 1907 codified the law of occupation, incorporating some of the prevailing intellectual notions of the time.³⁷ The concepts of limited war, social Darwinism, sovereignty as residing in the ruler or central government, laissez-faire government, and occupation as a trusteeship provided the philosophical bases for the treaty.³⁸ The law of occupation under the Hague Regulations was essentially an agreement among state elites, which ensured their return to power even if temporarily ousted from their territory during a period of limited war.³⁹ For, during the century leading up to the Hague Regulations, war was understood to be limited to fighting between armies, largely avoiding the

³⁴ Professor Benvenisti provides guidance for defining both “restore and ensure” and “public order and safety.” The definition of “restore” includes taking immediate acts to bring daily life as far as possible back to the state prior to the start of hostilities. In general, to “ensure” encompasses the duty to preserve the status quo, although occupants’ interpretations of this over the years have varied widely. “Public order and safety” should be defined as “public order and civil life.” This corresponds to an occupant’s duty to the local inhabitants to allow return to normal daily life, including social and economic life. Professor Benvenisti also notes that occupants have invoked these requirements to justify lawmaking (prescriptive measures) in occupied territories. BENVENISTI, *supra* note 2, at 9-12.

³⁵ Hague Regulations, *supra* note 17, art. 43.

³⁶ See discussion *infra* Part III.A.

³⁷ BENVENISTI, *supra* note 2, at 26-27.

³⁸ *Id.* at 6, 26-29.

³⁹ *Id.* at 27-28 (stating, “the ousted sovereign was ready to concede this much in order to ensure maintenance of its bases of power in the territory against competing internal forces”); Lancaster, *supra* note 2, at 53-54.

civilian population.⁴⁰ Sovereignty remained with the ousted ruler or ruling party.⁴¹

Furthermore, the theory of laissez-faire government also prevailed in this period, holding that the best type of government was one that interfered minimally in its citizens' lives.⁴² It flowed logically from laissez-faire governance that an occupant should interfere as little as possible with the existing legal systems in the occupied territory. Thus, Article 43 of the Hague Regulations⁴³ requires the occupant to maintain the status quo and to preserve the "sovereign rights of the ousted government" until a negotiated settlement returns the ousted government to power.⁴⁴

In order to accomplish these goals, under the Hague Regulations, the occupant is required to act as a trustee for the ousted sovereign government rather than for the indigenous population.⁴⁵ Moreover, although the occupant must refrain from changing the status quo, the Hague Regulations require the

⁴⁰ "War was seen as a match between governments and their armies; civilians were no more than the cheering fans of the fighting teams. Thus, civilians were left out of the war, and kept unharmed as much as possible, both physically and economically." BENVENISTI, *supra* note 2, at 27.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Hague Regulations, *supra* note 17, art. 43.

⁴⁴ See BENVENISTI, *supra* note 2, at 27 (stating "[t]he minimalist conception of war and the war effort made possible a conception of a laissez-faire type of government even in wartime"); Lancaster, *supra* note 2, at 54 (citing GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 7 (1957) and BENVENISTI, *supra* note 2).

⁴⁵ See VON GLAHN, *supra* note 15, at 774. Additionally, the trusteeship concept continues to be a bedrock principle of the law of occupation today, but it now requires the occupant to act in trust for the indigenous population. See Kristen Boon, *Legislative Reform in Post-conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 MCGILL L.J. 285, 294 (2005) (stating, "[h]istorically, trusteeship is manifest in the U.N.'s trusteeship system, under which member states and the UN together undertook to promote the political, economic, social, cultural, and educational well-being of the territory's inhabitants. Trusteeship is also implied by the obligations placed on occupying powers under the Geneva Conventions"); see also Brian Deiwert, *A New Trusteeship For World Peace and Security: Can An Old League of Nations Idea Be Applied to a Twenty-First Century Iraq?*, 14 IND. INT'L & COMP. L. REV. 771 (2004) (for a discussion on the origins of the trust concept in international law).

occupant to establish a system of government to control the occupied territory, or a “direct system of administration.”⁴⁶ Articles 44 through 56 of the Hague Regulations of 1907 further define the duties of an occupant in administering the government.⁴⁷ Included are rules setting forth baseline protections for civilians, rules pertaining to the use and requisitioning of civilian and state property, rules regarding the collection of taxes on behalf of the state, and rules on levying monetary contributions from the civilian population.⁴⁸ The rules are minimal, in keeping with the concepts of the *laissez-faire* and limited war, especially when compared to the later framework set out in the Fourth Geneva Convention of 1949. The rules do, however, provide a baseline framework for the occupation government.⁴⁹

As the last century progressed, especially after World War II, wider acceptance of modern notions of governance challenged these philosophical bases and provided occupants a rationale to justify non-compliance with the existing law.⁵⁰ Specifically, the notions of sovereignty and self-determination have become intertwined in the past sixty years and have altered the trusteeship concept underlying the law.⁵¹ Thus, a significant tension in the law has developed, especially during occupations where the ousted sovereign’s method of government does not reflect the right of self-determination.⁵² Despite this conceptual shift in one of the underpinnings to the original law of occupation, the general framework established by the Hague Regulations remains a viable part of the law of occupation. Most importantly, the requirement to refrain from

⁴⁶ This phrase is not found in the Hague Regulations. Professor Benvenisti states that the establishment of a system of direct administration was implied in Article 43 of the Hague Regulations. BENVENISTI, *supra* note 3, at 4-5. Articles 48-56 also discuss rules to which the occupant must adhere and use the term “administration of the territory.” Hague Regulations, *supra* note 17, art. 48-56.

⁴⁷ Hague Regulations, *supra* note 17, art. 44-56.

⁴⁸ *Id.*

⁴⁹ *Id.* On the other hand, comparing the relatively few prohibitions and allowances in these regulations to the more robust provisions of the Fourth Geneva Convention of 1949 leaves one with the impression that the provisions of the Hague Regulations of 1907 are somewhat Spartan. GC IV, *supra* note 18, art. 47-78. Moreover, for U.S. forces, FM 27-10’s administrative framework is much more detailed. FM 27-10, *supra* note 26, para. 351-448.

⁵⁰ See discussion *infra* Part II.D.

⁵¹ *Id.*

⁵² “This general awareness was bound to find its way into the law of occupation, and diminish the claim of ousted elites to return to areas they had controlled before the occupation but in which they did not continue to enjoy the support of the indigenous population.” BENVENISTI, *supra* note 2, at 106.

changing the occupied territory's governmental, economic, and social systems remains an essential part of the law of occupation except in limited cases of transformative occupations, as discussed below.⁵³

C. The Fourth Geneva Convention of 1949 and the 1977 Additional Protocols to the Geneva Conventions of 1949.

The four Geneva Conventions of 1949 followed in the wake of World War II and the atrocities committed by the Axis Powers largely during occupations.⁵⁴ The Fourth Geneva Convention of 1949 had at least three significant effects on the law of occupation.⁵⁵ First, the Convention introduced a minimal bill of rights for the occupied population⁵⁶ and shifted “attention from governments to the population.”⁵⁷ This shift, in many respects, redefined the

⁵³ See discussion *infra* Parts III.D, IV.

⁵⁴ See, e.g., Dennis, *supra* note 13, at 119 (explaining that, “[t]he atrocities committed during World War II served as a catalyst for the development of the Covenants, as well as the Geneva Conventions of 1949 . . .”); Harris, *supra* note 7, at 6 (stating, “[t]he Fourth Geneva Convention of 1949 was crafted as a result of the World War II experience to better extend the protections of the laws of war to civilians and to further address the rights and duties of occupying powers.”)

⁵⁵ Professor Benvenisti argues that there were two significant contributions: “[f]irst, it delineates a bill of rights for the occupied population . . . [s]econd, it shifts the emphasis from political elites to peoples.” BENVENISTI, *supra* note 2, at 105. This article argues there were three significant contributions, the third being the expansion in application of the law of occupation. Additionally, it is arguable that the protections of property rights in Part III, Section III, and the construct of a Protecting Power could be added to this list as significant contributions to the law; however, the Protecting Power concept has been largely disregarded. GC IV, *supra* note 18, art. 9, 52, 55, 59-61, 71, 72, and 74-76 (applying the “Protecting Power” concept to the protections contained therein); FM 27-10, *supra* note 26, para. 15-19 (discussing the application of the Protecting Power concept to the four post-World War II Geneva Conventions); BENVENISTI, *supra* note 2, at 204-207.

⁵⁶ GC IV, *supra* note 18, Part III, Sections I, III. Section I sets forth rights for protected persons during both armed conflict and occupation while Section III sets forth rights specifically designed to apply during occupations.

⁵⁷ This conceptual change showed that the “decision to dedicate the Fourth Geneva Convention to persons and not to governments signified a growing awareness in international law of the idea that peoples are not merely the resources of states, but rather that they are worthy of being the subjects of international norms.” BENVENISTI, *supra* note 2, at 105-106.

law of occupation by focusing protections on the affected civilian population during occupation.⁵⁸ The shift to emphasize the protection of the population occurred in tandem with the emergence of the principle of self-determination. International law began to recognize that a nation's sovereignty arose from its people rather than from a ruler's divine right to govern. Second, to some degree, it changed state practice. Occupants now generally attempt to administer the government on behalf of the indigenous population and not the ousted ruling party.⁵⁹ Third, the Fourth Geneva Convention of 1949 attempted to broaden the application of the law of occupation to "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation met with no armed resistance."⁶⁰

The Additional Protocols to the four Geneva Conventions of 1949 were intended to supplement the conventions' protections provided to civilian populations.⁶¹ Additional Protocol I also recognized the growing international acceptance of the right of self-determination⁶² and highlighted the increasing

⁵⁸ The Fourth Geneva Convention "shifts the emphasis from political elites to peoples." BENVENISTI, *supra* note 2, at 98, 105.

⁵⁹ See discussion *infra* Part III.C, D.

⁶⁰ GC IV, *supra* note 18, art. 2; see also Harris, *supra* note 8, at 6 (stating, "[o]f particular importance, the Fourth Geneva Convention attempts to reduce ambiguity in the application of the law of occupation by explicitly clarifying that the Convention applies to any case of occupation, thus incorporating any kind of non-treaty based occupation," (citing GC IV, art. 2 and 4)); Roberts, *supra* note 9, at 603 (stating, "[a]fter the entry into force of the 1949 Geneva Conventions, it became doubtful whether a claim could ever again be made that an occupation fell outside the framework of the laws of war, or would not be subject to certain conservationist provisions.").

⁶¹ The preamble to Additional Protocol I states, among other things, "[b]elieving it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application." Additional Protocol I, *supra* note 19, preamble, para. 3. Additional Protocol II "supplements and expands the guarantees of humane treatment expressed in Common Article 3 of the Geneva Conventions." Lancaster, *supra* note 2, at 65 (citing Additional Protocol II, *supra* note 19, art. 75).

⁶² See Lancaster, *supra* note 2, at 62-64. Also, "[t]he US has not signed or ratified either Protocol of 1977. However, the United States does consider the majority of their provisions to reflect customary international law." *Id.* at 65 (citing Michael J. Matheson, Remarks, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols*

emphasis on the application of human rights during times of conflict.⁶³ However, another potential contribution of Additional Protocol I never took root in state practice.⁶⁴

Additional Protocol I attempted to improve the system devised in the four Geneva Conventions of 1949⁶⁵ by establishing the role of a protecting power. This protecting power was to oversee the occupation by requiring each party (occupant and occupied nation) to either designate a protecting power, or allow the International Committee of the Red Cross to suggest a protecting power.⁶⁶ Unfortunately, this promising idea of an oversight mechanism to regulate the conduct of the occupant, “as a matter of fact . . . does not improve on the Geneva system.”⁶⁷

Despite the Fourth Geneva Convention of 1949 and the Additional Protocols’ contributions to the law of occupation, the law remained out of touch with the reality of occupation on the ground. For example, in spite of the apparent broadening of application of the law of occupation, the cases of occupants avoiding its application continued to rise after the four Geneva Conventions of 1949 and the Additional Protocols were entered into force.⁶⁸ Additionally, even though the Fourth Geneva Convention of 1949’s bill of rights expanded protections afforded to civilians, some have called the Convention’s contributions to the law of occupation “little more than a repetition of the Hague Regulations.”⁶⁹ Indeed, the protections provided in the Fourth Geneva

Additional to the 1949 Geneva Conventions, in 2 AM. U. J. INT’L L. & POL’Y 419 (1987)).

⁶³ “[H]uman rights considerations play a prominent role in both the Geneva Convention and the Additional Protocol I.” BENVENISTI, *supra* note 2, at 98-190; see discussion *infra* Parts II.D, III.D, IV.B.

⁶⁴ BENVENISTI, *supra* note 2, at 206-207.

⁶⁵ Article 9 of the Fourth Geneva Convention attempted to establish a system requiring Protecting Powers to be appointed, stating “[t]he present Convention shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict.” GC IV, *supra* note 18, art. 9. However, the conventions “do not prescribe the procedure for appointing and recognizing the protecting powers.” BENVENISTI, *supra* note 2, at 204.

⁶⁶ BENVENISTI, *supra* note 2, at 204-207.

⁶⁷ *Id.* at 206-207.

⁶⁸ See Roberts, *supra* note 9, at 604; BENVENISTI, *supra* note 2, at 98-190 (discussing examples of occupations from the entry into force of the four Geneva Conventions of 1949 to present).

⁶⁹ BENVENISTI, *supra* note 2, at 106.

Convention of 1949, as well as the Additional Protocols, may still not be enough to fully protect civilians--especially during prolonged occupations.⁷⁰ Perhaps this is one reason the scholarly debate over the application of human rights law during occupations continues.

D. The Modern Law of Occupation

The law of occupation appears to no longer exist in its traditional form, set forth above.⁷¹ Rather, the current state of the law is unclear. If it can be said that there is a modern law of occupation, it appears to be a hybrid of the traditional law of occupation and a framework for approval of the method of occupation via U.N. Security Council resolution.⁷² Two developments--state practice and shifting concepts underpinning the law of occupation--have continued to affect the law of occupation since the entry into force of the Fourth Geneva Convention of 1949 and the Additional Protocols of 1977. First, state practice has been to continue to avoid application of the original framework of the law of occupation. Occupants have occupied territory, frequently with transformative purposes,⁷³ but they have not applied the original framework of

⁷⁰ *Id.* at 105-90; Harris, *supra* note 8, at 10.

⁷¹ Some writers argue that a modern law of occupation under a U.N. framework already exists. BENVENISTI, *supra* note 2, at xi-xviii (arguing that the modern law of occupation has changed with recent state practice, especially in Iraq). Other writers argue that the status of the law of occupation is in question. *See, e.g.,* Lancaster, *supra* note 2, at 51. A third set of writers argues that the law has not changed but should be modified to account for modern notions of human rights and state practice. *See, e.g.,* Davis P. Goodman, Note, *The Need for Fundamental Change in The Law of Belligerent Occupation*, 37 STAN. L. REV. 1573, 1600 (1985); Harris, *supra* note 8, at 10.

⁷² *See* Harris, *supra* note 8, at 25-26; Goodman, *supra* note 71, at 1600; BENVENISTI, *supra* note 2, at xi-xviii.

⁷³ Occupations with transformative purposes are a subset of occupations where occupants have failed to apply the law of occupation, and they are the central question of Professor Roberts' article Transformative Occupations. He addresses therein whether it is "legitimate for an occupying power, in the name of creating the conditions for a more democratic and peaceful state, to introduce fundamental changes in the constitutional, social, economic, and legal order within an occupied territory," and whether the original law of occupation is relevant to these types of occupations despite their inherent conflict with the conservationist principle of the law. He argues that the law of occupation is still relevant and useful and offers two suggestions to make it more relevant: first, "the application of international human rights law, which offers principles and procedures that can help to define the means and ends of an occupation," and

the law.⁷⁴ Second, while state practice continues to highlight a general lack of respect for the law of occupation, the debate over the applicability of recently accepted human rights norms during times of occupation has also challenged the notion that the law of occupation continues to exist in its original form.⁷⁵

The state practice of ignoring the law of occupation and engaging in transformative occupations has impacted the modern law of occupation significantly.⁷⁶ Transformative occupations can be included within the general category of occupations during this time frame which did not apply the traditional law of occupation.⁷⁷ These occupations have significantly complicated the application of the law of occupation.⁷⁸ In these cases, both

second “the involvement of international organizations, especially the United Nations, that can assist in setting or legitimizing certain transformative policies during an occupation.” He also cautions that his proposed framework does not grant a right of military intervention for transformative purposes. Roberts, *supra* note 9, at 580.

⁷⁴ “Many post-Cold War military actions have been characterized by a tendency to avoid being seen as occupations, or even being thought of as amenable to the application of occupation law.” *Id.* at 604.

⁷⁵ See, e.g., BENVENISTI, *supra* note 2; Harris, *supra* note 8, 25-26; Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT’L L. 76, 79 (2001) [hereinafter Matheson, *U.N. Governance*].

⁷⁶ See Roberts, *supra* note 9, at 580-622; BENVENISTI, *supra* note 2, 59-190; discussion *infra* Part III.D.

⁷⁷ See Roberts, *supra* note 9, 601-620.

⁷⁸ One illustrative example of this complication is the statement of the applicability of the law of occupation by U.S. forces during “rule of law” operations in the CENTER FOR LAW AND MILITARY OPERATIONS (CLAMO) Rule of Law handbook. “Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention direct occupants to preserve and adopt existing systems of government. When applicable, these provisions may present obstacles to rule of law projects that modify existing legal regimes and institutions. Exceptions are primarily related to establishing and maintaining security and observance of fundamental humanitarian norms. The occupation phase of Operation Iraqi Freedom presented Judge Advocates with just such a challenge. Reform of Iraqi criminal, commercial, and electoral systems required legal authorization superior to the restrictive norms of occupation law.” CTR. FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. AND SCH. & JOINT FORCE JUDGE ADVOCATE, U.S. JOINT FORCES COMMAND, RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES 65 (2007). Although the Rule of Law Handbook includes a caveat that it does not apply to nation-building projects, it is hard to say where the line

individual nations and U.N. coalitions have occupied territory and exercised governmental authority in the territory, engaging in what may be termed “nation building.”⁷⁹ The U.N. has engaged in these types of occupations, under the heading of transitional administrations,⁸⁰ on numerous occasions since the end of World War II.⁸¹ The United States and British occupation of Iraq and the U.N. transitional administration in Kosovo both required significant rebuilding of governmental structures, political systems and *infrastructures*.⁸² In addition, the U.N. “occupation by consent in Cambodia, Bosnia, and other missions in which agreements with the relevant sovereign powers ceded to the UN mission rights and duties approaching elements of sovereignty” are examples of de facto occupations.⁸³ These examples occurred where the occupied territories required substantial development of new governmental structures.⁸⁴ The amount and

between nation building and stability and security operations occurs--especially given the language above regarding modifying Iraqi governmental systems. *Id.*

⁷⁹ For purposes of this paper, “nation building” is a subset of transformative occupations. One article defines nation building as “the use of armed force in the aftermath of major combat to promote a transition to peace and democracy. Other terms, such as peacebuilding [sic], peacekeeping, or state-building capture only elements of this paradigm.” Seth G. Jones & James Dobbins, *The U.N.’s Record in Nation Building*, 6 CHI. J. INT’L L. 703, 704 (2006); *see also* Sean D. Murphy, *Nation Building: A Look at Somalia*, 3 TUL. J. INT’L & COMP. L. 19, 20 (1995) (stating, “[m]ore commonly, however, the terms nation-building or peace-building are used to refer to situations where the international community uses highly intrusive means to rescue a state from a breakdown of law and order. Such a situation typically begins with the outbreak of civil warfare among competing factions and eventually leads to widespread civilian deaths and the flight of refugees into neighboring countries.”)

⁸⁰ The U.N. has occupied and administered territory, although not under the rubric of the traditional law of occupation. *See* Harris, *supra* note 8, at 25-26.

⁸¹ “UN expertise in the practice of nation-building and the previous involvement of international actors in the occupied territory also propel occupants toward multilateralism. The UN has built-up vast experience in, among other places, East Timor, Bosnia, and Kosovo, thus providing powerful advantages to being included in nation-building efforts.” *Id.* at 41.

⁸² *See* discussion *infra* Part III.E.

⁸³ This article will use “de facto occupations” to mean those where the occupant occupied and controlled the territorial government in fact but did not apply the law of occupation.

⁸⁴ Harris, *supra* note 8, at 32.

extent of rebuilding involved with these types of occupations went far beyond the limits of the law of occupation.⁸⁵

The purposes behind transformative occupations⁸⁶ conflict with the law of occupation's conservationist principle requiring the occupant to govern in trust for the temporarily ousted sovereign and to respect the laws in force in the occupied territory.⁸⁷ Thus, there has been an attempt among scholars to adjust the law of occupation to apply to transformative occupations.⁸⁸ This attempt to adjust the law has merit, for there are limited cases, such as a humanitarian intervention,⁸⁹ where an occupant's transformative goals may be justified under international law.⁹⁰ Given that these types of occupations will likely continue

⁸⁵ For example, the United Nations Interim Administration Mission in Kosovo (UNMIK) appointed a U.N. Special Representative to the Secretary General with sweeping powers to govern, legislate and administer the territory of Kosovo under U.N. Security Council Resolution 1244. See discussion *infra* Part III.E.1.

⁸⁶ Roberts, *supra* note 9, at 580.

⁸⁷ See discussion *supra* Part II.A; Hague Regulations, *supra* note 17, art. 43.

⁸⁸ Professor Adam Roberts, for example, argues that the original body of the law of occupation can still be useful in large part, but that in cases where there is a perceived need for transformation, the occupant should seek U.N. or other international approval. Roberts, *supra* note 9, at 580-623.

⁸⁹ There is a debate over whether a right of humanitarian intervention exists outside of a U.N. Security Council approval of use of force. See Michael J. Burton, *Legalizing the Sublegal: A Proposal for Codifying a Doctrine of Unilateral Humanitarian Intervention*, 85 GEO. L.J. 417 (1996) (discussing whether there is a right of humanitarian intervention for nations outside of the framework of the U.N. Charter.); Daphne Richemond, *Normativity in International Law: The Case of Unilateral Humanitarian Intervention*, 6 YALE H.R. & DEV. L.J. 45 (2003) (arguing that a right of humanitarian intervention exists and that "the ambiguous normative regime currently governing unilateral humanitarian intervention provides an adequate legal framework for such intervention.")

⁹⁰ Although Professor Roberts urges U.N. approval as the legal mechanism to allow humanitarian intervention, he states, "[t]here is scope for a nuanced view that allows for some possibility of humanitarian intervention even without specific Security Council authorization. In such a view, it is neither logical nor helpful to frame the consideration of interventions in humanitarian crises in terms of a general 'right' of humanitarian intervention." Roberts, *supra* note 9, at 581; see also discussion *infra* Part III.E.

into the foreseeable future,⁹¹ the law should be updated to accommodate the unique problems they present.

The second development that has impacted the law of occupation is the growth of international recognition of the importance of human rights since World War II. While occupation law's human rights protections were expanded by the Fourth Geneva Convention of 1949 and Additional Protocols, the ratification and implementation of various human rights conventions illustrated the growth of international recognition of certain human rights outside the law of occupation framework and supports an argument that these rights should be considered customary international law.⁹² If these rights are customary international law, nations must apply them within the framework of the law of occupation.⁹³

There continues to be much debate in the international community surrounding the applicability of human rights conventions during times of war, armed conflict, or occupation.⁹⁴ However, the United States' view is that the law of war applies as a *lex specialis*, exclusive of all other bodies of law during these times, while human rights treaty law generally applies to nations with regard to their treatment of persons within their own territory.⁹⁵ The United

⁹¹ See, e.g., MICHAEL E. O'HANLON, EXPANDING GLOBAL MILITARY CAPACITY FOR HUMANITARIAN INTERVENTION 17-49 (2003) (studying the number of global troops available for humanitarian intervention and arguing that roughly twice as many troops are necessary to prevent future humanitarian catastrophes).

⁹² For example, the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) contain fundamental human rights that may now be considered customary international law. See, e.g., Dr. Goran Sluiter, *The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal over the Past Decade: International Criminal Proceedings and the Protection of Human Rights*, 37 NEW ENG. L. REV. 935, 939-940 (2003) (discussing the application of the ICCPR and ECHR in certain criminal cases and questioning whether some of the rulings indicate that they reflect customary international law.)

⁹³ See Roberts, *supra* note 9, at 595; see also Lancaster, *supra* note 2, at 65-69.

⁹⁴ See Dennis, *supra* note 13, at 120 (stating "[t]he precise relationship between the two bodies of law remains unclear.")

⁹⁵ RULE OF LAW HANDBOOK, *supra* note 78, at 65 (stating "during combat operations the United States regards the law of war as an exclusive legal regime or a *lex specialis*. Under this view, the law of war operates to the exclusion of competing legal frameworks such as human rights law") (citing Dennis, *supra* note 13).

States agrees, however, that certain human rights have attained the status of customary international law and that they are applicable at all times.⁹⁶ Due to the ongoing debate, it may be a confusing task to determine which human rights⁹⁷ should apply specifically during an occupation. An updated law of occupation should attempt to clarify the issue.

In addition to the confusion caused by the debate over applicability of certain human rights, another change to the philosophical underpinnings of the law is challenging the law's usefulness. The right of self-determination,⁹⁸ as a subset of international human rights law, is arguably the right that has most significantly impacted the law of occupation.⁹⁹ The increased recognition of the right of self-determination has undermined the basic policy of the traditional law of occupation's conservationist principle¹⁰⁰ and overlaps with the justification for transformative occupations.¹⁰¹ While the traditional law of occupation as

⁹⁶ RULE OF LAW HANDBOOK, *supra* note 78, at 66-67 (stating that the U.S. military policy is to apply customary human rights norms in all operations, and enumerating specifically that protection from "genocide; slavery; murder or causing the disappearance of individuals; torture or other cruel, inhumane or degrading treatment or punishment; violence to life or limb; taking of hostages; punishment without fair and regular trial; prolonged arbitrary detention; systematic racial discrimination; failure to care for and collect the wounded and sick; consistent patterns of gross violations of internationally recognized human rights" is to be considered a customary human rights norm).

⁹⁷ Of course, this refers to human rights not already included in the Fourth Geneva Convention's minimal bill of rights. GC IV, *supra* note 18, Part III.

⁹⁸ For purposes of this article, this refers to political self-determination as opposed to individual self-determination. Political self-determination is defined by the American Heritage Dictionary as "freedom of the people of a given area to determine their own political status; independence." THE AMERICAN HERITAGE DICTIONARY 1112 (2d College ed. 1985).

⁹⁹ See, e.g., BENVENISTI, *supra* note 2; Harris, *supra* note 8, at 17-18 (stating, "[a]dditionally, the form of government is becoming a human right in and of itself rather than merely a means to protect other rights. The international human rights regime encompasses various rights, including the right to self-determination, that collectively add up to the right to an effective system of government in the long-term"); Youngjin Jung, *In Pursuit of Reconstructing Iraq: Does Self-Determination Matter?*, 33 DENV. J. INT'L L. & POL'Y 391 (2005).

¹⁰⁰ BENVENISTI, *supra* note 2, at 107-190.

¹⁰¹ The application of human rights norms during occupations includes allowing the occupying powers the opportunity to "justify certain transformative policies on the basis that these are the best way to meet certain goals and principles

established by the Hague Regulations of 1907 focused on the preservation of the status quo on behalf of the ousted sovereign, the modern law of occupation should take into account that sovereignty is a product of a social contract and derives from the people.¹⁰² The law of occupation should be updated to account for the emergence of the right of self-determination as paramount among other human rights norms.

In sum, if there exists a modern law of occupation, it is unclear exactly what it encompasses. As discussed in Part III below, the practice in most recent years has been to apply some sort of hybrid of the traditional law of occupation and U.N. Security Council Resolutions which have allowed for departure from the conservationist principles of the law. Regardless of whether one accepts the proposition that a modern law of occupation exists, ad hoc application of parts of the traditional law of occupation or the failure to apply it altogether calls into question its legitimacy and efficacy and creates a problem with enforcing the law upon a “recalcitrant occupant.”¹⁰³ Furthermore, if the law of occupation’s status as customary international law and its enforceability in general are called into serious doubt, which they appear to be, then it follows that the law should be updated.

III. APPLICATION OF THE LAW: CASE STUDIES

During the twentieth century, state practice and the evolution of the concepts of sovereignty and self-determination gradually eroded the law of occupation. After the era of limited war ended, nations began to apply the law of occupation in an ad hoc fashion, mostly when it was beneficial to their interests. During World War I and prior to World War II, occupants applied the

enshrined in international human rights law, including the right of self-determination.” Roberts, *supra* note 9, at 620.

¹⁰² See BENVENISTI, *supra* note 2, at 107 (stating, “the modern law of occupation has to consider also the claims of peoples as distinct subjects of international law”); Harris, *supra* note 8, at 25-26. Michael Walzer discusses sovereignty as deriving from a social contract. MICHAEL WALZER, JUST AND UNJUST WARS, A MORAL ARGUMENT WITH HISTORICAL ALLUSIONS 53 (4th ed. 2006) [hereinafter WALZER, JUST AND UNJUST WARS].

¹⁰³ “The issue of enforcing the law of occupation on the recalcitrant occupant has become more problematic than ever before Most of the post-World War II occupations were not administered according to the principles of the law of occupation; rather, most occupants asserted claims for exclusive control As a result of these factors, the law of occupation nowadays faces a double challenge; a challenge to the principles that underlie the laws of occupation, and a challenge to their enforceability.” BENVENISTI, *supra* note 2, at 107.

term “occupation” to their actions, but still failed to apply large portions of the actual law of occupation.¹⁰⁴ The German Occupation of Belgium from 1914 to 1918, discussed below, is one example of this phenomenon.

Moreover, the law of occupation has greatly eroded since the end of World War II and through the second half of the last century. This is due in part to the Allied occupations of Germany and Japan after World War II, and application of the doctrine of *debellatio*. This doctrine proclaimed that the sovereign governments had ceased to exist and therefore the constraints of the Hague Regulations did not apply.¹⁰⁵ Furthermore, despite the Fourth Geneva Convention’s attempt to broaden the application of the law of occupation, occupants continued to avoid application of the law.¹⁰⁶ Transformative occupations became more commonplace after the cold war.¹⁰⁷ One example of a transformative occupation where the occupants failed to fully apply the law of occupation was the American and British occupation of Iraq in 2003-2004. The occupants failed to follow the strict requirements of occupation law even though they eventually recognized the application of the body of law¹⁰⁸ as stated in U.N. Security Council Resolution 1483.¹⁰⁹ In sum, state practice since World War I has cast the law of occupation into a state of confusion and disuse which calls its status into question and highlights the need for change.

A. German Occupation of Belgium during World War I

The German occupation of Belgium during World War I represents one of the earliest departures from the law of occupation as it stood after the Hague Regulations of 1907.¹¹⁰ Germany invaded neutral Belgium on 4 August 1914, at the beginning of World War I, under the pretext that “[r]eliable information” showed that French forces intended to march through the Meuse Valley via

¹⁰⁴ BENVENISTI, *supra* note 2, at 32-58.

¹⁰⁵ See discussion *infra* Part III.B.2

¹⁰⁶ See Roberts, *supra* note 9, at 600; BENVENISTI, *supra* note 2, at 98-190.

¹⁰⁷ See Roberts, *supra* note 9, at 604.

¹⁰⁸ See discussion *infra* Part III.D.2.

¹⁰⁹ S.C. Res. 1483, U.N. Doc.S/RES/1483 (May 22, 2003).

¹¹⁰ Both Germany and Belgium signed and ratified the Hague Regulations of 1907. Both parties signed the Hague Regulations on 18 October 1907. Belgium ratified the convention on 8 August 1909, and Germany ratified it on 27 November 1909. A list of signatories and parties is available online. ICRC Website, International Humanitarian Law, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=195&ps=P> (last visited Dec. 1, 2008).

Namur to attack Germany.”¹¹¹ Germany occupied Belgium from August 1914 to November 1918.¹¹² As Germany exercised firm control over the territory and set up a civilian- and military-administered government,¹¹³ the full body of the law of occupation should have been triggered. However, Germany either applied the law of occupation only in its self-interest or violated it altogether.¹¹⁴ Although it appeared that some German officials recognized the application of the Hague Regulations,¹¹⁵ the German administration of Belgium was nearly entirely subject to Germany’s self-interests.¹¹⁶ The German Chancellor, Theobald von Bethmann Hollweg, while publicly avowing that the German invasion and occupation of Belgium was a purely defensive necessity, privately expressed that “the country ‘must be reduced to a vassal state,’ . . . and ‘must become economically a German province.’”¹¹⁷ German actions followed that private agenda as Germany squeezed the Belgian economy for its own benefit, deported and jailed thousands of Belgian workers, pursued a policy of splitting the country along ethnic and geographic lines, and burned and looted Belgian towns and villages during the initial invasion, the occupation, and the retreat.¹¹⁸

¹¹¹ LARRY ZUCKERMAN, *THE RAPE OF BELGIUM: THE UNTOLD STORY OF WORLD WAR I* 13 (2001) (citing GREAT BRITAIN, *COLLECTED DIPLOMATIC DOCUMENTS RELATING TO THE OUTBREAK OF THE EUROPEAN WAR: THE BELGIAN GREY BOOK*, 309-311 (1915)).

¹¹² BENVENISTI, *supra* note 2, at 32.

¹¹³ “The German Imperial Cabinet established what it called a ‘Government General’ in most of the occupied area.” The rear area of the combat zone was administered by military commanders. *Id.* at 32.

¹¹⁴ See ZUCKERMAN, *supra* note 111, at 120-141.

¹¹⁵ BENVENISTI, *supra* note 2, at 33.

¹¹⁶ Professor Benvenisti notes many of the German transgressions of the law of occupation in his discussion of this occupation. BENVENISTI, *supra* note 2 at 33-40. However, Professor Benvenisti’s recap of the occupation is mild compared to that of Mr. Zuckerman, which makes a compelling case that the German occupation violated the law of occupation far more significantly than previously believed. On the other hand, Mr. Zuckerman tempers his recitation by noting that early reports of German atrocities, such as rape and mutilation stories, were widely over-reported. ZUCKERMAN, *supra* note 111, at 120-141.

¹¹⁷ ZUCKERMAN, *supra* note 111, at 78-79 (quoting Hugh Gibson Papers, Box 31, letters to Gibson’s mother, Jul 1914 – Jan 1915). Hugh Gibson was the Secretary of the U.S. delegation in Brussels during the initial occupation. *Id.* at 24.

¹¹⁸ Even the German retreat in October and November of 1918 left a swath of destruction “twenty miles wide” as the German army “deported able-bodied men,” destroyed infrastructure including railways, coal mines, factories, and canals, and looted the countryside and villages, piling carts and vehicles with

At the time the Hague Regulations of 1907 were signed, the framers' intent was that the lawful rights of an occupant to regulate and prescribe laws under Article 43 should be minimal.¹¹⁹ The German occupation of Belgium, however, was the first of many to show that occupants would be involved in every aspect of the occupied territory's government and daily life.¹²⁰ Germany regulated the coal and oil industries to accommodate the German war effort and its internal industry. Germany also regulated supply and demand over food supplies and agriculture, established strict controls over Belgian banks, prescribed new taxes and a levy of contributions from the local population, and requisitioned manufactured goods, livestock, agricultural produce, industrial supplies, and machines for use in Germany.¹²¹ German officials couched most of these actions as an exercise of Germany's authority as an occupant under the Hague Regulations. However, the effect of the measures "was to give the occupant exclusive and immediate control of every facet of public and private enterprise in Belgium."¹²² As did the Belgians, the majority of English and American scholars of the time expressed the position that the German measures went far beyond the allowances of Article 43 of the Hague Regulations of 1907. Given the broad language of that Article, however, and the lack of bright line rules for an occupant's allowable prescriptive measures, it is difficult to say exactly where the line was crossed.¹²³

"all they could carry, including chickens, rabbits, and pigeons." The retreating army "column looked like a 'horde of Gypsies rather than an army on the march.'" ZUCKERMAN, *supra* note 111, at 216 (quoting Van Swygenhoven memoir, AP, no. 29:28).

¹¹⁹ BENVENISTI, *supra* note 2, at 44-48. Additionally, the "general emphasis should be laid on maintaining the status quo," and "no conflicting acts [of law by the occupant] would be permitted unless (for example) the public order had deteriorated significantly." *Id.* at 13.

¹²⁰ *Id.* at 47.

¹²¹ For example, "[f]ifty-seven times during 1916 they decreed requisitions for commodities as varied as horses, machine tools, wool, mattresses, cocoa, tires, cloth and elastic, and the copper tubing in breweries." ZUCKERMAN, *supra* note 111, at 142-187. The effects of the requisitions upon Belgian civilians included, among other things, civilian deaths resulting from acute food shortages. *See also* BENVENISTI, *supra* note 2, at 33-40.

¹²² BENVENISTI, *supra* note 2, at 37.

¹²³ Germany's claims regarding what measures were allowed under the Hague Regulations of 1907 were "undoubtedly exaggerated"; however, the Belgians denied the validity of all of Germany's occupation measures. This position was also viewed to be "extreme." *Id.* at 45-46.

Germany further flouted the law of occupation through its nefarious deportation and public works policies. Germany began deporting Belgians to work in Germany in 1916 after it suffered military setbacks caused by an Allied offensive at Somme and the French defense of Verdun.¹²⁴ The German Ministry of War requested 400,000 Belgian workers be provided “forcibly, if need be” for German industry.¹²⁵ Moritz von Bissing, the German Governor General, was reluctant to provide the workers.¹²⁶ He cited “avoidance of a flagrant violation of the provisions of the Hague Convention” among other reasons for refusing the initial order.¹²⁷ Despite his objections, however, Germany began the forcible deportation of Belgian workers to Germany in October of 1916.¹²⁸

Deportations continued throughout the occupation and even during the German retreat.¹²⁹ Similarly, Belgian workers were forced to labor on projects that aided the German war effort. When 190 Belgian railway workers at two state railway arsenals refused to work, they were deported.¹³⁰ The policy of deportation and forced labor clearly violated the Hague Regulations of 1907 - specifically, the prohibitions against forced labor for “operations of war” and collective punishments, and the requirement to respect the “family honour and rights” and the “lives of persons.”¹³¹

¹²⁴ ZUCKERMAN, *supra* note 111, at 148-49.

¹²⁵ *Id.* at 145.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Upon arrival, the deportees were kept in nine prison camps in northern Germany called “allocation camps” where the men slept on the floors of unheated buildings without bedding and were fed a breakfast of 150 to 250 grams of bread, and lunch and dinner of watery soup. In 1916 alone, “the occupiers had shipped almost fifty-five thousand Belgians to Germany and almost forty-seven thousand to northern [occupied] France.” Recalcitrant workers were sent to “discipline camps” known as “hell’s premises” where conditions were far worse. *Id.* at 142-164.

¹²⁹ Zuckerman, *supra* note 111, at 142-164.

¹³⁰ *Id.* at 112.

¹³¹ Hague Regulations, *supra* note 17, art. 23, 46, 50. Not surprisingly, the Allied Commission to inquire into war crimes after the war listed deportations and internment of civilians under inhumane conditions as two war crimes committed by the Germans during the occupation. M. Cherif Bassiouni, *World War I: “The War to End All Wars” and the Birth of a Handicapped International Criminal Justice System*, 30 DENV. J. INT’L L. & POL’Y 244 (2002).

Germany also engaged in a major restructuring of the Belgian government, seeking to split the country into two separate territories.¹³² Under *Flamenpolitik*,¹³³ Germany attempted to divide Belgium geographically along ethnic lines into the territories of Wallonia and Flanders. Germany supported “Flemish leaders and exploit[ed] their quarrel with the Walloons, to split Belgian loyalties and later, perhaps, divide the country geographically.”¹³⁴ Germany used a minor pre-existing tension between the Walloons and the Flemings regarding the official language as a pretext to declare that Flemish was the official language of certain areas near the border,¹³⁵ to “reopen the university [of Ghent] as a Flemish institution,”¹³⁶ and finally, in 1917, to divide the country into separate local governing bodies of Wallonia and Flanders.¹³⁷ Although the majority of Flemings opposed this policy,¹³⁸ in December of 1917 the Council of Flanders, a puppet of the German occupation government, declared Flemish

¹³² BENVENISTI, *supra* note 2, 42-44; ZUCKERMAN, *supra* note 111, at 78, 149-151.

¹³³ German politicians developed the theory of *Flamenpolitik* to support the goal of dividing and subjecting the country to German rule. The theory held that “Belgians had no nationality, and that Latin Walloons and Germanic Flemish were irreconcilable. *Flamenpolitik* further supposed that Belgium had never been independent but had always leaned towards France, thanks to the dominant Walloon minority. Therefore, if encouraging (or pretending to encourage) Flemish aims reversed the trend, the Flemish would look to Germany, and Belgium would never again conspire to France. And even if a peace treaty required German withdrawal . . . Germany would retain influence over the Flemish.” ZUCKERMAN, *supra* note 111, at 78-79.

¹³⁴ *Id.* at 78.

¹³⁵ The only real divide among the two ethnic groups prior to the war was the issue of securing equal status for the Flemish language. That issue was being handled politically within Belgium without serious turmoil. BENVENISTI, *supra* note 2, at 41-43.

¹³⁶ Despite being a symbol of some Flemish resistance, when the German plan to make the University a Flemish institution was announced, most of the pro-Flemish professors “spurned the gift.” ZUCKERMAN, *supra* note 111, at 146-147.

¹³⁷ BENVENISTI, *supra* note 2, at 43.

¹³⁸ ZUCKERMAN, *supra* note 111, at 165-69; BENVENISTI, *supra* note 2, at 43.

independence.¹³⁹ Germany's attempt to split the country in two was widely considered to have violated the conservationist principle of Article 43.¹⁴⁰

Further attacks on the conservationist principle of the Hague Regulations of 1907 followed in the wake of Belgian protests to the policy of *Flamenpolitik*. When the Belgian Court of Appeals ordered the public prosecutor to bring a case against the councilmen for violating the Belgian penal code, which forbade any attempt to change the form of government, Germany had two of the arrested councilmen released.¹⁴¹ The highest court in Belgium "suspended its sessions in protest."¹⁴² Germany followed up on this judicial revolt by deporting three Court of Appeals justices, barring Belgian magistrates from pursuing cases, and ultimately substituting "German criminal and civil courts for Belgian."¹⁴³ German military courts had already been handling charges against both Belgians and German military personnel and civilians, but this final measure represented "the complete dissolution of the indigenous court system."¹⁴⁴ Germany could hardly have been said to have been "absolutely prevented"¹⁴⁵ from respecting the laws in force in Belgium prior to the occupation by a chain of events set in place by its unlawful attempt to restructure the nation.

The German occupation of Belgium during World War I presaged a century of state avoidance of the law of occupation and highlighted the weaknesses of the Hague Regulations of 1907. According to Professor Benvenisti,

[t]wo fundamental problems surfaced in this occupation. The modern occupant, it was found, can no longer be considered the impartial trustee of indigenous private interests, as the framers of the Hague Convention had envisioned. Rather, the occupant is more likely to be an interested party, with short-

¹³⁹ On 4 February 1917, two hundred Flemish leaders, sponsored by Germany, demanded the separation of Belgian administration into Flanders and Wallonia. The Germans monitored meetings to ensure the Flemish radicals "stayed within bounds." ZUCKERMAN, *supra* note 111, at 186.

¹⁴⁰ The policy was also "one of the most criticized policies of the Germans." BENVENISTI, *supra* note 2, at 47.

¹⁴¹ ZUCKERMAN, *supra* note 111, at 197-8.

¹⁴² *Id.*

¹⁴³ The courts were run by German judges and staff and even the court language became German. *Id.* at 198.

¹⁴⁴ BENVENISTI, *supra* note 2, at 41.

¹⁴⁵ Hague Regulations, *supra* note 17, art. 43.

and long-term objectives, with effective power to implement those objectives, and with the opportunity to couch them within the language of Article 43.¹⁴⁶

He notes that a second problem was the lack of clear guidelines for the occupant with regard to changing the status quo, and points out that the Hague Regulations of 1907 do not set forth any “internationally accepted goals for the occupation administration to pursue.”¹⁴⁷

Germany’s occupation of Belgium also highlighted another serious flaw in the law of occupation. The law lacked a mechanism to provide either oversight of the occupant or enforceability of the law of occupation against the occupant. Even if the law of occupation set forth in the Hague Regulations of 1907 had provided more detailed limits to an occupant’s authority, without an oversight mechanism, Germany would still have been able to circumvent the law to serve its own self-interest. Moreover, the attempted enforcement of violations of the law of occupation after the war was all but a farce.¹⁴⁸ As Mr. Zuckerman argues, the failure to enforce the violations of the law and challenge the military doctrine of necessity, which had been invoked by Germany as a legal excuse for its actions, opened the door to future violations of the law of occupation, and the law of war in general, by Germany.¹⁴⁹ As he states, “the number of criminals the victors could have punished in 1919 was less important than challenging [the doctrine of] necessity,¹⁵⁰ a pernicious doctrine that the German Army had cited since 1871 and that had survived the war intact,” and

¹⁴⁶ BENVENISTI, *supra* note 2, at 47.

¹⁴⁷ The Fourth Geneva Convention of 1949 first delineated internationally accepted goals. *Id.* at 47.

¹⁴⁸ ZUCKERMAN, *supra* note 111, at 270-274; *see also*, Bassiouni, *supra* note 131.

¹⁴⁹ Mr. Zuckerman also argues that the failure of the allies to punish the German aggression and occupation contributed, in part, to Germany’s actions during World War II. Germany was emboldened by the lack of punishment in the wake of its brazen disregard for the law. He argues that the Allied failure to pursue trials and reparations for violations of the law of war by the Germans was partially responsible for the early skepticism over the holocaust during World War II. ZUCKERMAN, *supra* note 111, at 270-274; *see also*, Bassiouni, *supra* note 131.

¹⁵⁰ The escape clause of Article 43 of the Hague Regulations derives directly from the doctrine of military necessity. As Professor Benvenisti states, “[i]t seems the drafters of this phrase viewed military necessity as the sole relevant consideration that could ‘absolutely prevent’ an occupant from maintaining the old order.” BENVENISTI, *supra* note 2, at 14.

“[t]he world had to know the truth in case Germany rode to battle again because if she did, necessity was likely to ride with her.”¹⁵¹ Thus, this early failure to enforce clear violations of the law of occupation foreshadowed and perhaps contributed to the next 80 years of occupants’ repeated defiance of the law.

In sum, the German occupation of Belgium during World War I provided ample evidence that the framework for the law of occupation set forth by the Hague Regulations of 1907 was lacking. Despite the evidence, scholars of the time were content to consider the German actions an aberration that would not be repeated often, and were hesitant to challenge the existing framework.¹⁵² As the case studies set forth in the next sections show, those scholars were mistaken. The German occupation was simply the first of many examples of the failure of the law of occupation to provide a reliable framework to regulate an occupant’s behavior.

B. Allied Occupations after World War II

At the end of World War II, because of the atrocities committed by the Axis powers,¹⁵³ the Allied plan for the occupation of Germany and of Japan included ensuring the removal of those in power and completely restructuring the organs of power that supported the policies promoted by the defeated sovereigns.¹⁵⁴ In their place, the Allies would establish a democratic system.¹⁵⁵ To that end, the Allies at the end of the war declared a state of debellatio, arguing that the German and Japanese sovereign governments had ceased to exist due to their unconditional surrenders.¹⁵⁶ Debellatio, or subjugation, refers

¹⁵¹ ZUCKERMAN, *supra* note 111, at 275.

¹⁵² BENVENISTI, *supra* note 2, at 45-46.

¹⁵³ Many of these atrocities occurred during the Axis Powers’ occupation of several nations, especially the German occupation of European nations and the Japanese occupation in China and Southeast Asia. “The three Axis powers, Germany, Italy, and Japan, completely ignored the basic tenets of the law of occupation.” Among other violations of the law, the Axis Powers annexed territory, set up puppet states to rule foreign states and took measures to comprehensively transform local legal systems, all in clear violation of Article 43 of the Hague Regulations. BENVENISTI, *supra* note 2, at 60-66.

¹⁵⁴ *Id.* at 91-96.

¹⁵⁵ *Id.* at 91; *see also* Jared Wessel, *The Demilitarization of Palestine: Lessons from the Japanese Experience*, 11 U.C. DAVIS J. INT’L L. & POL’Y 259 (2005) (discussing the theory of debellatio as applied to Japan as a model for solving the Palestinian conflict).

¹⁵⁶ BENVENISTI, *supra* note 2, at 91-96. At the time there was some debate over whether to apply the law of occupation in Germany or to invoke the doctrine of

to the ancient legal doctrine that applies where a “party to a conflict has been totally defeated in war, its national institutions have disintegrated, and none of its allies continue to challenge the enemy militarily on its behalf.”¹⁵⁷ The conditions of debellatio had to have been met before a victorious party could invoke the doctrine.¹⁵⁸ The conditions were “a purely factual matter,” so if, for example, the national institutions remained intact, there could be no factual debellatio.

In Germany, where the Nazi regime had largely fled or been taken into custody and Hitler had committed suicide, the factual conditions for debellatio had arguably been met.¹⁵⁹ Therefore, in the case of Germany, the doctrine permitted the transfer of sovereignty to the Allies, and the Allies’ measures were internal matters governed by domestic laws and not by the law of occupation.¹⁶⁰ This position with regard to Germany was generally accepted by courts and scholars at the time.¹⁶¹ On the other hand, in Japan, while the unconditional surrender was signed, there was not necessarily a disintegration of the national institutions.¹⁶² Although the Allies invoked the doctrine of debellatio for the sweeping changes they made, a better legal argument is that the terms of surrender, “sufficiently broad to enable the occupant to implement . . . fundamental changes of Japan’s laws and institutions,” were what allowed the

debellatio. Some argued that the escape clause language of Article 43 of the Hague Regulations requiring respect for the laws in place “unless absolutely prevented” would permit the Allied measures taken to obliterate the Nazi system. *Id.* at 91-92 n.135.

¹⁵⁷ *Id.* at 92. Furthermore, “[a]lthough debellatio is an ancient concept of international law, there is no general consensus on its distinction from, and relationship to, other concepts like subjugation, conquest, and annexation. Some define debellatio as the ‘extermination in war of one belligerent by another through annexation of the former’s territory after conquest, the enemy forces having been annihilated.’” Wolff Heintschel Von Heinegg, *The Rule of Law in Conflict and Post-Conflict Situations: Factors in War to Peace Transitions*, 27 HARV. J.L. & PUB. POL’Y 843, 851 (2004) (citing Karl Ulrich-Meyn, *Debellatio*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 969 (Max Planck Inst. for Comparative Pub. Law and Int’l Law ed., 1992) (defining debellatio)).

¹⁵⁸ BENVENISTI, *supra* note 2, at 92.

¹⁵⁹ *Id.* at 92-93.

¹⁶⁰ *Id.* at 93-94.

¹⁶¹ *Id.* at 93 nn.143, 144. However, “[w]hile the Allies’s title to Germany was not challenged, its logical consequence, namely the inapplicability of the law of occupation . . . was convincingly tested,” by German scholars and the International Committee of the Red Cross. *Id.* at 94 n.145.

¹⁶² BENVENISTI, *supra* note 2, at 92-93.

Allies to lawfully effect the necessary changes to transform the government in Japan.¹⁶³

In any case, the Allies invoked *debellatio* as legal justification for the sweeping transformative measures they took in both countries. The Allied measures, especially the transfer of sovereignty, were not permissible under the law of occupation.¹⁶⁴ Since that time, the doctrine widely has been considered dead.¹⁶⁵ The case study of the Allied use of *debellatio*, however, is helpful to illustrate that the *de facto* occupants could not rely upon the law of occupation in a situation wherein the occupants believed transformative change was a moral imperative.¹⁶⁶ As the next sections will discuss, there are other instances where transformative change in an occupation may be lawful, but *debellatio* as a means of accomplishing that change should remain a legal footnote. The law of occupation should be modified to allow for transformative change only in the appropriate context and under the appropriate supervision.

¹⁶³ *Id.* at 93.

¹⁶⁴ “The foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through actual or threatened use of force.” *Id.* at 5.

¹⁶⁵ Several scholars including Professor Benvenisti have declared the doctrine no longer exists. *See, e.g.*, BENVENISTI, *supra* note 2, at xi, 94-96; Harris, *supra* note 8, at 20 (noting that “[s]overeignty now rests in the people, not in the government, and can no longer be permanently transferred to the victor of the war. International law now outlaws aggressive war and rejects annexation, and *debellatio* is simply not politically palatable in modern times.”)

¹⁶⁶ Although use of the phrase “moral imperative” connotes justification outside the law, the Allies used moral arguments to justify the removal of regimes which were “contemptuous of human rights and the modern notions of legality.” BENVENISTI, *supra* note 2, at 91- 92 n.135 (quoting BRITISH WAR OFFICE, THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW 143 n.1 (1958)). Moreover, Nazism “lies at the outer limits of exigency, at a point where we are likely to find ourselves united in fear and abhorrence,” and is “an ideology and a practice of domination so murderous, so degrading even to those who might survive, that the consequences of its final victory were literally beyond calculation, immeasurably awful.” WALZER, JUST AND UNJUST WARS, *supra* note 102, at 253.

C. Occupations since the Four Geneva Conventions of 1949

Despite the broadened application of the law of occupation in the Fourth Geneva Convention of 1949,¹⁶⁷ occupants since that time have systematically avoided the application of the law of occupation.¹⁶⁸ The one exception to this statement is Israel in the occupied territories after the 1967 war.¹⁶⁹ Outside of this exception, occupants have come up with alternate legal theories to avoid application of the law, including requests for intervention from the occupied nation, attempts to annex territory, disputes over title to territory, and limited scale operations inside another state's territory which did not trigger the law.¹⁷⁰ Regardless of the different rationales for ignoring the law, the effect of this state practice is that it calls into question the status of the law of occupation and again highlights the need to update the law to make it realistic and enforceable.¹⁷¹

Of course, changing the law merely to reflect state practice would not make sense if there were not at least a rational and moral policy shift underlying the state practice. Obviously, not every occupant who has avoided the application of the law has had such a legitimate goal in avoiding the law of occupation.¹⁷² On the other hand, where the shift in state practice has been made to accommodate the rise of the importance of human rights and the right of self-determination, the practice should be reflected in the law.

¹⁶⁷ See discussion *supra* Part II.C.

¹⁶⁸ See, e.g., Ottolenghi, *supra* note 2; BENVENISTI, *supra* note 2, at 149-190.

¹⁶⁹ BENVENISTI, *supra* note 2, at 107-149.

¹⁷⁰ Professor Benvenisti chronicles several occupations and their justifications outside of the law of occupation. Among others, he submits that the Soviet occupation of Afghanistan, the Vietnamese occupation of Cambodia, and the U.S. occupation of Grenada and Panama relied upon requests for intervention from the occupied nation while the Iraqi occupation of Kuwait, the Moroccan occupation of the Western Sahara, and the Indonesian occupation of East Timor were examples of attempts to annex territory. *Id.* at 149-184.

¹⁷¹ "This avoidance of recognition of occupation status served as a major stumbling block to international scrutiny of the conduct of most occupants." *Id.* at 190. Professor Benvenisti provides two strategies to remedy this problem: 1) to emphasize that the law applies regardless of claims to the contrary and stress human rights application, and 2) to "explore existing enforcement mechanisms that could be used" to authoritatively state when the law of occupation applies and to set forth the occupant's duties. *Id.*

¹⁷² See discussion *supra* Part III.A.

D. United Nations Governance and the Coalition Occupation of Iraq

United Nations (U.N.) governance occupations, such as those in East Timor and Kosovo¹⁷³ and the American and British occupation of Iraq in 2003, are instances of transformative occupations requiring resort to legal authority outside the traditional law of occupation framework. Despite the fact that the U.N. in Kosovo, and the American and British multilateral coalition, exercised firm control over territory and the local governments (a de facto state of occupation), these occupations occurred under legal frameworks authorized by the U.N. Charter and the approval of the U.N. Security Council.¹⁷⁴ U.N. Security Council Resolution 1483, recognizing the state of occupation after the fact, stated that the law of occupation applied to the U.S. and Great Britain in Iraq, while at the same time allowing the transformation of Iraq into a democratic nation.¹⁷⁵ As was the case with the Allied occupation of Germany and of Japan and the corresponding invocation of the doctrine of debellatio, the legal framework invoked in these cases to allow changes to the system of government was clearly outside the traditional framework of the law of occupation. Given that the current state of global affairs means that such occupations are likely to continue,¹⁷⁶ this section will discuss these types of occupations to outline potential models to update the law of occupation.

1. United Nations Administered Occupations

A recent example of a relatively successful U.N. administered occupation with transformative objectives is that of Kosovo. After the North Atlantic Treaty Organization (NATO) campaign against Serbian forces in the former Yugoslavia¹⁷⁷ attempted to restore order in Kosovo, the territory was in a

¹⁷³ See Matheson, *U.N. Governance*, *supra* note 75, at 78 (discussing examples of U.N. governance).

¹⁷⁴ U.N. Security Council Resolution 1272 established the U.N. Transitional Administration in East Timor. S.C. Res. 1272 U.N. Doc.S/RES/1272 (Oct. 25, 1999). U.N. Security Council Resolution 1244 established the U.N. Mission in Kosovo (UNMIK). S.C. Res. 1244, U.N. Doc.S/RES/1244 (June 10, 1999). U.N. Security Council Resolution 1483 recognized the occupation in Iraq and established its framework. S.C. Res. 1483, U.N. Doc.S/RES/1483 (May 22, 2003).

¹⁷⁵ See discussion *infra* Part D.2.

¹⁷⁶ See, e.g., O'HANLON, *supra* note 91, at 17-49.

¹⁷⁷ The North Atlantic Treaty Organization (NATO) mission began as an air campaign which lasted from 23 March 1999 to 10 June 1999. It continued under U.N. Security Council resolution 1244, passed on 10 June 1999, as

state of near collapse.¹⁷⁸ Based on the belief that the “the chaotic situation would present a continuing, acute threat of escalating violence and regional instability, as well as a serious humanitarian crisis,”¹⁷⁹ the U.N. Security Council adopted Resolution 1244¹⁸⁰ under Chapter VII of the U.N. Charter. This Resolution set forth, among other things,

an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions.”¹⁸¹

Given this mandate, the Secretary General created a civil administration, the U.N. Interim Administration in Kosovo (UNMIK), and appointed a Special Representative to the Secretary General¹⁸² (SRSG) to run it.¹⁸³

Kosovo Force (KFOR), with ground troops entering the territory on 12 June 1999. KFOR Website, Conflict Background, <http://www.nato.int/KFOR/docu/about/background.html> (last visited Dec. 18, 2008).

¹⁷⁸ See Matheson, *U.N. Governance*, *supra* note 75, at 78 (stating, “[b]y the conclusion of the NATO campaign, the province was in a state of economic and social chaos. Out of a total population of about 1.7 million, 800,000 Kosovars had fled or been driven out of the province and as many as 500,000 others had been internally displaced; most of these refugees followed NATO troops back into Kosovo, but many found their homes and possessions destroyed or stolen.”)

¹⁷⁹ *Id.*

¹⁸⁰ S.C. Res. 1244, U.N. Doc.S/RES/1244 (June 10, 1999).

¹⁸¹ See Matheson, *U.N. Governance*, *supra* note 75, at 78 (citing SC Res. 1244, para. 10 (June 10, 1999)).

¹⁸² There have been six Special Representatives of the Secretary General (SRSG) since the inception of UNMIK. The current SRSG is Mr. Joachim Rucker, from Germany. About UNMIK: United Nations Interim Administration in Kosovo website [hereinafter About UNMIK webpage], <http://www.unmikonline.org/intro.htm> (last visited Oct. 11, 2008).

¹⁸³ See Matheson, *U.N. Governance*, *supra* note 75, at 78.

The U.N. Mission in Kosovo functioned alongside the Kosovo Force (KFOR),¹⁸⁴ the international security force authorized by U.N. Security Council Resolution 1244, and “was unprecedented in scope and complexity.”¹⁸⁵ It granted the SRSG “all executive authority with respect to Kosovo.”¹⁸⁶ The SRSG’s powers included appointing and removing civil administrators and judicial officials and administering “all funds and property of the FRY and the Republic of Serbia in the territory of Kosovo.”¹⁸⁷ Although the SRSG retains the ultimate authority, UNMIK is currently divided into four “pillars,” each of which are administered by a separate international organization or entity.¹⁸⁸ Those include: 1) the Civil Administration pillar, led by the U.N., 2) the Police and Justice pillar, also led by the U.N., 3) the Democratic and Institution Building pillar, led by the Organization for Security and Cooperation in Europe (OSCE), and 4) the Reconstruction and Economic Development pillar, led by the European Union (EU).¹⁸⁹

At the outset of the mission the SRSG, being vested with “all legislative and executive authority with respect to Kosovo, including the administration of the judiciary,” via UNMIK, had to determine how to govern.¹⁹⁰ He did this through a series of regulations, the first of which stated that all laws prescribed by the Federal Republic of Yugoslavia (FRY) prior to the UNMIK administration remained in force so long as they did not conflict with new regulations promulgated by UNMIK.¹⁹¹ After objections were lodged by the indigenous Albanians,¹⁹² however, the SRSG issued a new decree declaring that the prevailing law would be that in place prior to the FRY’s removal of Kosovo’s autonomy.

¹⁸⁴ KFOR’s current troop strength is 17,000. NATO Force to Stay in Kosovo Despite Uncertain Future, Agence France-Presse, Dec. 7, 2007, http://www.defencetalk.com/news/publish/army/NATO_force_to_stay_in_Kosovo_despite_uncertain_future110014505.php. In mid-2002, the troop strength was about 50,000. O’HANLON *supra*, note 91, at 35.

¹⁸⁵ Matheson, *U.N. Governance*, *supra* note 75, at 78.

¹⁸⁶ *Id.* at 76, 79.

¹⁸⁷ *Id.*

¹⁸⁸ About UNMIK webpage, *supra* note 179.

¹⁸⁹ *Id.*

¹⁹⁰ Matheson, *U.N. Governance*, *supra* note 75, at 80.

¹⁹¹ *Id.*

¹⁹² “However, this action did not go far enough for Kosovar Albanians and the newly appointed Kosovar judges, who considered FRY laws to have been ‘part and parcel of the revocation of Kosovo’s prior autonomous status and an instrument of oppression since then.’” *Id.*

Since UNMIK's inception, the SRSG has "functioned as a general lawmaking authority over a wide range of subjects."¹⁹³ Much like the previously discussed occupation of Germany in Belgium during World War I, UNMIK has exercised substantial lawmaking powers. Such sweeping legal reforms would likely have violated the law of occupation's conservationist principle in Article 43 of the Hague Regulations of 1907; however, they occurred outside that legal framework and under the lawful authority of the U.N. Charter framework.¹⁹⁴

In addition to finding the appropriate law to apply, the SRSG had the task of setting up the interim political structure to provide for self-government within an autonomous Kosovo.¹⁹⁵ To that end, in June of 2002, UNMIK set up the provisional government and in October of 2004 general elections were held.¹⁹⁶ As a result, the government currently consists of a 120-member assembly of ministers led by a Prime Minister selected by the President.¹⁹⁷ The President's job is limited, as his "main function is to take action in the field of external relations in coordination with the SRSG following consultations with the political parties in the Assembly."¹⁹⁸ The President has "the power to dissolve, in agreement with the SRSG, the Assembly."¹⁹⁹ UNMIK, however, still exercises broad authority in Kosovo, which would not be lawful under the law of occupation.

The future of Kosovo is uncertain. KFOR is still providing external and internal security for Kosovo due to the failure of the Serbians and Kosovar Albanians to agree on the status of Kosovo.²⁰⁰ Most recently, Kosovo's parliament declared its independence, setting off a wave of controversy among the European Union, the United States, and Russia.²⁰¹ With the status of Kosovo remaining unsettled, UNMIK will likely have to remain in place for some time to come.²⁰²

¹⁹³ *Id.* at 81.

¹⁹⁴ *Id.* at 76-81.

¹⁹⁵ Matheson, *U.N. Governance*, *supra* note 75, at 81.

¹⁹⁶ UNMIK Fact Sheet, 3-4, April 2007, http://www.unmikonline.org/docs/2007/Fact_Sheet_apr_2007.pdf.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ BBC News Online, Kosovo MP's Proclaim Independence, BBC Website, 17 February 2008, <http://news.bbc.co.uk/2/hi/europe/7249034.stm>.

²⁰² *See, e.g.*, UNMIK Press Release, 17 Jan 2008, UNMIK/PR/1721, <http://www.unmikonline.org/dpi/>

Despite this uncertain future, the UNMIK administration in Kosovo appears to be a short term success. If one measures success in terms of improved security, and a functioning self-determinative government, the Kosovo story potentially illustrates an effective model of how to administer an occupied territory. The U.N. framework employed provides a useful model for an updated law of occupation by illustrating the effectiveness of a multilateral method of administering the territory during a transformative type of occupation. Furthermore, this model, relying as it has on U.N. oversight and approval from the beginning, has international legitimacy that other de facto occupations may not; the next example will further illustrate this point.

2. *The American and British Occupation of Iraq*

The legal framework for the 2003 American and British occupation of Iraq is a hybrid of a U.N. Security Council authorization and the law of occupation. The American and British governments justified the military invasion in March of 2003 both under a theory of self-defense and through recourse to prior U.N. Security Council Resolutions authorizing force against Iraq in the First Gulf War in 1991.²⁰³ During the earliest phase of the occupation of Iraq in 2003, the occupants did not use the term “occupation,” arguing that the facts did not trigger the law of occupation.²⁰⁴ Despite this early

[pressrelease.nsf/0/2C8FB116D3D6266FC12573D30055AB47/\\$FILE/pr1721.pdf](http://www.unmikonline.org/pub/focuskos/dec07/Focus_K_36_ENG_web.pdf) (noting improvements in the areas of return of refugees and internally displaced persons, successful elections in November 2007, and greater freedom of movement, while admitting to continued problems with living conditions, radical groups and intimidation of voters, and resolving to continue to work towards the successful implementation of UNSC Resolution 1244.). Also, as of November 2007, the UNDP reported that Kosovo continued to “face serious and persisting problems” including an extremely high incidence of poverty and unemployment (44%) and environmental problems, among others. Where will Kosovo be in 2015? Second Millennium Development Goals Progress Report, FOCUS KOSOVO 6, November 2007, available at:

http://www.unmikonline.org/pub/focuskos/dec07/Focus_K_36_ENG_web.pdf.

²⁰³ See Charles Pierson, *Preemptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom*, 33 DENV. J. INT'L L. & POL'Y 150, 152-155 (2004) (for a discussion of the arguments made by the U.S. prior to the invasion of Iraq in 2003). This article will not discuss the legality of the initial use of force.

²⁰⁴ As Professor Benvenisti points out, the U.S. did not recognize an occupation. According to a memorialized Q&A session with W. Hays Parks, most scholars believe a de facto state of occupation existed by this point. BENVENISTI, *supra* note 2, at ix; but see David J. Scheffer, *Future Implications of the Iraq Conflict*:

posturing, both the U.N. and the occupants recognized the application of the law of occupation by May 22, 2003.²⁰⁵ U.N. Security Council Resolution 1483 established the legal guidelines for the occupants, including the paradoxical admonition to fulfill the law of occupation's obligations under the Hague Regulations of 1907 and the Geneva Conventions of 1949 while calling for transformational change to the government and political system of Iraq.²⁰⁶

Although the occupants were handed a legal mandate for transformative change, they were legally obligated to adhere to the rest of the law of occupation; arguably, they failed to do so. In failing to provide enough troops to secure the peace and prevent an insurgency, the occupants arguably failed to properly safeguard the civilian population as required under Article 43 of the Hague Regulations of 1907 and Articles 27 and 64 of the Fourth Geneva Convention of 1949.²⁰⁷ Other failures may be judged best by the light of history; however, some writers have argued that such failures include the inability to provide basic services for health, hygiene, and medical care; not allowing humanitarian supplies into the country; causing massive unemployment; failing to restore vital public services in a timely manner;²⁰⁸ and the profiteering of American and British contractors and politically connected officials.²⁰⁹

Beyond Occupation Law, 97 AM. J. INT'L L. 842 (2003) (stating that "[w]hen the armed forces of the United States and the United Kingdom invaded Iraq and exercised control over its territory, the law of occupation immediately began to apply to their actions.") It also should be noted that the U.S. military is bound by Department of Defense regulations to comply with the law of war in all military operations other than war regardless of the official U.S. position on the applicability of the law. U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM para. 4 (9 Dec. 1998), updated in 2006 by U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 4 (9 May 2006); CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 5810.01C (31 Jan. 2007).

²⁰⁵ S.C. Res. 1483, U.N. Doc.S/RES/1483 para. 5 (May 22, 2003); Scheffer, *supra* note 204, at 842.

²⁰⁶ S.C. Res. 1483, U.N. Doc.S/RES/1483 (May 22, 2003).

²⁰⁷ Hague Regulations, *supra* note 17, art. 43; GC IV, *supra* note 18, art. 27, 64.

²⁰⁸ Scheffer, *supra* note 204, at 854-856 (listing several possible violations of the law of occupation).

²⁰⁹ See, e.g., MICHAEL WALZER, ARGUING ABOUT WAR 167 (2004) (arguing that "[t]he distribution of contracts to politically connected American companies is a scandal. . . . [T]here has to be someone regulating the conduct of the companies – not only their honesty and efficiency but also their readiness to employ, and gradually yield authority to, competent Iraqi managers and technicians.")

Poor policy decisions may have caused some of these failures, including the failure to protect civilians in the wake of a broad insurgency. Two of these policy decisions, the “de-Baathification” order and the dissolution of the Iraqi Army, also arguably violated the law of occupation.²¹⁰ High on the agenda of L. Paul Bremer III’s Coalition Provisional Authority’s task list was the “de-Baathification” of Iraqi society.²¹¹ De-Baathification consisted of a plan for the sweeping removal of members of the Baath party from government positions. There were over two million Baath Party members in Iraq, and membership was a prerequisite for almost all government jobs, including the police force.²¹²

Even if the transformative objective of regime change were allowed, the complete removal of all these Iraqi citizens from their livelihoods and important administrative positions was a bridge too far.²¹³ It is difficult to see how removing an entire group of government workers from their livelihoods was a part of the political change envisioned by U.N. Security Council Resolution 1483. Not only was it inadvisable as a method of administering the country as an occupant and possibly contrary to the law of occupation,²¹⁴ but it

²¹⁰ See, e.g., MICHAEL ISIKOFF & DAVID CORN, HUBRIS, THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR 224-225 (2006); Scheffer, *supra* note 204, at 855.

²¹¹ L. Paul Bremer III was the head of the Coalition Provisional Authority (C.P.A.), replacing Jay Garner. Following the President’s directive to uproot “all remnants of Saddam’s hated regime,” Bremer issued the order of “de-Baathification” on 12 May 2003 despite objection from his own staff. ISIKOFF, *supra* note 210, at 224-225.

²¹² *Id.*

²¹³ See WALZER, JUST AND UNJUST WARS, *supra* note 102, xi (“Even when a humanitarian crisis has rightly triggered intervention, we can still hope to minimize the coercive imposition foreign ideas and ideologies”). Walzer rightly points out that political transformation does not come with the right to make “cultural” transformation. Of course, drawing this line is one of the major problems with any transformative occupation. There may be no culture of self-government, or large portions of the population may be left out of the governing party. The point is that transforming a government comes with a great responsibility to try to understand the indigenous culture before embarking upon a complete overhaul of the government. It also comes with a great responsibility to avoid arrogantly grafting one’s own system onto another.

²¹⁴ This point is arguable depending on how much room the U.N. Security Council gave the C.P.A. in derogating from the conservationist principle. Professor David Scheffer believes the policy was not allowable under international law. Scheffer, *supra* note 204, at 855 (stating that “acts or omissions” which might be violations of the law of occupation include

is also frequently cited as one of the largest contributors to the instability that later plagued Iraq and led directly to the current insurgency.²¹⁵ Whether the insurgency was preventable by a strict adherence to the law of occupation in Iraq by the two occupants remains debatable.²¹⁶

In light of the above failures and the novel legal framework employed, the occupation has sparked a fair amount of debate with regard to the law of occupation. Professor Benvenisti declares the occupation of Iraq “the most significant development in the law of occupation in recent years.”²¹⁷ Professor Adam Roberts opines that the legal framework under U.N. Security Council Resolution 1483 illustrates how human rights law has become part of the law of occupation; he also points out that the fact has “curiously” been ignored “in some American discussion” of the topic.²¹⁸ Additionally, both of these authors argue that U.N. Security Council Resolution 1483 purported to allow for deviation from the conservationist principle of the Hague Regulations.²¹⁹ This is an understandable sentiment, as U.N. Security Council Resolution 1483 called upon “all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907,” while also allowing for wide-ranging transformation of the Iraqi government to a self-representative form of democracy.²²⁰

“[a]ctions by the occupying powers that create unemployment on a massive scale, including among local police, Ba’ath Party members, and the Iraqi armed forces, notwithstanding the importance of defeating the ideology that dominated these groups”).

²¹⁵ Removing all the civil servants, police and military left a power vacuum and an absence of qualified people to run the government. Mr. Bremer apparently knew this at the time, but stated ironically that, “de-Baathification will be carried out even if at a cost to administrative efficiency.” ISIKOFF, *supra* note 210, at 224.

²¹⁶ As pointed out by Professor Scheffer, however, the insistence by the U.N. and the occupants on referring to the law of occupation as the governing body of law may have created legal liability for the above failures. Scheffer, *supra* note 201, at 855.

²¹⁷ BENVENISTI, *supra* note 2, at viii – ix.

²¹⁸ See Roberts, *supra* note 9, at 598 (arguing that human rights conventions “can play an important role in some situations that either constitute occupations, or closely resemble occupations in certain key respects.”).

²¹⁹ BENVENISTI, *supra* note 2, at viii – ix; but see Roberts, *supra* note 9, at 598 (questioning whether the resolution truly provided legal grounds for the C.P.A.’s transformative measures precisely because the law of occupation was cited and a U.N. administration framework was not used.).

²²⁰ S.C. Res. 1483, U.N. Doc.S/RES/1483 (May 22, 2003).

While Professor Adams questions the legality of the transformative measures allowed, Professor Benvenisti believes that these measures were not only legal but also became part of an updated law of occupation.²²¹ Professor Benvenisti argues that the following modifications were made to the law of occupation: 1) the integration of human rights law, including the concept that “sovereignty inheres in the people;”²²² 2) the ability to transform a system of government during occupation; 3) a change from the Hague Regulations of 1907 concept of a disinterested occupant to that of a “heavily involved regulator;” and 4) the development of an international oversight mechanism.²²³ Whether these occurrences truly constitute modifications to the law of occupation, however, remains a point of debate.

Regardless of whether one example of a U.N. Security Council Resolution, in correspondence with the factual occupation, actually can constitute such changes, the continuing debate illustrates again the need to clarify and update the law. The occupation of Iraq is an example of how mismanaged transformational occupations are an ill fit with the traditional law of occupation. The lessons learned should be put to use in further developing the law of occupation.

IV. UPDATING THE LAW OF OCCUPATION

As can be seen from case studies highlighting the problems with the law of occupation and the resulting legal debate over the status of the modern law of occupation, there is a need for change. Recognizing that the law of occupation is still relevant and useful for modern occupations, there are four significant components that should be included in an updated law of occupation: 1) a method for international oversight of the occupant’s activities; 2) a requirement for U.N. approval or other multilateral agreement for the system of administration of the occupation; 3) the inclusion of certain human rights in order to clarify the application of those rights within the *lex specialis* of the law of occupation, the right of self-determination and self-governance being paramount among these rights; and 4) a method to handle transformative occupations.

²²¹ See BENVENISTI, *supra* note 2, at xi (stating “Resolution 1483 can be seen as the latest and most authoritative restatement of several basic principles of the contemporary law of occupation.”)

²²² *Id.* at xi.

²²³ *Id.* at xi-xii. Professor Benvenisti calls international oversight a “necessary addition to a law that virtually lacked effective international mechanisms to monitor occupants’ decision making as being compatible with the law.”

The next question is how to incorporate these components into the law of occupation. The continuing debate over the status of the law and whether some of these suggested updates already exist in the law clearly demonstrates that there is no consensus on that point.²²⁴ Due to the lack of clarity and consensus on this point, the law of occupation treaty framework should be updated with a new treaty. Even an attempt to draft such a treaty could help to clarify the issues (despite objections that such consensus will never be reached and that attempting to update the law in treaty form is fruitless).²²⁵ In addition, given the complexity of the issues that should be included in the updated treaty discussed below, a treaty would be much more useful in providing clarity to the law than ad hoc reference to various other sources of law such as U.N. Security Council Resolutions and various human rights treaties.

A. Multilateral Oversight Mechanism and United Nations Approval of the Mandate

Given that the history of occupation in the past century is rife with examples of abuses of the law of occupation,²²⁶ it is clear that a mechanism to ensure international oversight of occupations would be useful in every type of modern occupation. Here, three issues are addressed: 1) how to best formulate the oversight mechanism's powers; 2) what the composition of the oversight mechanism should be; and 3) who should provide the mandate for the oversight mechanism. To fully address these issues, a new treaty should establish robust powers for the proposed oversight mechanism and ensure its universal application, ensure that the mechanism is multilateral in composition, and require the U.N. to establish the mandate in every case of occupation.

The first issue to be addressed is how to formulate the international oversight mechanism to ensure it is robust enough to deter potential abuses of the law of occupation. Modern occupations continue to illustrate the likelihood of occupants to violate the law of occupation.²²⁷ The occupation of Iraq, among others, illustrated how poor planning and management can result in disaster and possible legal liability.²²⁸ The international oversight mechanism could remedy these types of recurring problems if it is allowed to review, approve and monitor

²²⁴ See discussion *supra* Part II.D.

²²⁵ See Roberts, *supra* note 9, at 622 (stating that the case for attempting to “secure a formal modification of the Hague Regulations and the Fourth Geneva Convention to make allowance for transformative occupations, especially in the light of human rights law . . . is weak.”)

²²⁶ See discussion *supra* Part III.

²²⁷ See discussion *supra* Part III.

²²⁸ See discussion *supra* Part III.D.2.

the occupant's security plan and method of governance prior to implementation. The proposed treaty should ensure the oversight agency is empowered to do all of these things. Moreover, any treaty should require the universal application of the oversight mechanism.²²⁹ It is clear that nearly every instance of occupation that has been studied over the past century could have benefitted from such a mechanism.²³⁰

The second issue to be addressed is how to constitute an oversight mechanism. It should be a multilateral coalition of nations. Reliance upon a single nation or entity that is not multilateral would surely provoke attacks upon its legitimacy by some. The agency could be a U.N. agency, another international organization, such as the OSCE or NATO, or an ad hoc multilateral coalition. A multilateral oversight agency would provide the most international legitimacy²³¹ and greatest deterrence to abuses of the law. In turn, by deterring abuses of the law of occupation and providing the occupation with international legitimacy, there would arguably be a potential calming effect upon any insurgency. This model has already been in development in the case of U.N. de facto occupations and has been used with moderate success in cases such as that of UNMIK in Kosovo.²³²

The third issue to be addressed is who should provide the mandate for the oversight mechanism. Regardless of the membership of the oversight mechanism, at present, the U.N. Security Council is the only body capable of providing the mandate to the oversight agency given its prior experience, recognized legitimacy and flexibility. The U.N. governance model already exists and has been put into practice in several instances.²³³ The U.N. has been involved as a de facto occupant on multiple occasions since its inception and has

²²⁹ The attempt to fashion an oversight mechanism by the four Geneva Conventions of 1949 and Additional Protocol I has been a failure. Requiring the parties or the International Committee of the Red Cross to choose the protecting power did not work. Accordingly, the oversight mechanism proposed here should ensure the procedures for the appointment of the oversight mechanism are more detailed and enforceable than the previous attempt. See discussion *supra* Part II.C, and accompanying notes.

²³⁰ See, e.g., BENVENISTI, *supra* note 2, at 32-190.

²³¹ "Political legitimacy is a primary reason to multilateralize [sic] an occupation because international political legitimacy of the occupation is, in some cases, the ultimate litmus test of the success of the military intervention." Harris *supra* note 8, at 38.

²³² See discussion *supra* Part III.D.

²³³ See discussion *supra* Part III.D.1.

developed the most competence in handling multilateral occupations.²³⁴ Moreover, a separate U.N. mandate could be tailored to each specific case allowing flexibility.²³⁵ The U.N., with its prior experience, is best qualified to fashion the method of oversight that will provide a workable set of rules that can be tailored to the particular type of occupation.²³⁶ Thus, the oversight mechanism should have robust powers, should apply in every occupation, and should maintain a multilateral membership, and the U.N. should provide the basic mandate for oversight.

B. Including International Human Rights Law and the Right of Self-Determination

Human rights norms have clashed with the original philosophical underpinnings of the law of occupation set forth in the Hague Regulations over the past sixty years. This clash has sparked a debate over whether human rights norms not already included in the law of occupation framework should apply during times of occupation.²³⁷ Human rights treaties have potentially established human rights as norms that should be included in the law of occupation framework. Additionally, the right to self-determination is one which consistently creates tension in cases of occupation with transformative intent. An updated law of occupation should attempt to resolve these tensions by determining which rights should be included in the law, and clarifying their application.

²³⁴ See discussion *supra* Part III; see also Thomas M. Franck, *Collective Security and UN Reform: Between the Necessary and the Possible*, 6 CHI. J. INT'L L. 597, 598 (2006).

²³⁵ "The UN acts as a gatekeeper to legitimacy through its ability to confer (or withhold) an international seal of approval on occupations." Harris, *supra* note 8, at 25. Professor David Scheffer argues a U.N. mandate serves several purposes, including, among others, promoting legal flexibility in handling transformative occupations and avoiding possible legal liability of the strict requirements of the full application of the law of occupation. Scheffer, *supra* note 204, at 855.

²³⁶ For instance, according to Professor David Scheffer, the U.N. could provide a specific mandate that allows significant deviation from the law of occupation for transformative occupation. In Iraq, "[i]deally, that mandate would implement (1) those principles of occupation law (particularly humanitarian and due process norms) that remain relevant . . . and (2) other principles of modern international law pertaining, for example, to human rights, self-determination . . . to create a legal regime uniquely suitable for the territory in question." Scheffer, *supra* note 204, at 853.

²³⁷ See discussion *supra* Part II.D.

1. *Human Rights*

The rise in importance of international human rights law in the latter half of the twentieth century arguably now requires an occupant to apply minimum international human rights norms regardless of any possible conflicts with the *lex specialis* of the law of war.²³⁸ Several writers have offered solutions to this conflict. This section will discuss some of these theories as a baseline for the debate over how to clarify this issue for an updated treaty law of occupation.

Professor Benvenisti argues that one solution to the problem of the failure of states to appropriately apply occupation law is to “emphasize that the law of occupation applies without respect to the different claims regarding the relevant territory, and at the same time to concentrate on the elaboration of human rights.”²³⁹ He argues that the American and British occupation of Iraq, and U.N. Security Council Resolution 1483 of May 22, 2003,²⁴⁰ explicitly recognize that human rights law operates in occupied territories “in tandem with the law of occupation,” and “may thus complement the law of occupation on specific matters.”²⁴¹ Similarly, Professor Goodman sets forth a framework for the application of human rights norms to the law of occupation.²⁴² His

²³⁸ See, e.g., Goodman, *supra* note 71, at 1600.

²³⁹ BENVENISTI, *supra* note 2, at 190. Professor Roberts also believes that application of international human rights norms by way of reference to human rights conventions in certain instances provide a model for the law of occupation. Roberts, *supra* note 9, at 600-601 (specifying eight instances where “human rights conventions can play an important role in some situations that either constitute occupations, or closely resemble occupations in certain key respects.”)

²⁴⁰ S.C. Res. 1483, ¶ 5, U.N. Doc.S/RES/1483 (May 22, 2003).

²⁴¹ See BENVENISTI, *supra* note 2, at xi; moreover, it is important to note that as the Hague Regulations require that the laws in force in the occupied territory be respected, in occupied countries that are parties to human rights treaties, the occupant may be bound by the human rights treaties by operation of the law of occupation. Hague Regulations, *supra* note 17, art. 43. However, in occupied nations that have not acceded to human rights treaties, the application of the norms of these human rights treaties would be subject to the argument that they did not apply. This is another demonstration of why specificity of the applicable human rights is important. It is essential to provide a uniform application of human rights in all occupations.

²⁴² Goodman, *supra* note 71, at 1598 (stating, “some rules should be addressed to nations not inclined to follow the generally accepted norms expressed as international law and accepted by the community of nations. These rules would

framework calls for “mak[ing] a start with domestic human rights standards” and argues that “many of the enumerated rights [set forth in international and regional human rights conventions] should be guaranteed in a belligerent occupation as well.”²⁴³ He specifies that fundamental social rights of education, welfare, economy, baseline legal rights, and political rights should be guaranteed under an updated law of occupation regime.²⁴⁴ Both of these authors supply meritorious proposals for applying human rights norms to the law of occupation. However, unless such proposals are actually incorporated into an updated treaty, there will be no clarity with respect to which rights apply and when.

This article will not attempt to set forth an all-inclusive list of human rights to be included should a treaty be drafted; however, two proposals stand out. First, it is paramount to keep the law flexible given that the facts of each particular case may vary greatly.²⁴⁵ For example, in a transformative occupation, some political rights might have to be curtailed in the short term while in the long term (should the occupation continue) these same political rights should be reinstated. Second, the law should be clarified to ensure that the principle of necessity as represented in Article 43 of the Hague Regulations is not invoked as a rationale to violate human rights. The phrase “unless absolutely prevented” represents a vague and over-exercised exception to the conservationist principle which has been used to abuse basic human rights, as demonstrated in the case of Germany’s occupation of Belgium during World War I.²⁴⁶

2. *Self-Determination*

Should an updated treaty be put into place, the right of self-determination must also be addressed. Arguably, self-determination, as a subset of human rights, is now recognized as an inalienable right.²⁴⁷ In that vein, it is

give notice to all nations of the minimum standards of occupation acceptable to civilization. The rules would have the additional virtue of permitting officials of non-victorious, errant nations to be tried as criminals.”)

²⁴³ *Id.*

²⁴⁴ *Id.* at 1600-06.

²⁴⁵ *See id.* (arguing “[w]hile it would be tempting to prescribe detailed standards for various types and levels of changes . . . such standards would be too fact-specific to apply generally, and would certainly lose their contemporaneous nature over time.”)

²⁴⁶ *See* discussion *supra* Part III.A.

²⁴⁷ *See* discussion *supra* Part II.D. In addition, the United Nations Charter declares that among its purposes is: “[t]o develop friendly relations among

not surprising that scholars have recognized the right of self-determination as a guiding principle for the law of occupation.²⁴⁸ Professor Benvenisti declares the principle of self-determination as the “existence of a major qualification to the concept of territorial integrity that forms the basis of the law of occupation.”²⁴⁹ It is apparent that the right of self-determination was used as just such a qualification in the case of the occupation of Iraq in 2003, as it formed the basis for the U.N. Security Council Resolution allowing for sweeping transformative changes to the status quo.²⁵⁰ Given the broadly accepted application of this right and its use as justification for transformation in recent occupations, the right should be incorporated in an updated treaty defining the law of occupation. The right of self-determination must be balanced with the conservationist principle, but it must not be left out of the equation. This concept of self-determination, as an emerging human right norm, overlaps with the consideration of transformative objectives and how they should be addressed in the updated law.

C. Occupations with Transformative Objectives

Assuming occupants, including U.N. authorized multilateral forces, will continue to have transformative objectives in some cases in the foreseeable future, the law of occupation must account for these types of occupations.²⁵¹ Occupations with transformative objectives should be handled by at least two constructs in an updated law. First, the requirement discussed above for reliance upon a U.N. or other international oversight mechanism will be imperative in

nations based on respect for the principle of equal rights and self-determination of peoples . . .” U.N. Charter art. 1; *see also* Jung, *supra* note 99, (stating, “Throughout the twentieth century, however, the international community has gradually accepted this theory as one of the most robust principles of international law. It is even believed to constitute a part of *jus cogens*.”) (citing Mitchell A. Hill, *What The Principle of Self-Determination Means Today*, 1 ILSA J. INT’L & COMP. L. 119, 120-23 (1995) and Report of the International Law Commission, U.N. GAOR, 56th Sess., Supp. No. 10, at 207-08, U.N. Doc. A/56/10 (2001)).

²⁴⁸ *See* BENVENISTI, *supra* note 2, 175-177 (discussing international reaction to the creation of Bangladesh as an entity independent from Pakistan and arguing that the claim of Bangladeshi self-determination and the international repulsion of the Pakistani measures to suppress that claim, “overcame the traditional concern for sovereignty and territorial integrity of the occupied Pakistani territory.”)

²⁴⁹ *Id.* at 176.

²⁵⁰ *See* discussion *supra* Part III.D.2.

²⁵¹ “The need for foreign military presences with transformative political purposes is not going to disappear.” *See* Roberts, *supra* note 9, at 618.

cases of transformative occupation to prevent abuses of this sweeping power.²⁵² Second, as Professor Adam Roberts points out, transformative objectives should be limited to extreme cases.²⁵³ Contrary to his argument,²⁵⁴ however, the proposed exception to the conservationist principle for transformative objectives should be formalized in an updated treaty. The proposed treaty would ensure the exception occurs only rarely. It would further establish a mechanism for overseeing the occupation by notifying the occupant that its conduct will be regulated and that it may be subject to liability for violations of the law. In sum, the problem of transformative occupations can be tackled by strong international oversight and by putting a system in place designed to address concerns prior to the occurrence of an invasion.

V. CONCLUSION

State practice, modern notions of sovereignty, and the rise of human rights have marginalized the usefulness of the original law of occupation framework. Nearly every modern occupant has avoided applying the law in whole or in large part during de facto occupations. The law must be updated to make it relevant to modern notions and practice. Applying these new principles in an ad hoc manner to the old framework will not suffice to make the law flexible and coherent.

The new framework should implement strong international oversight, afford human rights protections, address the potential for transformative occupations, and remain flexible enough to address the multitude of modern military operations that amount to de facto occupations. At the same time, a new law should not jettison the old model; the traditional conservationist approach to the local political, economic, and social system should still be applied as far as possible. Finally, it is not enough to continually revisit the

²⁵² This section will not repeat the proposal for an oversight mechanism; however, it is important to note that such a mechanism, if given broad enough powers, should assist in preventing problems. See discussion *supra* Part IV.A.

²⁵³ “Only in exceptional circumstances are occupations likely to bring about a successful democratic transition in a society. There is ample ground for skepticism about the propositions that democracy can be spread by the sword, and that the holding of multiparty elections in itself constitutes evidence that a society is moving beyond authoritarianism.” Roberts, *supra* note 9, at 580.

²⁵⁴ Professor Roberts does not believe an updated treaty for the law of occupation would remedy the problem of transformative occupations. Rather he promotes an ad hoc approach “to secure a variation in the application of the law by obtaining a resolution from the UN Security Council (or other major international body) setting out the goals of the occupation.” *Id.* at 622.

ongoing debate over the possible modifications to the law; only by attempting to update the law in writing can the law be moved forward in a useful, transparent, and authoritative manner.

ONE SMALL STEP FOR A SUBMERSIBLE, ONE GIANT LAND GRAB FOR RUSSIAN- KIND: AN EVALUATION OF RUSSIA'S CLAIM TO THE NORTH POLE UNDER INTERNATIONAL LAW

Lieutenant Commander J. Trent Warner *

*The sea, washing the equator and the poles, offers
its perilous aid, and the power and empire that
follow it, — day by day to his craft and audacity.
"Beware of me," it says, "but if you can hold me, I
am the key to all the lands."*¹

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¹ RALPH W. EMERSON, *Wealth*, in THE CONDUCT OF LIFE 71, 77 (Ticknor and Fields, 1860).

I. INTRODUCTION

As temperatures in the Arctic rise,² regional tensions between the five competing Polar nations, i.e., Denmark, Norway, Canada, Russia, and the United States (U.S.), likewise begin to increase.³ Locked away beneath the floor of the icy Arctic Ocean are potentially vast amounts of oil and gas deposits.⁴ For the past several years the Arctic ice has continued to recede, allowing greater access to shipping in the Arctic.⁵ An Arctic Ocean free of ice opens the possibility of energy exploitation as well as a more direct route for shipping to transport goods and fuel between Europe and Asia through the so-called Northwest Passage.⁶

On August 2, 2007,⁷ a Russian Federation submersible placed a small titanium Russian flag on the Arctic Sea floor directly beneath the North Pole.⁸

² See Barry Hart Dubner, *On the basis for Creation of a New Method of Defining International Jurisdiction in the Arctic Ocean*, 13 MO. ENVTL. L. & POL'Y REV. 1 (2005) (discussing the need to create a novel jurisdiction called an "Arctic indicator").

³ See *id.*, discussing the rising tensions in the region dealing mainly with Denmark.

⁴ Ben Leapman, *Denmark joins race to claim North Pole*, TELEGRAPH, available at

<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/08/12/wpole112.xml> (last updated Aug. 14, 2007) (noting that "The U.S. Geological Survey has estimated that the Arctic has up to 25 per cent of the world's undiscovered oil and gas."); see generally R.R. CHURCHILL AND A. V. LOWE, *THE LAW OF THE SEA* 141 (Prof. Dominic McGoldrick ed., Juris Publishing 1999) (1983).

⁵ See *Arctic Sea Ice Shatters All Previous Record Lows*, National Snow and Ice Data Center (NSIDC), Press Release, Oct. 1, 2007, http://nsidc.org/news/press/2007_seaiceminimum/20070810_index.html (discussing the fact that any sea going vessel for the first time could have traversed the Northwest Passage in 2007 without the aid of an ice breaker).

⁶ Doug Struck, *Russia's Deep-Sea Flag-Planting at North Pole Strikes a Chill in Canada*, WASH. POST, Aug. 7, 2007, at A8. Further discussion of the Northwest Passage and the validity of global warming are beyond the scope of the present article.

⁷ Mike Eckel, *Russia defends North Pole flag-planting*, Aug. 8, 2007, http://www.usatoday.com/tech/science/2007-08-08-russia-arctic-flag_N.htm?csp=34 (showing a picture of the Russian Arctic expedition leader, Artur Chilingarov, holding a photo of the Russian flag placed on the Arctic Sea floor, with the photograph dated, "02.08.2007").

⁸ Leapman, *supra* note 4.

After planting the flag, the expedition leader, Artur Chilingarov, angered many by stating, "Russia must win. Russia has what it takes to win. The Arctic has always been Russian."⁹ Even as Russia extolled the expedition team members as heroes,¹⁰ Russian officials attempted to minimize the significance of the event by arguing that the flag does not represent a Russian claim to the sea floor under the North Pole,¹¹ but was merely a symbol of its scientific achievement, no different than when the U.S. planted its own flag on the moon.¹²

Canada, the United States, and Denmark were quick to respond to Russia's actions. Canadian Foreign Minister Peter MacKay stated that, "[l]ook, this isn't the 15th century. You can't go around the world and just plant flags and say 'We're claiming the territory.'"¹³ Soon after, Canada announced its intentions to build two new military bases in the Arctic and to build a deepwater port at Nanisivik, Baffin Island, to help secure its national interests in the region.¹⁴ The United States expressed a similar intention to increase its own presence in the Arctic. For instance, Admiral Thad Allen, Commandant of the U.S. Coast Guard, declared his intention to increase U.S. "Arctic Domain Awareness."¹⁵ The Coast Guard intends to build a new station at Barrow, Alaska,¹⁶ and to increase Coast Guard patrol flights to the North Pole,¹⁷ while at the same time continuing its ongoing efforts to map the Arctic Sea floor.¹⁸

⁹ Eckel, *supra* note 7.

¹⁰ *Id.*

¹¹ See Staff Writers, *Russia Guided By International Law in Its Polar Shelf Probe*, Aug. 7, 2007,

http://www.terraviva.com/reports/Russia_Guided_By_International_Law_In_Its_Polar_Shelf_Probe_999.html (discussing that "when explorers reach an unexplored point they leave flags there").

¹² See Eckel, *supra* note 7, discussing the fact that the Russian Foreign Minister, Sergey Lavrov, believes that the U.S. flag planting on the moon and Russia's flag planting on the Arctic Ocean are comparable.

¹³ Staff Writers, *supra* note 11.

¹⁴ Leapman, *supra* note 4.

¹⁵ Admiral Thad Allen, Commandant of the U.S. Coast Guard, Address at the 2007 Innovation Expo (Nov. 1, 2007),

http://cgvi.uscg.mil/media/main.php?g2_itemId=185784.

¹⁶ Matthew L. Wald and Andrew C. Revkin, *New Coast Guard Task in Arctic's Warming Seas*, Oct. 19, 2007,

<http://www.nytimes.com/2007/10/19/us/19arctic.html>.

¹⁷ *Coast Guard Conducting First North Pole Flight*, Press Release, Oct. 25, 2007, <http://www.piersystem.com/go/doc/786/179980/&printerfriendly=1>.

¹⁸ *Id.*

Denmark has gone even further by announcing its intention to also lay claim to the North Pole in order to counter Russia's claim.¹⁹

The international uproar was more pronounced because of the context in which Russia planted its flag on the Arctic Sea floor. Russia's actions came on the heels of its formal submission to the Commission on the Limits of the Continental Shelf (Commission). In its submission, Russia proposed extending its sovereignty over the Arctic Sea floor up to and including the North Pole.²⁰ Arguably, this marked the beginning of increased competition for resources on the Arctic seabed and has significantly increased tensions in the region. The increase in regional tension has helped spotlight several problems under international law that are inherent in the process of extending a coastal state's sovereignty over the continental shelf beyond its 200 nautical mile Exclusive Economic Zone (EEZ).²¹

Russia's efforts to extend its claim of sovereign control over the Arctic Sea floor, up to and including the North Pole, have been procedurally consistent with its obligations under Article 76 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS III).²² However, Russia's claim is excessive and runs afoul of the substantive law under the same article of UNCLOS III. Because of continuing uncertainty regarding the limited science²³ of the continental shelf and the Commission's application of that science to the law, predicting the exact outcome of Russia's claims to the Arctic Sea floor is problematic. The validity of Russia's claim ultimately depends on its conformity with the recommendations of the Commission in accordance with UNCLOS III. Based on what is currently understood about the geology and

¹⁹ Leapman, *supra* note 4.

²⁰ Letter by the Secretary General of the U.N. dated 20 Dec. 2001 ((Reference: CLCS.01.2001.LOS (Continental Shelf Notification), see Table 1. Point No. 31, coordinates 90.0000 N, 0.0000 E)).

²¹ See *infra* notes 101-105 and accompanying text, explaining a coastal state's rights to exploit the resources in its EEZ.

²² See CHURCHILL AND LOWE, *supra* note 4, discussing the fact that the 1958 Geneva Convention on the Continental Shelf was one of four conventions governing international oceans law. These four conventions are sometimes referred to as UNCLOS I. A second conference held in 1960 to address the issue of the limits of the territorial sea is often referred as UNCLOS II, but did not conclude with an adopted agreement. The conference which began in 1973 and concluded with the adoption of the United Nations Convention on the Law of the Sea in 1982 is often referred to as UNCLOS III.

²³ See *infra* note 124 and accompanying text for an explanation of "limited science."

geomorphology²⁴ of the seafloor beneath the North Pole, the presumed basis of Russia's claim, and the express language of Article 76 of UNCLOS III, international law should prevent a Russian claim from extending as far north as the North Pole. This conclusion is by no means absolute, and the Commission could eventually provide Russia with a favorable recommendation. Furthermore, the lack of transparency, due to the Commission's rules of confidentiality, may impede procedural accountability.

This article will analyze the legal impact of Russia's controversial flag-planting in conjunction with its excessive claim over the North Pole on the Arctic Sea floor and conclude that both acts are unsupportable under international law. Before exploring the significance of Russia's act of planting a flag in Section III,²⁵ it will be necessary to first discuss the historical bases for claiming sovereignty over a state's continental shelf in Section II,²⁶ and discuss some of the root causes of the inherent problems of continental shelf law. Section IV will explain why Russia's claim is not supportable under either treaty or customary international law, but is uncertain due to problems in the use of science.²⁷ Finally, Section V will offer a few concluding thoughts regarding continental shelf law.²⁸

II. HISTORICAL OVERVIEW OF CONTINENTAL SHELF LAW

Modern treaty law has all but foreclosed the ability of a state to extend its sovereignty beyond its current borders, including its maritime boundaries.²⁹ Treaties such as UNCLOS I, UNCLOS III, the U.N. Charter, the Antarctic Treaty, and the Outer Space Treaty all contain provisions which operate to prevent a nation from extending its sovereignty beyond its existing borders.³⁰ However, both treaty and customary international law provide for one notable exception to the general rule prohibiting state expansionism: continental shelf law. Assuming a coastal state's effective compliance with the applicable treaty governing its continental shelf, UNCLOS I or UNCLOS III, or the principles of

²⁴ See *infra* notes 99-102 and accompanying text for definitions of these terms.

²⁵ See *infra* notes 139-73 and accompanying text.

²⁶ See *infra* notes 29-138 and accompanying text.

²⁷ See *infra* notes 174-280 and accompanying text.

²⁸ See *infra* notes 281-88 and accompanying text.

²⁹ See generally Bernard H. Oxman, *Centennial Essay: The Territorial Temptation: A Siren Song At Sea*, 100 AM. J. INT'L L. 830, 831 (2006) (discussing the influence that modern international law has had on the historical "temptation" of nations to expand their sovereignty on land and at sea).

³⁰ See generally *infra* notes 155-60 and accompanying text, discussing a general prohibition against the extension of sovereignty.

customary international law, a coastal state may legally extend its sovereign rights to the seafloor beyond its current maritime boundaries. The historical compromises made during the development of continental shelf law helped sow the seeds of UNCLOS III's unique combination of law and limited science.³¹

A. The Truman Proclamation

By 1930, customary international law recognized a nation's legitimate right to claim not only the waters of its territorial sea, but the seabed and subsoil beneath.³² During the middle of the 20th century, nations began to take a greater interest in laying claim to the resources of the ocean floor.³³ Until this time, nations lacked the technical ability to exploit the resources of the deep ocean floor.³⁴ As these technical skills developed, nations began to assert their sovereignty over the resources of the continental shelves.³⁵

In 1945, President Harry S. Truman made the first clear assertion that the continental shelf, contiguous to a coastal state, constituted part of the state and was therefore subject to its sovereign power.³⁶ President Truman proclaimed, "[t]he Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, as appertaining to the United States, subject to its jurisdiction and control."³⁷ Truman's theory was that because a continental shelf is attached to the continental landmass, the "contiguous" nature of shelves to the land area of a nation makes extension of state sovereignty to them "reasonable."³⁸ The Truman Proclamation was almost

³¹ See *infra* note 124 and accompanying text.

³² See CHURCHILL AND LOWE, *supra* note 4, at 142-43 (discussing the fact that before 1930, coastal states gained proprietary rights to submarine resources by "exploiting" those resources. One of the earliest examples of exploitation of the ocean seafloor was United Kingdom mining operations from the shore out under the ocean off of Cornwall. Another early example of gaining proprietary rights to submarine resources through exploitation was France's sponge fisheries beyond the territorial sea off Tunis).

³³ Thomas H. Heidar, *Legal Aspects of Continental Shelf Limits*, in LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS 20 (Myron H. Nordquist, John N. Moore & Thomas H. Heidar eds., 2004).

³⁴ *Id.*

³⁵ *Id.*

³⁶ CHURCHILL AND LOWE, *supra* note 4, at 143; see also Presidential Proclamation No. 2667 (Sept. 28, 1945).

³⁷ CHURCHILL AND LOWE, *supra* note 4, at 144.

³⁸ *Id.*

universally accepted in the international community and has become known as one of the few historical examples of customary international law developing spontaneously.³⁹

The Truman Proclamation articulated a nation's legitimate right to extend its sovereignty over its continental shelf. Yet the Proclamation itself did not articulate any boundaries or limits as to what a state may consider as belonging to its continental shelf.⁴⁰ Attached to the Proclamation was a Press Release, which attempted to define the continental shelf as extending up to a depth of 600 feet of water.⁴¹ It is, however, unclear what legal effect, if any, the international community gave to the attached press release.

Soon other claims were made that would greatly affect future definitions of the "continental shelf." For example, Chile, Ecuador, and Peru agreed to claim sovereign rights over the seabed and subsoil out to a distance of 200 nautical miles despite the fact that their continental shelf does not extend out to 200 nautical miles.⁴² Such claims to the sea floor not based on the existence of a continental shelf helped provide yet another criterion for determining the limits of the continental shelf, that of distance from a state's coastline rather than depth of water. The notion that nations could claim the sea floor without an accompanying physical continental shelf inspired a new concept in maritime law—that of an EEZ with its accompanying rights over natural resources, including the seafloor and subsoil beneath.⁴³

³⁹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987)(discussing a State's sovereignty over its "continental shelf as the natural prolongation of the land territory of the coastal State." President Truman's Proclamation in 1945 is generally cited as the "classic" example of "instant customary international law" due to the speed with which similar claims were made by other coastal States); see also Heidar, *supra* note 33, at 21, citing the Truman Proclamation as a "classic example of the formation of a new rule of customary law."

⁴⁰ See CHURCHILL AND LOWE, *infra* note 4, at 146 (discussing the fact that the Truman Proclamation did not set a "seaward limit" on the continental shelf).

⁴¹ Heidar, *supra* note 33, at 21.

⁴² *Id.* The basis for this claim was the fact that these three countries have a greatly reduced continental shelf. Although this claim encompassed aspects of the seafloor that did not include a *geomorphologic* feature called "continental shelf," all of the claimed area would eventually be part of the *legal* definition of a "continental shelf."

⁴³ CHURCHILL AND LOWE, *supra* note 4, at 160.

Thus, customary international law recognized a nation's right to extend its sovereignty over the resources of the seafloor beyond the traditional maritime boundary of only 3 nautical miles⁴⁴ so long as the extension was over an appurtenant continental shelf. The effect of the emerging custom of continental shelf law was that all a coastal state need do to extend its sovereignty was simply to define the continental shelf as it pleased and lay claim to the accompanying resources. It was the uncertainty over what constituted a "continental shelf" that led the international community in 1958 to seek a more exact definition in a convention.

B. The 1958 Geneva Convention on the Continental Shelf

In 1950, the International Law Commission (ILC) commenced a study to consider the international law governing the high seas.⁴⁵ Part of the study was devoted to developing a more useful definition of the "continental shelf."⁴⁶ By 1951, the ILC produced draft articles that included a definition of the continental shelf based on the notion of "exploitability."⁴⁷ The ILC then changed the basis of its definition from exploitability to that of a fixed depth of water.⁴⁸ The

⁴⁴ Heidar, *supra* note 33, at 20; *see also* CHURCHILL AND LOWE, *supra* note 4, at 77-78 (discussing the history of the 3 nautical mile territorial sea claim. The "cannon-shot" rule is often cited as the basis of setting a nation's territorial sea limit. However, as Churchill and Lowe explain, at the time of the emergence of the "cannon-shot" rule, cannons did not necessarily fire out to a distance of 3 miles. However, the "cannon-shot" was one method used by coastal states to set the breadth of its territorial sea. Another method was the "fixed distance" rule, which set the limit out to the "Scandinavian league" or 4 miles. Three miles was adopted by the United States in 1793. Soon 3 miles was generally adopted by other states and the "cannon-shot" rule became associated with the method of setting the 3 mile territorial sea limit).

⁴⁵ 2 CENTER FOR OCEANS LAW AND POLICY, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 828 (Myron H. Nordquist, et. al. eds., 1993) [hereinafter A COMMENTARY].

⁴⁶ *Id.*

⁴⁷ *Id.* "Exploitability" means that a nation may claim sovereign rights over a continental shelf out to a distance where the nation still has a realistic ability to actually take advantage of the shelf's resources. Once the water gets too deep or the technical skill becomes inadequate to exploit the resources, the nation's sovereignty ends.

⁴⁸ *Id.* A "fixed depth" basis would prevent any further extension of a nation's sovereignty beyond that point where the continental shelf slopes down to a set depth of water. Any portion of the shelf that might continue to extend beyond that point would be unavailable to the nation for sovereignty purposes.

reason for changing the basis of the definition was the concern felt by some countries that the “exploitability criterion” would cause conflict between nations due to “vagueness.”⁴⁹ Soon after, the ILC incorporated *both* the exploitability and depth-based criteria into its definition of a continental shelf.⁵⁰ Thus, the 1958 Convention on the Continental Shelf (UNCLOS I) defines the continental shelf as extending:

(a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; and (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.⁵¹

In comparison to the Truman Proclamation, the ILC’s definition provided only slightly more guidance regarding the extent of national claims over the continental shelf and it offered no additional guidance as to the nature of the continental shelf itself. Under the ILC regime, a nation could choose either of the two criteria to determine the extent of its claim over the continental shelf.⁵² A nation could choose the depth criteria, where the extent of its claim would be limited to a distance where the water reached a depth of 200 meters, or the exploitability criteria, where the extent of its claim was limited to a distance where a nation could realistically exploit the natural resources of the seafloor.⁵³ Clearly, the most advantageous choice a nation could make to extend its continental shelf under UNCLOS I was the exploitability criteria. The depth criteria could be easily determined and thus final, but the exploitability criteria

⁴⁹ CHURCHILL AND LOWE, *supra* note 4, at 146.

⁵⁰ A COMMENTARY, *supra* note 45, at 828.

⁵¹ Geneva Convention on the Continental Shelf art. 1, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311 [hereinafter 1958 Convention].

⁵² See generally A COMMENTARY, *supra* note 45, at 828 (discussing the influence of the Inter-American Specialized Conference on Conservation of Natural Resources: The Continental Shelf and Marine Waters in 1956 on the ILC’s decision to keep the option of the exploitability criterion, in addition to fixed depth, as one of the methods available to a coastal state to help it determine the extent of its continental shelf).

⁵³ See generally CHURCHILL AND LOWE, *supra* note 4, at 146 (discussing the notion that it was believed that the exploitation of the continental shelf beyond a depth greater than 200 meters was unlikely in the near term).

offered a coastal state the chance to continue to extend its sovereignty out further to sea as technology advanced.⁵⁴

As with the Truman Proclamation, the only real limit inherent in the definition of the continental shelf under UNCLOS I is the implied limit that a nation's claim must be confined to a continental "shelf." This limit is at least implied from the title, that is, a coastal state may claim the submerged continental shelf of the continental land mass "adjacent"⁵⁵ to its coast. Unfortunately, UNCLOS I provided no guidance on this point because the continental shelf definition provided no scientific criteria with which to determine the characteristics of a continental shelf.⁵⁶ Without a clearer process for a nation to determine what was and was not part of its continental shelf, a state could simply begin the exploitation of the sea floor as far out as it could reach providing some colorable scientific argument that the submerged land was part of its continental shelf. Without a better definition for continental shelf no state could challenge another coastal state's claim even if it possessed more accurate scientific data of the characteristics of the submerged land in question.

Although UNCLOS I was widely accepted by the international community, the convention was criticized for its inherent ambiguities regarding the limits of the continental shelf. For example, in 1969, the General Assembly of the U.N. issued a resolution criticizing the convention's lack of precision in the definition describing the "limits of the area over which a coastal State exercises sovereign rights for the purpose of exploration and exploitation of the natural resources."⁵⁷ That same resolution also argued that "customary international law on the subject was inconclusive."⁵⁸ The international

⁵⁴ See generally Heidar, *supra* note 33, at 22-23 (discussing the fact that many feared that under the exploitability criterion the development of new technology might enable nations to lay claim to the whole ocean floor).

⁵⁵ See generally CHURCHILL AND LOWE, *supra* note 4, at 147 (discussing the use of the word "adjacent" in relation to the 1958 Convention's definition of the "continental shelf." Churchill and Lowe noted that the use of "adjacent" "... raised questions: was it intended to restrain the seaward limit of exploitability, or did it simply mean that, to qualify as continental shelf, the sea bed must be one continuous mass, unbroken by troughs or depressions?")

⁵⁶ See generally A COMMENTARY, *supra* note 45, at 873 (discussing the fact that the definition of the continental shelf as set forth in Art. 76 of UNCLOS III is a juridical definition. UNCLOS III followed the "approach which has been taken since the articles drafted by the ILC in 1956." The ILC articles laid the foundation for the definition of the continental shelf in the 1958 Convention).

⁵⁷ See *id.*, at 829 (quoting Gen. Ass. Res. 2574 A(XXIV) of 15 Dec. 1969).

⁵⁸ *Id.*

community was concerned with two main issues regarding the 1958 Convention. They were concerned first that technological advances in the near future would render the exploitability criteria “unsatisfactory,” and second, that the emerging notion of the “common heritage of mankind”⁵⁹ over the oceans and their resources “made it essential to define the limits of the national jurisdiction over the continental shelf.”⁶⁰ Thus under UNCLOS I, a coastal state is free to define the limits of its continental shelf; so long as a coastal state restricts its claim to its adjacent continental shelf and does not exceed a distance beyond either 200 meters in depth or a distance beyond where it has the technical ability to exploit the resources, it may legally lay claim to the territory.⁶¹

As early as 1958, it became apparent that without a more precise definition of what constituted a continental shelf, nations would soon obtain the ability to exploit any part of the ocean floor, regardless of depth.⁶² In 1969, the International Court of Justice (ICJ) considered the question of continental shelf delimitation in the *1969 North Sea Continental Shelf Case*.⁶³ This case would have a “big influence” on the future development of continental shelf law under UNCLOS III.⁶⁴

C. The 1969 North Sea Continental Shelf Case

In 1967, the governments of Denmark, Germany, and the Netherlands requested that the ICJ decide “[w]hat principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea”⁶⁵ Prior to requesting ICJ intervention, Denmark and the Netherlands had purported to delimit the continental shelf

⁵⁹ The “common heritage of mankind” is based on the notion that there exists a portion of the oceans and their resources that may not be claimed by any one state and that the international community as a whole should enjoy the resources of the high seas and their accompanying sea beds and subsoil on an equitable basis. See generally CHURCHILL AND LOWE, *supra* note 4, at 227 (quoting Gen. Ass. Res. 2749 (XXV), 17 December, 1970).

⁶⁰ A COMMENTARY, *supra* note 45, at 829.

⁶¹ This sentence is written in the present tense because UNCLOS I is still the law for some coastal states, including the United States, which have not yet ratified or acceded to UNCLOS III.

⁶² See generally CHURCHILL AND LOWE, *supra* note 4, at 145-47.

⁶³ North Sea Continental Shelf (F.R.G. v. Den./F.R.G. v. Neth), 1969 I.C.J. 3 (Feb. 20, 1969).

⁶⁴ Heidar, *supra* note 33, at 22.

⁶⁵ North Sea Continental Shelf, *supra* note 63, at 9-11.

boundary as between themselves per the provisions of the 1958 Convention.⁶⁶ Both Denmark and the Netherlands enjoy comparatively convex shorelines in comparison to Germany's concave shoreline, which sits in between the other two countries.⁶⁷ By applying the equidistance provision of article 2 to derive the continental shelf boundaries, Denmark and the Netherlands left to Germany a comparatively small triangle-shaped continental shelf area,⁶⁸ despite the fact that Germany's shoreline, although concave, is roughly the same length as that of the other two nations.⁶⁹ ICJ adjudicated the case in 1969 and announced its decision.⁷⁰ The decision had a profound impact on the development of continental shelf law. In the North Sea case, the ICJ stated that the:

most fundamental of all rules relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it,—namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory in to and under the sea exists *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short there is here an inherent right.⁷¹

This pronouncement reconfirmed the status of the Truman Proclamation as a firmly rooted principle of customary international law.⁷²

The ICJ was the first to employ the phrase “natural prolongation,”⁷³ though the Truman Proclamation was first to recognize the concept that a nation is entitled to that portion of the submerged landmass that constitutes an “extension of the landmass from the coastal nation” using a similar phrase,

⁶⁶ *Id.* at 15-17.

⁶⁷ *Id.* at 16-18.

⁶⁸ *Id.* at 18.

⁶⁹ *Id.* at 51.

⁷⁰ North Sea Continental Shelf, *supra* note 63, at 3.

⁷¹ *Id.* at 22.

⁷² See generally CHURCHILL AND LOWE, *supra* note 4, at 144-45 (discussing the fact that “[s]o firmly was the principle of coastal State rights over the continental shelf established that in 1969 . . .” the ICJ stated, among other things, that continental shelf rights are an “inherent right”).

⁷³ A COMMENTARY, *supra* note 45, at 843, n.4.

“naturally appurtenant.”⁷⁴ Although UNCLOS I was in existence and had been ratified by the Netherlands and Denmark, the third state party to the 1969 North Sea Continental Shelf Case, Germany, had only signed but never ratified the convention.⁷⁵ As such, UNCLOS I was binding only between the Netherlands and Denmark and not on Germany, to which only customary international law applied.⁷⁶ Thus, the ICJ did not apply UNCLOS I to derive those principles that should govern the delimitation of the continental shelf among the three parties.⁷⁷ Instead, the ICJ focused on several key principles, rooted in the Truman Proclamation, to adjudicate the North Sea Case.⁷⁸

The first principle was that the continental shelf is the “natural prolongation”⁷⁹ of the coastal state’s land territory.⁸⁰ The second principle was the notion that the delimitation of the continental shelf, as between nations, must be determined by agreement.⁸¹ The third principle was that the delimitation should be decided upon equitable principles.⁸² The drafters of UNCLOS I

⁷⁴ Presidential Proclamation 2667 of Sept. 28, 1945, “Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf,” 10 Fed. Reg. 12,303 (Oct. 2, 1945) (stating that “. . . the continental shelf may be regarded as an extension of the land mass of the coastal nation and thus naturally appurtenant to it”).

⁷⁵ North Sea Continental Shelf, *supra* note 63, at 25.

⁷⁶ *Id.* at 25-26.

⁷⁷ *Id.* at 46.

⁷⁸ *See id.*, at 39 (discussing the fact that ICJ held that some provisions of UNCLOS I may be reflective of customary international law and some provisions did not. For example, the ICJ reasoned that Article 12 of the Convention allowed nations to make reservations to any part of the Convention except articles 1-3, as they were “ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf....” On the other hand, the ICJ held that Article 6, regarding the equidistance principle, did not reflect customary international law). *See infra* note 80 and accompanying text.

⁷⁹ *See generally supra* notes 75-76 and accompanying text (discussing the fact that although the Truman Proclamation does not use the phrase “natural prolongation” the language of the Truman Proclamation clearly inspired this principle).

⁸⁰ North Sea Continental Shelf, *supra* note 63, at 31.

⁸¹ *Id.* at 48

⁸² *Id.* *See also id.* at 34, in which the ICJ quotes from the Truman Proclamation: “. . . such boundaries shall be determined by the United States and the State concerned in accordance with equitable principles.” The ICJ further states that “[t]hese two concepts, of delimitation by mutual agreement and

expressly included only one of these three fundamental principles in the articles of that convention, i.e., mutual agreement.⁸³ While accepting the three principles as general principles of international law, the ICJ also rejected the notion that UNCLOS I should have universal application regardless of a party's status vis-à-vis the Convention. For example, the ICJ rejected as customary international law the principle of "equidistance."⁸⁴ As the court stated, "[e]quity does not necessarily imply *equality*."⁸⁵

In addition to listing what it considered to be governing principles of customary international law regarding the continental shelf, the ICJ also defined the continental shelf as:

an area physically extending the territory of most coastal States into a species of platform....The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whither the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong.⁸⁶

In using the phrases "species of platform," "configurational features," and the term "geology" to describe the continental shelf, the ICJ effectively recognized the legitimacy in considering not only the physical shape of the continental shelf, called "geomorphology," but also the composition of the submerged

delimitation in accordance with equitable principles, have underlain all the subsequent history of the subject." The ICJ did not provide an exact definition of what exactly constitutes "equitable principles." *But see id.* at 48 (ICJ stating that at the very least the parties should (1) negotiate in good faith, (2) consider all of the facts and various methods of boundary delimitation, including equidistance, and (3) not allow the shelf claim of one party to encroach upon the natural prolongation of another party's shelf.

⁸³ 1958 Convention, *supra* note 57, at art. 6.

⁸⁴ North Sea Continental Shelf, *supra* note 63, at 45; *see also id.* at 20 (noting that equidistance is, under UNCLOS I a mandatory rule of law set forth in Article 6 that states that in the absence of agreement, ". . . all continental shelf boundaries must be drawn by means of an equidistance line . . . a line every point on which is the same distance away from whatever point is the nearest to it on the coast of each of the countries concerned").

⁸⁵ *Id.* at 49 (emphasis added).

⁸⁶ *Id.* at 51.

physical feature in question, more broadly called “geology.”⁸⁷ Physical shape and composition as factors in determining a coastal state’s continental shelf were eventually incorporated into UNCLOS III, as well as a third factor having nothing to do with shape or composition, the legal continental shelf. Ultimately, the Court’s three principles of “natural prolongation,” delimitation by agreement, and agreement based upon equitable principles, would help lay the foundation of continental shelf law in UNCLOS III.

D. The 1982 United Nations Convention on the Law of the Sea—Article 76

The provisions of UNCLOS III dealing with a nation’s sovereign rights over its adjacent submerged land are convoluted and confusing, to say the least. These complex negotiated provisions of UNCLOS III were designed to help ensure that coastal states are able to enjoy, to the maximum extent *reasonable*, all the submerged natural resources adjacent to their coasts.⁸⁸ The provisions of UNCLOS III offer a coastal state two methods whereby it may assert continental shelf rights. A coastal state may look to either the EEZ provisions of articles 55 to 75 or the continental shelf provisions of article 76 of UNCLOS III to help preserve its sovereign rights over its submerged natural resources adjacent to its coasts.⁸⁹ However, it is still a challenge to determine exactly what the continental shelf is and how to find its outer limits.

During the many years that UNCLOS III was being negotiated, the international community struggled to derive a definition of the continental shelf that would satisfy various competing interests. Nations with little or no continental shelf, for example, argued that distance from the coastline should be the main criteria in determining the limits of the continental shelf, namely 200 nautical miles.⁹⁰ However, more industrialized nations, such as the United States, the Soviet Union, and Canada, did not wish to cede any portion of their continental shelves that extended beyond 200 nautical miles.⁹¹ The international community compromised on this point and created a hybrid legal regime governing the continental shelf that took into account both the interests of

⁸⁷ See *infra* notes 104-105 and accompanying text for definitions of these terms.

⁸⁸ See generally CHURCHILL AND LOWE, *supra* note 4, at 149 (discussing the fact that provisions of UNCLOS III essentially allow coastal states to seek “inclusion within national jurisdiction of substantially the whole of the continental margin . . .”).

⁸⁹ *Id.*, at 145.

⁹⁰ A COMMENTARY, *supra* note 45, at 831.

⁹¹ CHURCHILL AND LOWE, *supra* note 4, at 148.

nations with little or no continental shelves and those with continental shelves extending beyond 200 nautical miles.⁹² Article 76 of UNCLOS III provides:

The continental shelf of a coastal State comprises the seabed and the subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.⁹³

Thus, Article 76 preserves the right of nations to extend their sovereignty over the sea floor out to a distance of 200 nautical miles, or further if their continental shelves extend out beyond that distance. As a compromise provision, Article 76 sought to address the various interests of the international community.⁹⁴ In order to derive an agreement that would appease all the parties, the negotiating states were compelled to include an additional compromise on the issue of continental shelf claims beyond 200 nautical miles with those espousing the notion that the seabed was the “common heritage of mankind.”⁹⁵ UNCLOS III balanced these interests by requiring a nation that exploits its continental shelf beyond 200 nautical miles to make contributions to be distributed back to more developing states.⁹⁶ Although scholars have felt compelled to demur the characterization that this section is particularly controversial,⁹⁷ it was the

⁹² Heidar, *supra* note 33, at 22-23.

⁹³ 1982 United Nations Convention on the Law of the Sea, Art. 76(1), December 10, 1982, U.N. document A/Conf.62/122, *reprinted in* 21 I.L.M. 1261-1354 (1982) [hereinafter 1982 Convention].

⁹⁴ A COMMENTARY, *supra* note 45, at 834.

⁹⁵ *Id.* at 832-36. *See supra* note 60 and accompanying text for a discussion of the “common heritage of mankind.”

⁹⁶ *See* 1982 Convention, *supra* note 93, at art. 82.

⁹⁷ *See* John Norton Moore, United States Adherence to the Law of the Sea Convention: A Compelling National Interest 29 (May 12, 2004) (unpublished prepared testimony before the House Committee on International Relations, on file with the Center for Oceans Law and Policy, University of Virginia) (discussing why the belief that ratifying UNCLOS III will subject the United States to an international tax is invalid: “Similarly, the Convention provides for minimal revenue sharing for oil and gas development in areas beyond the 200 mile economic zone. Such revenues, which would amount to an average of two to five percent over the life of a well, were an enormous bargain for the United States as payment in return for our obtaining sovereign rights over resources in

negotiations dealing with the process of determining the character and outer limit of a nation's continental shelf that make the provisions of Article 76 of UNCLOS III problematic to this day.⁹⁸

1. EEZ Rights to the Sea Floor

There are two methods a nation may look to in order to justify establishing its sovereign rights over the sea floor adjacent to its coasts: EEZ rights and continental shelf rights.⁹⁹ During the development of continental shelf law under the UNCLOS III regime, another important legal principle was also under development, the EEZ. The provisions of the EEZ are located in Part V of UNCLOS III and allow a coastal state sovereign rights for purposes of exploration and exploitation over all resources in the water column, or on the seabed and subsoil adjacent to its territory out to a distance of 200 nautical miles.¹⁰⁰ Although the EEZ provisions of UNCLOS III do not expressly provide coastal states automatic continental shelf rights, the collective result of those provisions is the right to regulate not only the resources of the water column above the seafloor but also the resources of the seafloor itself within the EEZ. For example, Article 60 of Part V gives a coastal state the exclusive right to construct, authorize, and regulate any artificial islands, installations, and structures within the EEZ in addition to the state's right to regulate the natural resources within the water column, to the exclusion of all other states.¹⁰¹ The

an area of the continental shelf beyond 200 nautical miles that is roughly equivalent to the size of California. That is, we retain ninety-five to ninety-eight percent of the value of the future resources in this area beyond the 200 mile economic zone placed under United States resource jurisdiction by the Convention. Indeed, the revenue sharing system adopted was drafted by a representative of an American oil company on our law of the sea industry advisory group and has been perfectly acceptable to the oil industry. And even beyond the great bargain that was the purchase of Alaska, in this case not a penny is due until seven years after production begins. Moreover, once again, the distribution of any such revenue to the states parties, including revenues from this small royalty from all production beyond 200 miles from other nations, would be subject to a United States veto").

⁹⁸ See generally CHURCHILL AND LOWE, *supra* note 4, at 149 (stating that "[d]espite its detail, the formula in the 1982 Convention leaves room for considerable uncertainty").

⁹⁹ *Id.*, at 145.

¹⁰⁰ 1982 Convention, *supra* note 93, arts. 56-60.

¹⁰¹ See *id.*, arts. 60-62. The right to exclude all other nations from the EEZ from exploiting the living resources or the resources of the seafloor does not include the exclusion of navigational rights or over-flight rights over the EEZ.

rights granted in the EEZ provisions have nothing to do with the physical characteristics of the ocean floor. Therefore, a coastal state exercising its rights under Part V automatically enjoys the rights commensurate to possessing a continental shelf, even if it does not have a scientifically-defined continental shelf. As the ICJ has stated, “although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf.”¹⁰²

2. *Juridical Continental Shelf Under Article 76*

Article 76 sets forth a “juridical definition” of the continental shelf and not a definition based solely on science.¹⁰³ The terms “geology”¹⁰⁴ or “geomorphology”¹⁰⁵ are not to be found within its definition of continental shelf, despite the fact that the use of such sciences is a necessary function when applying Article 76 to any nation’s shelf claim. The practical effect of using a juridical or legal definition of the continental shelf instead of a pure scientific definition means that a coastal state may enjoy the rights of possessing a continental shelf over areas where no submerged land structures, which might otherwise be labeled as a geologic¹⁰⁶ or geomorphic¹⁰⁷ continental shelf, exist. Likewise, a coastal state may be limited from enjoying continental shelf rights over areas of the seafloor that possess physical structures that could be labeled a continental shelf, but because of compromises in the development of Article 76

¹⁰² See A COMMENTARY, *supra* note 45, at 826 (quoting from the 1985 Continental Shelf case (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. 4, 33, para. 34. Thus, a coastal state may claim sovereign rights over a continental shelf without having to also claim the rights and responsibilities of an EEZ, however, the converse is not true).

¹⁰³ A COMMENTARY, *supra* note 45, at 873.

¹⁰⁴ Webster’s Third New International Dictionary of the English Language 949 (1976) (defines the term “geology” as “the geologic features of an area: the attributes of rocks, rock formations, or rock constituents of a district . . .”). Thus, geology is the broad science dealing with more than just earth formation, but also its composition.

¹⁰⁵ *Id.*, defining “geomorphology” as “a science that deals with the land and submarine relief features of the earth’s surface and seeks a genetic interpretation of descriptive aspects and of dynamic and structural geology in its explanatory phase.”

¹⁰⁶ See *supra* note 104 and accompanying text. The word “geologic” is the adjective form of “geology.”

¹⁰⁷ See *supra* note 105 and accompanying text. The word “geomorphic” is the adjective form of “geomorphology.”

of UNCLOS III, are not considered a part of the legally-defined continental shelf.

Recall that this provision defines the continental shelf as “the seabed and subsoil of the submarine areas that extend beyond its territorial seas throughout the natural prolongation of its land territory . . . to a distance of 200 nautical miles . . . where the outer edge of the continental margin¹⁰⁸ does not extend up to that distance.”¹⁰⁹ Thus, if a coastal state has a continental shelf that does not extend up to 200 nautical miles the state may still claim full “sovereign rights”¹¹⁰ to the seafloor and subsoil up to 200 nautical miles. Because the law allows for continental shelf rights with or without the existence of a continental shelf, continental shelf rights based on the EEZ or Article 76 up to 200 nautical miles are called a “juridical” continental shelf.

3. *The Geologic or Geomorphologic Continental Shelf*

The distinction between a juridical continental shelf and a geologic or geomorphologic (physical) continental shelf is an important one to understand when considering a claim beyond the 200 nautical mile limit. Much of the process of determining a coastal state’s continental shelf rights beyond 200 nautical miles is based on a mix of both the legal shelf and the physical shelf. Geology and geomorphology gain greater significance when attempting to determine the outer limits of the continental margin, beyond 200 nautical miles.¹¹¹ By the same token, the scientific nature of a continental shelf that did not extend beyond 200 nautical miles becomes less important.¹¹²

¹⁰⁸ See 1982 Convention, *supra* note 93, at art. 76(3) (discussing the fact that the “continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof”); see also Heidar, *supra* note 33, 24-25 (discussing the fact that the phrase “continental margin” is often used to describe the geomorphologic or physical continental shelf. Distinguish the continental margin to that of the juridical phrase “continental shelf,” which may or may not correspond to the continental margin).

¹⁰⁹ 1982 Convention, *supra* note 93, at art. 76(1).

¹¹⁰ *Id.* at art. 77(1).

¹¹¹ See generally Dave Monahan, *Determination of the Foot of the Continental Slope as the Point of Maximum Change in the Gradient at Its Base*, in LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS 99-116 (Myron H. Nordquist, John N. Moore & Thomas H. Heidar, eds., 2004) (discussing the process, including the scientific processes, of determining the foot of the continental slope. Determining the foot of the continental slope is necessary

The incorporation of the term “continental margin”¹¹³ in the definition of the continental shelf was a major step forward in guiding states in the establishment of their continental shelf rights beyond 200 nautical miles. The continental margin is the actual physical geomorphic structure commonly referred to as a continental shelf, which includes the shelf, its slope and its rise, but doesn’t include the deep ocean floor.¹¹⁴ The coastal state must choose one of two methods in determining the edge of its continental margin, which starts from the foot of the continental slope as a reference point.¹¹⁵ Article 76(4)(a)(i) or (ii) allows a coastal state to push the outer limit of its continental margin so long as the conditions listed in 76(4) are not reached.¹¹⁶ Once the conditions are met the continental margin is set.¹¹⁷ Each coastal state is free to choose the option it finds to be most advantageous in setting its outer margin boundaries. Like UNCLOS I, UNCLOS III also provides both a distance and a depth criterion to limit the extent a coastal state may seek to extend its continental margin.

when determining the extent of the shelf beyond 200 nautical miles. The process of how this is accomplished is beyond the scope of this article).

¹¹² In theory, geologic and geomorphologic factors could be important to a coastal state when determining the outer limits to a continental shelf that does not extend beyond 200 nautical miles. If a state wished to claim its geologic or geomorphologic continental shelf, but did not want the responsibilities commensurate with EEZ rights, including management of the water and its resources, the state could do so under article 76 of UNCLOS III without invoking EEZ rights. In such a case, the scientific factors needed to chart the outer limit of the continental shelf might then become important. The author knows of no such case among nations.

¹¹³ See *supra* note 108 and accompanying text.

¹¹⁴ See *supra* note 108 and accompanying text; See also generally *infra* Fig. 2 on p. 55.

¹¹⁵ See *supra* notes 131-33 and accompanying text for a brief overview of the “foot of the continental slope.”

¹¹⁶ For an excellent review of how this is accomplished, see Dave Monahan’s or Richard T. Haworth’s articles in the LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS 91-121 (Myron H. Nordquist, John N. Moore & Thomas H. Heidar, eds., 2004). A full discussion of this process is beyond the scope of this article.

¹¹⁷ For example, a nation may continue out along the seafloor until the thickness of the sedimentary rock is at least 1 per cent of the shortest distance from such point to the foot of the continental slope or until reaching a point 60 nautical miles from the foot of the continental slope. See generally 1982 Convention, *supra* note 93, at art. 76(4).

The definition of the continental margin requires states and the Commission to use scientific data to assist in determining certain benchmark characteristics inherent in a continental margin.¹¹⁸ Because the continental margin consists of the seabed and subsoil of the shelf, slope, and not the deep ocean floor, Article 76 infused the science of geomorphology and geology as the silent partner in the definition of the continental margin.¹¹⁹ At the same time, the drafters of the Article rejected other forms of science that might have been useful in making these assessments. For instance, in 1976 and again in 1979, Japan introduced a proposal to incorporate a “crustal criterion”¹²⁰ into the definition of the continental margin, and each time the proposal was rejected.¹²¹ A crustal criterion would have required coastal states to not only consider the form, structure, and composition of the continental margin, but also which type of crust the formation in question was a part, continental crust or the crust of the deep ocean floor.

Using crustal science to help determine the boundary between the continental margin and the deep ocean floor is a logical tool in accomplishing the task of determining the continental margin because the formation in question, such as a ridge, either is or is not composed of the same crust type as that which composes the coastal state out to its continental margin. However, no such criterion was included in Article 76’s definition.¹²² The negotiating

¹¹⁸ See *supra* note 108 and accompanying text.

¹¹⁹ See Steinar Thor Gudlaugsson, *Natural Prolongation and the Concept of the Continental Margin*, in *LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS* 63 (Myron H. Nordquist, John N. Moore & Thomas H. Heidar, eds., 2004) (noting the use of the “scientific term continental margin, which in its essence is a geomorphological concept”).

¹²⁰ Webster’s Third New International Dictionary of the English Language 547 (1976) (defines the term “crustal” as “relating to a crust, especially of the earth and moon: Crust is defined as ‘the outer part of the earth composed essentially of crystalline rocks and varying in thickness from place to place . . .’”).

¹²¹ Harald Brekke and Philip A. Symonds, *The Ridge Provisions of Article 76 of the UN Convention on the Law of the Sea*, in *LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS* 175-77 (Myron H. Nordquist, John N. Moore & Thomas H. Heidar, eds., 2004); see also Gudlaugsson, *supra* note 119, at 65.

¹²² See Brekke and Symonds, *supra* note 121, at 175 (discussing the fact that the reason the “crustal-type criterion” is so potentially useful is because “[t]here are distinct differences in the composition and origin of oceanic and continental crust. The distinction is so profound that oceanic and continental crusts are regarded as the Earth’s two most fundamental crustal types.” Thus, because one of the goals of continental shelf law is determining all those portions of the submerged shelf that are the “natural prolongation” of the continent in question,

states deliberately decided not to make crustal science an express part of the definition.¹²³ Because the drafters of Article 76 refused to incorporate crustal science into the definition, the concept of a continental margin is itself a legal term, that is, a determination of the continental margin that is not obtained by pure science but by a mix of limited science and law.¹²⁴

Because of the decision not to include crustal or tectonic¹²⁵ science as a criterion in the definition of the continental margin, coastal states are left with limited geology regarding continental shelf composition and geomorphology, the study of continental shelf shapes and formation. One scholar argues that shape plays a more significant role than geology in Article 76.¹²⁶ It appears the drafters of Article 76 intended to emphasize geomorphology as the primary science to be used when assessing the outer edge of the continental margin. Some have concluded that the “submerged prolongation” phrase in the definition is synonymous with “geomorphology.”¹²⁷ This conclusion is based not only on the fact that crustal science was rejected by the drafters, but also because of the

it would have been useful to know upon what crust type the continental margin was affixed, continental crust or oceanic crust).

¹²³ *Id.* at 180.

¹²⁴ See generally Harald Brekke and Philip A. Symonds, The Ridge Provisions of Article 76 of the UN Convention of the Law of the Sea (June 25-27, 2003) (published PowerPoint Presentation on CD attached to the back cover of LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS (Myron H. Nordquist, John N. Moore & Thomas H. Heidar, eds., 2004) (given as part of a presentation in Reykjavik in 2003. The accompanying notes attached to slide #16 discuss the fact that the concept of the continental shelf departs from strict science, thus “any kind of landmass (irrespective of crustal type) may generate a continental margin in the sense of the Convention . . .”). The science of Article 76 of UNCLOS III is called limited science because the drafters of the Article refused to include crustal science as a criterion for continental margin determinations despite the potential usefulness the information would have in distinguishing continental formations from those of the deep seabed.

¹²⁵ Webster’s Third New International Dictionary of the English Language 2348 (1976) (defines the term “tectonic” as “of or relating to the deformation of the earth’s crust, the forces involved in or producing such deformations and the resulting rock structures and external forces”).

¹²⁶ Gudlaugsson, *supra* note 119, at 73-74. Gudlaugsson was discussing a debate between which science was more applicable to Article 76 of UNCLOS III, geology or geomorphology. In this context, geology was being used more narrowly, referring to geology more as a signal for crustal science, not for the more general term encompassing all the earth sciences, such as geomorphology.

¹²⁷ *Id.* at 69.

definition's inclusion of the terms "shelf," "slope," and "rise," all terms that denote shape and form.¹²⁸ The argument is that the geomorphologic criteria of the continental margin will help prevent coastal states from using pure geology, such as an appeal to crustal science, to "bypass" the criteria in order to extend its claim out beyond what was intended by Article 76.¹²⁹ Thus, the concept of natural prolongation maintains its important role in the process of determining what is and is not part of the continental margin. For example, a submerged structure that has broken off of the continental margin of a coastal state will possess many of the same geologic properties as its parent land mass. If the structure has drifted out onto the deep ocean floor such that it is now surrounded by the crust of the deep ocean floor, the principle of natural prolongation should preclude the coastal state from a successful claim to the structure, unless it falls within 200 nautical miles.

The drafters of Article 76 also introduced another very "geomorphic" concept for determining the outer limits of a continental margin: the "foot of the continental slope."¹³⁰ As a coastal state attempts to trace out the exact boundary of the outermost edge of its continental margin, Article 76 requires coastal states to do so in relationship to the foot of the continental slope. The foot of the slope is found by applying the following language: "[i]n the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base."¹³¹ Once the foot of the continental slope is determined, specific points are located and established in accordance with Article 76(4).¹³² The points created following the process in Article 76 did not fall on the foot of the continental slope, but form the basis of the outer edge of the continental margin, usually located further out from the foot of the slope.

¹²⁸ *Id.* at 73-74.

¹²⁹ *Id.* at 77.

¹³⁰ 1982 Convention, *supra* note 93, at art. 76(4); *see also* Dave Monahan, *supra* note 111, at 97-98 (who uses the phrase "geomorphic foot of the slope" when discussing the possibility that the foot of the slope may need to be determined by methods other than simple geomorphic methods, but possibly by geophysical means; i.e., the concept of the foot of the slope may not be totally geomorphic).

¹³¹ 1982 Convention, *supra* note 93, at art. 76(4). A thorough evaluation of how this process works is beyond the scope of this article.

¹³² *Id.* at art. 76(4), discussing the fact that the outer edge of the continental margin is determined in one of two ways, either by: "a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope"; or "a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope."

The practical effect of this is that the continental margin may in fact include parts of the deep ocean floor that are not part of the actual physical continental shelf. Once the points are established, the points may be connected in accordance with Article 76(7)¹³³ such that the resulting outline designates the outer most edge of the continental margin and consequently the full extent of the coastal state's continental shelf.

4. *Restrictions Under Article 76*

If Article 76 only contained the provisions regarding the location of the foot of the continental shelf and the process of finding the outer edge of the continental margin, it might be possible for a coastal state to locate the outermost edge of its continental margin well out into the middle of the ocean. One such methodology might be by following a ridge¹³⁴ that is located near the coastal state out into the ocean, using the rules located in Article 76(4) and (7). But Article 76 places restrictions on how far out a coastal state may seek to push its claim. Article 76 states:

[t]he fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4(a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.¹³⁵

Article 76 further states:

[n]otwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.¹³⁶

¹³³ *Id.* at art. 76(7).

¹³⁴ The question of ridges and the restriction of their use to base a continental shelf claim will be discussed at length in part IV of this article. *See infra* notes 217-54 and accompanying text.

¹³⁵ *See* 1982 Convention, *supra* note 93, at art. 76(5).

¹³⁶ *Id.* at art. 76(6).

The restrictions in Article 76, especially the restrictions regarding “ridges,” are very important in the evaluation of Russia’s claim to the Arctic Sea floor up to and including the North Pole, and will be discussed in greater detail later in this article.¹³⁷

Over the years, Article 76 has evolved into a much more useful guide for coastal states and the international community in determining the character and extent of a nation’s continental shelf rights, despite some lingering deficiencies in its provisions.¹³⁸ The Truman Proclamation enunciated the customary international legal principle that a coastal state has sovereign rights to its adjacent continental shelf, but provided no indication as to the limit of those rights. UNCLOS I attempted to set the limits of continental shelf rights, but was itself subject to compromise, in the form of the exploitability criterion, opening the door to the potential for excessive continental shelf claims. The 1969 North Sea Case helped solidify the Truman Proclamation as customary international law, but did not itself provide any significant assistance in determining the seaward extent of continental shelf limits other than attempting to provide its own definition of the continental shelf. Article 76 of UNCLOS III attempted for the first time to truly characterize the nature of the continental shelf in terms of the legal shelf and the physical shelf, and to provide limits on how far out a nation may claim. But as a product of compromise and limited science, Article 76 opens the door, however slight, for nations to push the boundaries of what is intended. For example, by not providing a firm definition of what constitutes a “ridge,” Article 76 could enable a nation to circumvent the restrictions imposed on “ridges.” Thus, a nation like Russia might feel justified in claiming the ocean floor along a ridge up to a point well beyond the limit of what might otherwise have been intended by the drafters of Article 76, if the ridge in question could be redefined as something else, such as a “submarine elevation.” In so doing, Russia might also feel it is justified in placing its flag on that same point, a point located beyond where Article 76 should otherwise allow.

¹³⁷ See *infra* Section IV.C.

¹³⁸ See generally A COMMENTARY, *supra* note 45, at 841-42 (discussing the fact that UNCLOS III introduced a “new definition of the continental shelf.” This definition “introduced some precision with respect to the delimitation of the outer limits of the continental shelf . . .” This definition was in stark contrast to the “inherent ambiguity and imprecision of the exploitability criterion . . .” found in the definition of UNCLOS I).

III. THE SIGNIFICANCE OF PLANTING THE RUSSIAN FLAG

In the summer of 2007, Russia planted its flag on the Arctic Sea floor directly beneath the North Pole. The degree to which Russia believes that planting its flag on the Arctic Sea floor may assist its claim to the sea floor beneath the Pole is unclear. Contrary to its assertions, Russia's act of planting a flag on the Arctic Sea floor represented more than merely a symbolic gesture of scientific discovery, at least to its neighbors. Although planting a flag does not constitute a legal method of acquiring territory under modern international law, it may represent an act of provocation inconsistent with the spirit of a nation's obligations under international law.¹³⁹ Nor do Russia's actions equate to those of Apollo 11 in 1969 when the U.S. planted its flag on the surface of the moon, because the U.S. made its intentions to not lay claim to the resources of the moon clear to the world well before the landing.¹⁴⁰

Russia was the first country to make a submission to the Commission to extend its continental shelf well beyond 200 nautical miles.¹⁴¹ It is ironic that Russia should be first to attempt to do so, since it was the USSR in 1978 that proposed that no shelf claim should exceed 300 nautical miles from a nation's baseline.¹⁴² Soon after Russia made its submission to the Commission in 2001, the Commission recommended that Russia resubmit its claim over the central Arctic Ocean, which includes the North Pole.¹⁴³ It appears that Russia has yet to do so.¹⁴⁴ Because the details of the Commission's recommendation are

¹³⁹ See *infra* notes 152-56 and accompanying text.

¹⁴⁰ See Anne M. Platoff, *Where No Flag Has Gone Before: Political and Technical Aspects of Placing a Flag on the Moon*, Aug. 1993 (discussing President Nixon's inaugural address in January 1969, where he spoke of the international aspects of space exploration and purpose of the establishment of a Committee of Symbolic Activities for the First Moon Lunar Landing), available at <http://www.hq.nasa.gov/office/pao/History/alsj/alsj-usflag.html>.

¹⁴¹ Peter F. Croker, *The Commission on the Limits of the Continental Shelf*, in *LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS* 217 (Myron H. Nordquist, John N. Moore & Thomas H. Heidar, eds., 2004).

¹⁴² A COMMENTARY, *supra* note 45, at 856-57.

¹⁴³ Croker, *supra* note 141, at 218.

¹⁴⁴ See Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission, Twenty Second Session, New York, 11 August-12 September 2008 CLCS/60, Item 16 pg. 12 (indicating that the only update of the Russian submission is the Commission's rejection of a recommendation that it resubmit its original 2002 summary of its

confidential, one can only guess at what the Commission felt was lacking in Russia's submission. However, what is clear is the fact that planting a flag, in and of itself, is inadequate to base a claim of national sovereignty to the seafloor.¹⁴⁵

A. What's in a Flag?

A flag is "a national standard . . . carried by soldiers, ships, etc., and commonly displayed at forts, businesses and many other suitable places."¹⁴⁶ As the definition implies, a national flag is commonly displayed at locations over which that flag's nation has some sort of authority or control, such as on ships, by soldiers, and over military forts. But in the past, flags were used for more than representing national identity; they constituted part of the "discovery ritual."¹⁴⁷

The U.S. Supreme Court recognized the once-common practice of states when it provided, "Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives."¹⁴⁸ In the latter

recommendation that Russia resubmit its submission regarding the Central Arctic area) (available at <http://daccessdds.un.org/doc/UNDOC/GEN/N08/523/33/PDF/N0852333.pdf?OpenElement>).

¹⁴⁵ See generally Alfred-Maurice De Zayas, *Territory, Discovery, in 4* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 839, 840 (Rudolf Bernhardt ed., 2000) (characterizing the action of "erecting of landmarks and the hoisting of flags on a few points of the discovered territory . . ." as "symbolic annexation" equating to "inchoate title" only that may lapse if not perfected by some other action, such as the "classical modes" of effective occupation, accretion, or cession).

¹⁴⁶ BLACK'S LAW DICTIONARY 638 (6th ed. 1990).

¹⁴⁷ Mike Nizza, *Why Plant a Flag at the North Pole*, Aug. 6, 2007, <http://thelede.blogs.nytimes.com/2007/08/06/why-plant-a-flag-at-north-pole/>, (quoting Robert J. Miller *Finders Keepers in the Arctic? The Doctrine of Discovery is still alive in the modern world*, Los Angeles Times, OpEd (Aug. 6, 2007), available at <http://www.latimes.com/news/opinion/commentary/la-oe-miller6aug06,0,60191.story?track=rss>).

¹⁴⁸ *Johnson v. M'Intosh*, 21 U.S. 543 (1823) (discussing aboriginal and European title to North America. The case also states, "This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession").

half of the 20th century, one scholar argued that planting a flag would be a required element for any nation to lay claim to a celestial body.¹⁴⁹ Although scholars reject the notion that planting a flag alone is adequate to legally stake a claim to a celestial body, the concept was regarded as a necessary factor among others in making such a claim.¹⁵⁰ Nevertheless, however legally significant the use of flags may have been in the historical practice of nations in acquiring new territory, such actions are no longer legally binding on nations.¹⁵¹

B. Modern Treaty Law vs. Custom

International treaty law has supplanted the customary use of discovery and conquest as legitimate means of extending national sovereignty. For example, when the United States sent Apollo 11 to the moon in 1969, the governing principles of the Outer Space Treaty of 1967¹⁵² would have enjoined any attempt by the U.S. to claim the moon through the “discovery ritual” of planting the U.S. flag in the lunar dust. This treaty expressly states, “[o]uter space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.”¹⁵³ Similarly, the cumulative effect of other international treaties

¹⁴⁹ Michel Smirnoff, *The Legal Status of Celestial Bodies*, 28 J. AIR L. & COM. 385, 391 (1961-1962).

¹⁵⁰ *Id.*

¹⁵¹ See generally De Zayas, *supra* note 145, at 841-42 (stating, “[t]oday the concept of discovery is primarily of historical interest. De Zayas also states, “. . . in the light of the United Nations Charter and prevailing standards, the concept of discovery, effective occupation and historical titles have been rendered obsolete with respect to territories inhabited at the time of discovery and colonization.” But see Santiago Torres Bernárdez, *Territory, Acquisition*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 831, 835 (Rudolf Bernhardt ed., 2000) (discussing that although occupation may be used under some limited circumstances by a nation state to acquire new territory, “occupation can only be effected in respect of a *terra nullis* . . .” or *empty land*. Bernárdez also states, “. . . the concept of *terra nullius* excludes *a priori* from its field of application both territories subject to State sovereignty and areas constituting *res communis* or the common heritage of mankind . . .” As discussed earlier, (*supra* note 59 and accompanying text), the deep ocean floors are considered to be the common heritage of mankind and not subject to any one nation’s claims).

¹⁵² Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. 2, Oct. 10, 1967, 18.3 U.S.T. 2410, TIAS No. 6347.

¹⁵³ *Id.*

governing the relationships between states, such as the U.N. Charter,¹⁵⁴ or UNCLOS I and III,¹⁵⁵ is that States are foreclosed from using conquest or discovery as a basis to legitimize a claim to new territory.¹⁵⁶

Nevertheless, the act of planting a flag has lost none of its symbolic significance and even retains some residual legal significance as a custom of national practice in the absence of a governing treaty. Russia's action of

¹⁵⁴ FREDERIC L. KIRGIS, JR., *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING* 12 (West Publishing Co. 1993) (quoting U.N. Charter art. 2(4), which prohibits the use of force, because the Charter expressly prohibits nations from threatening the territorial or political integrity of another nation. Art. 2(4) states, “[a]ll 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 United Nations”). Thus, unless a nation is willing to cede its own territory to another, all nations must respect current boundaries, whether on land or at sea, or resolve the matter in a manner consistent with international law, such as by mutual agreement or resolved by the International Court of Justice (ICJ). *See* The Antarctic Treaty, Dec. 9, 1959, 12 U.S.T. 794; TIAS 4780. *See also* 19 Int'l Legal Materials 860 (1980) (discussing art. 4, para. 2, which states, “[n]o acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of any existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force”).

¹⁵⁵ *See* 1958 Convention, *supra* note 51, at art. 2, discussing the fact that UNCLOS I forbids any state's attempt to subject any part of the high seas to its sovereignty; *see also* 1982 Convention *supra* note 93, arts. 89-137 (discussing virtually the same concept as in art. 2 of the 1958 Convention, which also forbids any state's attempt to subject any part of the high seas to its sovereignty. In addition, art. 137 provides, “no State shall claim or exercise sovereignty or sovereign rights over any part of the Area [defined as “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction,” art. 1, para. 1] or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized”). A nation may seek to extend its sovereignty over its continental shelf; however, such a claim must be based on the provisions of the two governing treaties on the issue, UNCLOS I & III.

¹⁵⁶ *See generally* Bernárdez, *supra* note 151, at 836 (discussing the fact that there are few if any undiscovered places on the earth not already “under the territorial sovereignty of an existing State . . . or subject by treaty to a special international regime”).

planting its flag was made subsequent to its 2001 submission to the Commission on the Limits of the Continental Shelf, in which it claimed that the area under the North Pole was part of its continental shelf, imbuing the flag planting with a heightened sense of legality,¹⁵⁷ even if none actually existed.

C. A Flag of Peace?

Although flags have clearly been used to symbolize more than ownership or control over an area or people, there is no question that it is the context governing the use of a flag that makes the difference between a flag of peace and a flag of provocation. In 1996, Greece and Turkey almost went to war when a group of Turkish journalists climbed atop a disputed but uninhabited island in the eastern Aegean Sea and planted the Turkish flag.¹⁵⁸ Thereupon, a series of flag plantings ensued between the two countries.¹⁵⁹ Fortunately, the two parties were able to resolve the dispute before military hostilities commenced.¹⁶⁰ One of the necessary concessions required of the two nations in order to reduce tensions was an agreement not to plant their flags on the disputed island.¹⁶¹

The dispute over another island provides yet another example of how planting national flags within a particular context can raise tensions between nations. On July 20, 2005, the Foreign Defense Minister of Canada paid a visit to Hans Island, a small island between Canada and Denmark, located between Ellesmere Island and Greenland.¹⁶² Shortly after the visit, the Canadian military

¹⁵⁷ Much of this argument is based on the discussion later in this paper, in that the Commission may only make a recommendation to the submitting state, which then, in turn, makes a binding claim regarding the extension of its shelf. See *infra* notes 189-196 and accompanying text.

¹⁵⁸ *Holbrooke: Greece, Turkey were on verge of battle*, 6:30 p.m. EST, Jan. 31, 1996, http://www.cnn.com/world/9601/turkey_greece_dispute/01-31/index.html (last visited Nov. 29, 2008).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See *id.*, discussing the fact both sides were “willing to guarantee through the United States that neither side would put troops or its flag on the island.”

¹⁶² Christopher Stevenson, *Hans Off!: The Struggle for Hans Island and the Potential for Ramifications for International Border Dispute Resolution*, 30 B. C. INT’L & COMP. L. REV. 263, 266-67 (2007). Part of the significance of Hans Island is that it sits in the middle of a narrow waterway between Greenland and Canada that could be used to circumnavigate North America in lieu of using the Northwest Passage further south.

planted the Canadian flag on the island and raised a small stone marker.¹⁶³ Denmark condemned the action, calling it an “occupation.”¹⁶⁴ Denmark then sent its own military expedition to the island. Tensions had been increasing over the island since 1973.¹⁶⁵ Both sides visited the island over the years to raise flags and leave markers in order to demonstrate their superior claims.¹⁶⁶ Fortunately, the two nations agreed to discuss the matter, which helped to defuse the situation.¹⁶⁷ Although a degree of calm has returned between the two countries since meeting, the issue has not been fully resolved.

Russia’s comparison of its flag planting to that of Neil Armstrong planting the U.S. flag on the moon¹⁶⁸ is disingenuous. It may be true that both the United States and Russia were motivated by more than the mere desire to celebrate scientific achievement¹⁶⁹ in their desire to be the first to plant their flags on the moon and on the Arctic Sea floor respectively. The similarities end there. In 1969, NASA went to great lengths to ensure that the world did not misinterpret the U.S. lunar landings as a land-grab of the moon.¹⁷⁰ It is arguably

¹⁶³ *Id.*

¹⁶⁴ *Id.*, quoting Anne McIlroy, *Hans Off My Island*, GUARDIAN UNLIMITED, Aug. 30, 2005, available at <http://guardian.co.uk/elsewhere/journalist/story/0,7792,1559064,00.html> (last visited Oct. 2, 2005); see also *Denmark Calls for Talks on Arctic Island Dispute*, CTV.CA, July, 28, 2005, http://www.ctv.ca/servlet/Article-News/story/CTVNews/1122473659796_117882859?s_name=&no_ads=.

¹⁶⁵ Stevenson, *supra* note 162.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See Eckel, *supra* note 7, discussing the fact that the Russian Foreign Minister, Sergey Lavrov, believes that the U.S. flag planting on the moon and Russia’s flag planting on the Arctic Ocean are comparable.

¹⁶⁹ See George J. Annas, *The Man on the Moon, Immortality, and Other Millennial Myths: The prospects and Perils of Human Genetic Engineering*, 49 Emory L. J. 753, 760 (2000) (discussing U.S. motivations for going to the Moon); see also Yuri Zarakhovich, *Russia Claims the North Pole*, July 12, 2007, <http://www.time.com/time/printout/0,8816,1642905,00.html> (discussing Russian motivations for going to the bottom of the Arctic Ocean).

¹⁷⁰ See Platoff, *supra* note 140, discussing the fact that NASA considered planting the flag of the United Nations (UN) instead of the U.S. flag, only to have the idea rejected by Congress because the mission had been U.S. funded, not U.N. funded. In addition, NASA set up a Committee on Symbolic Activities for the First Lunar Landing whose job it was to help ensure that the correct message was sent to the world about U.S. intentions concerning the Moon. The Astronauts did take up a plaque that stated, “Here men from the planet Earth

this contextual difference of manifest national intentions to extend sovereignty that makes Armstrong's flag one of peace and Chilingarov's¹⁷¹ flag one of provocation.

The situations discussed above demonstrate how the mere use of a national flag, in conjunction with an already sensitive regional dispute, may serve to further threaten regional peace and security as it did in the Aegean and in the Arctic. Planting a flag on the Arctic Sea floor and stating that, "[t]he Arctic has always been Russian,"¹⁷² following a formal submission to extend Russian sovereignty over the Arctic Sea floor before resolution of the claim, constitutes a provocative act not in keeping with the obligations of modern states under the U.N. Charter to live together "as good neighbors."¹⁷³

IV. RUSSIAN CLAIMS TO THE NORTH POLE ARE NOT SUPPORTED UNDER INTERNATIONAL LAW

Although Russia has complied with the *procedural* requirements under UNCLOS III for a state to seek an extension of its continental shelf in the Arctic Sea, science and the law should act to prevent Russia's substantive claim on the North Pole. Because Russia has ratified UNCLOS III, Russia is bound by its provisions regarding the extension of its sovereignty over the seabed beyond 200 nautical miles.¹⁷⁴ The physical characteristics of the Arctic Sea floor provide circumstances that limit Russia's claim under the North Pole. The Arctic Sea's geomorphology and geology are factors that cannot be changed, even if Russia or the Commission on the Limits of the Continental Shelf ultimately chooses to characterize certain submerged formations favorably toward Russia's claim. Unfortunately, because of continued uncertainty as to the definitions of what constitute the continental margin, the deep ocean floor, and ridges, it is unlikely but still possible that an argument may be made for Russia's claim.¹⁷⁵

first set foot upon the moon July 1969, A.D. We came in peace for all mankind."

¹⁷¹ Chilingarov was the leader of the expedition that planted the Russian flag on the Arctic Sea floor beneath the North Pole. *See supra* note 7 and accompanying text.

¹⁷² *See supra* note 9 and accompanying text.

¹⁷³ U.N. Charter pmbl.

¹⁷⁴ *See infra* notes 176-84 and accompanying text.

¹⁷⁵ *See generally infra* note 236 and accompanying text, discussing the fact that the definition of a submerged structure, such as a "ridge," is "variable" and must be considered on a case-by-case basis; *see also generally* Brekke and Symonds, *supra* note 121, at 170, discussing the fact that the "ridge issue directly affects

A. Article 76 of UNCLOS III Governs

As a threshold matter, it is important to identify which conventional and customary international legal principles govern Russia's continental shelf extension claims. As stated earlier,¹⁷⁶ continental shelf law is governed mainly by UNCLOS I, UNCLOS III Article 76, and customary international law. Russia is a party to UNCLOS I, having ratified that agreement in 1960.¹⁷⁷ Until April 11, 1997, Russia had not ratified UNCLOS III.¹⁷⁸ Russia shared the same reservations to ratification of UNCLOS III as other industrialized nations, stemming mainly from problems dealing with deep seabed mining.¹⁷⁹ Once Russia's concerns were addressed to its satisfaction by the 1996 Agreement relating to the Implementation of Part XI of the Convention (Agreement), Russia ratified UNCLOS III and has remained a party ever since.¹⁸⁰ To determine which treaty governs the question of Russia's continental shelf claims, we turn to the rules set out by the Vienna Convention on the Law of Treaties (Convention on Treaties).¹⁸¹ As a party to the Convention on Treaties, Russia is bound by its provisions on matters regarding treaty interpretation and application.¹⁸²

Article 26 of the Convention on Treaties provides that, "[e]very treaty in force is binding upon the parties to it and must be performed in good faith."¹⁸³

the delineation of the outer edge of the continental margin under article 76, and the margin and the ridges are subject to the same principles and provisions."

¹⁷⁶ See *supra* notes 29-30 and accompanying text.

¹⁷⁷ William E. Butler, *The Soviet Union and the Continental Shelf*, 63 AM. J. INT'L L., 103 n.1 (1969).

¹⁷⁸ Letter, Secretary General of the U.N., Receipt of the submission made by the Russian Federation to the Commission on the Continental Shelf, Ref. No. CLCS.01.2001.LOS (Dec. 20, 2001) (*available at* http://www.un.org/Depts/los/clcs_new/clcs_home.htm).

¹⁷⁹ See CHURCHILL AND LOWE, *supra* note 4, at 21.

¹⁸⁰ See generally *id.*, at 19-22.

¹⁸¹ Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter *Law of Treaties*]; see also, KIRGIS, *supra* note 154, at 216, stating that the United States is not a party to the Convention on Treaties, but considers most of the provisions of the Convention to be customary international law, with the possible exception of the Convention's procedural provisions.

¹⁸² W. E. Butler, *National Treaty Law and Practice: Russia*, 33 STUD. TRANSNAT'L LEGAL POL'Y 152 (2003).

¹⁸³ *Law of Treaties*, *supra* note 181, at art. 26.

In Russia's case, it has ratified two treaties that deal specifically with continental shelf law, namely UNCLOS I and UNCLOS III. Russia, having ratified UNCLOS III, is bound to observe Article 311 of that Convention which explains, "[t]his Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958."¹⁸⁴ Although Russia is a party to UNCLOS I, all provisions of UNCLOS III that otherwise limit or are incompatible with UNCLOS I will prevail. This point is extremely important because it means that whereas UNCLOS I left much doubt as to what might limit a nation's claim over the continental shelf, UNCLOS III provides a great deal more guidance and restrictions on a nation's ability to claim a continental shelf. It is to this standard that we look to evaluate Russia's claim.

B. The 2001 Russian Continental Shelf Submission

Among the most pronounced limitations placed upon a State Party to UNCLOS III wishing to extend its claim over the continental shelf beyond 200 nautical miles is the requirement that it submit the information justifying its claim to the Commission on the Limits of the Continental Shelf as per Article 76.¹⁸⁵ As the first nation to make such a submission under UNCLOS III, Russia has led the way for other nations who have also issued their submissions to the Commission.

1. Submissions to the Commission

Article 76 requires, "[i]nformation on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf."¹⁸⁶ The Commission plays a major role in the process of establishing a coastal state's continental shelf beyond 200 nautical miles under UNCLOS III. The provisions of Article 76 relating to the Commission apply only for the purpose of governing the determination of the outer limits of a coastal state's continental shelf that *exceed* 200 nautical miles from its baseline.¹⁸⁷ A coastal state must submit the "particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible."¹⁸⁸

¹⁸⁴ 1982 Convention, *supra* note 93, at art. 311.

¹⁸⁵ *Id.* at art. 76.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at art. 4 to Annex II.

Once the Commission has received a nation's submission on the limits of its continental shelf, "[t]he Commission shall make recommendations to [the] coastal State on matters related to the establishment of the outer limits of the continental shelf."¹⁸⁹ The Commission may also provide, when requested by the coastal state, scientific and technical advice while the state prepares to submit its information regarding the limits of the continental shelf beyond 200 nautical miles.¹⁹⁰ If a coastal state establishes the outer limits of its continental shelf in conformity with the recommendations of the Commission, the state's established limits are final and binding.¹⁹¹ Thus, the role of the Commission is not to establish the outer limits of the continental shelf, but merely to offer a recommendation regarding the same.¹⁹²

The secretary of the Commission described the role of the Commission as a scientific body working within the context of UNCLOS III and not as a court of law.¹⁹³ Despite this express distinction between the role of the Commission and that of a coastal state, the practical effect of the last sentence of Article 76(8) is very different. A state's establishment of the outer limits of its continental shelf appears to be clearly "final and binding" only if it is based on the Commission's recommendations and, at least in one scholar's opinion, only with regard to states party to UNCLOS III.¹⁹⁴ Thus, the Commission's role is more than a mere scientific advisor of states party to UNCLOS III.¹⁹⁵ The Commission arguably holds the key to finality and legality. This leaves open the question of whether any state party to UNCLOS III that establishes the outer limits of its continental shelf beyond 200 nautical miles without or over the recommendations of the Commission can actually be final or binding on the international community. The answer appears to be in the negative.¹⁹⁶

The Commission is also entitled to make its own determination as to what constitutes a "ridge" under Article 76 of UNCLOS III. The Commission is

¹⁸⁹ 1982 Convention, *supra* note 93, at art. 76(8).

¹⁹⁰ *Id.* at art. 3(1)(b) to Annex II.

¹⁹¹ *Id.*, at art. 76(8).

¹⁹² *See supra* note 189.

¹⁹³ Alexei A. Zinchenko, *Emerging Issues in the Work of the Commission, in* LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS 225-26 (Myron H. Nordquist, John N. Moore & Thomas H. Heidar, eds., 2004).

¹⁹⁴ *See generally* Heidar, *supra* note 33, at 32 (arguing that establishment of the outer limits of the continental shelf on the basis of the Commission's recommendations is binding on all states party to UNCLOS III, but not to non-party states).

¹⁹⁵ *See generally id.*

¹⁹⁶ *See generally id.*

not bound by any one definition of “oceanic ridge” or “submarine ridge.” According to the Commission’s Scientific and Technical Guidelines, the Commission expressly recognizes that these terms are not specifically defined.¹⁹⁷ As the Commission’s guidelines point out, “[i]t seems that the term ‘ridge’ is used on purpose, but the link between the ‘oceanic ridges’ of paragraph 3 and the ‘submarine ridges’ of paragraph 6 is unclear. Both terms are distinct from the term ‘submarine elevations’ of paragraph 6.”¹⁹⁸

The Commission’s guidelines further explain that crust types will not be used as the only factor in distinguishing ridge types.¹⁹⁹ As regarding ridges, the Commission is to be guided by “scientific and legal considerations.”²⁰⁰ Because the Commission has stated that it would not solely consider factors dealing with the science of the earth’s crust when determining the difference between an oceanic ridge and a submarine ridge, the Commission will be compelled to balance both scientific and legal considerations. The Commission’s guidelines provide, “[a]s it is difficult to define the details concerning various conditions, the Commission feels it appropriate that the issue of ridges be examined on a case-by-case basis.”²⁰¹ Because of the intermingling of science with the law and the rejection of the use of pure geology when distinguishing submerged formations, it seems problematic that any one definition may be derived to definitively guide coastal states or the Commission to a consistent application of Article 76.

Not only must coastal states and the Commission rely on this mix of limited science and the law to establish a nation’s continental margins, but the Commission’s rules of confidentiality prevents peer review of the process the Commission might follow to accomplish this goal.²⁰² Annex II of the Commission’s Rules of Procedure require the Commission to maintain as secret any portion of a coastal state’s submission that the coastal state has marked

¹⁹⁷ Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf, 52 CLCS/11 (May 13, 1999).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 54.

²⁰⁰ *Id.*

²⁰¹ *See supra* note 197, at 55.

²⁰² *See generally* Zinchenko, *supra* note 193, at 226-27 (discussing the “marked interest . . . expressed in scientific circles, primarily among geologists, geophysicists, and lawyers who assist coastal states in the preparation of their submissions to the Commission.” Those interested in the Commission’s recommendations have raised questions of “sufficiency” of scientific data relied upon, submitting state conformity to requirements of UNCLOS III, and the desire to resolve any “allegations” of “withholding scientific information”).

confidential.²⁰³ It is the Commission's view that submitting countries have proprietary rights over the scientific data used to establish their outer continental margins.²⁰⁴ The Chairman of the Commission recognized that the question of confidentiality is an issue of concern for the international community,²⁰⁵ but indicated that the Commission has no plans to change its procedures on the matter.²⁰⁶ However, to address the concerns of the international community, the Commission decided to issue executive summaries of a general nature regarding submissions and recommendations, but containing no confidential information.²⁰⁷

The troubling aspect of the Commission's confidentiality rules is the "lack of transparency"²⁰⁸ in such an important body. If the only role the Commission played was to give advice, keeping confidential the particulars of submissions and subsequent advice makes sense. However, the legality and finality of a coastal state's continental shelf claims beyond 200 nautical miles depends on its conformity with the Commission's recommendations.²⁰⁹ This lack of transparency weakens the ability of the international community to monitor the legitimacy of submissions made to the commission and the work of the Commission itself.

The ability of coastal states and the Commission in consistently applying Article 76 to determine the outer limit of the world's continental margins beyond the 200 nautical mile limit is untested and uncertain because it has not happened yet. Therefore, it would be impossible to predict with certainty how the Commission might act regarding Russia's eventual re-submission regarding its continental shelf claims beneath the Arctic Ocean.

²⁰³ Rules of Procedure of the Commission on the Limits of the Continental Shelf, Thirteenth Session

New York, 26-30 Apr. 2004 CLCS/40, Annex II pg. 22-23.

²⁰⁴ Croker, *supra* note 141, at 219.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 216.

²⁰⁷ Zinchenko, *supra* note 193, at 228.

²⁰⁸ See Gundmundur Eiriksson, *The Case of Disagreement Between a Coastal State and the Commission*, in LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS 252 (Myron H. Nordquist, John N. Moore & Thomas H. Heidar, eds., 2004).

²⁰⁹ See *supra* notes 193-96 and accompanying text.

2. *Russia's Submission to the Commission*

On December 20, 2001, Russia submitted its claim to the Commission.²¹⁰ Unfortunately, the particulars of the submission are unknown to everyone except Russia and the Commission, making it difficult to assess the submission's legality. On December 20, 2001, the same day that Russia made its submission, both the Commission and the Secretary General issued summaries of that submission.²¹¹ The Secretary General's summary provided details regarding Russia's claims to the continental shelf beyond 200 nautical miles affecting areas in the Barents and Bering Seas, and the Sea of Okhotsk,²¹² as well as the North Pole in the Central Arctic Ocean.²¹³ In June of 2002, the Commission adopted its recommendations regarding Russia's submissions and issued them to Russia accordingly.²¹⁴ Just as the Commission keeps the particulars of the submissions it receives secret, except for what it releases in executive summaries, the Commission also keeps the advice it gives to submitting countries secret, except for a summary of that advice. In Russia's case, the United Nations General Assembly issued a Report of the Secretary General on Oceans and the Law of the Sea containing a brief summary of the Commission's recommendations.²¹⁵ As regarding the central Arctic Sea, the Commission recommended that Russia make a revised submission based on the Commission's findings listed in its recommendations.²¹⁶ To date, Russia has yet to provide the Commission a revised submission.

Although we do not know the exact basis for Russia's claims to the Central Arctic Sea as far north as the North Pole, the next section will argue that

²¹⁰ Croker, *supra* note 141, at 217. *See also infra* Appendix B to view the chart that Russia included within its submission. The shaded areas are those portions of the Arctic Sea floor that Russia claims as its extended continental shelf beyond 200 nautical miles. The bold red lines represent the 200 nautical mile limit.

²¹¹ *See* Letter CLCS.01.2001.LOS (Continental Shelf Notification) Dec. 20, 2001; *See also* Letter by the Secretary General of the U.N. dated 20 Dec. 2001 (Reference: CLCS.01.2001.LOS (Continental Shelf Notification)).

²¹² Issues relating to Russian continental shelf claims affecting the Barents, Bering, and Okhotsk Seas is beyond the scope of this article.

²¹³ *See supra* note 211 and accompanying text. The Secretary General summary letter includes Table 1. Point No. 31, describing the North Pole, namely the coordinates 90.0000 N, 0.0000 E, as part of the Russian claim).

²¹⁴ Croker, *supra* note 141, at 218.

²¹⁵ General Assembly Report 57th Session, dated Oct. 8, 2002 para. 41.

²¹⁶ Croker, *supra* note 141, at 218.

Russia's shelf claim over the North Pole does not appear to satisfy the requirements of Article 76 of UNCLOS III, based on the assumption that Russia is considering the Lomonosov Ridge to not be a ridge at all, but merely a submarine elevation.

C. Article 76 of UNCLOS III and the Exclusion of "Ridges"

The status of ridges in Article 76 is important because the provisions of the Article impose restrictions upon how ridges may be used as the basis to extend continental shelf rights. In addition, how a submerged land structure, like the Lomonosov Ridge, is defined can determine whether that structure will be subject to the ridge restrictions under Article 76 or not. It seems apparent from the chart that accompanied Russia's 2001 submission²¹⁷ to the Commission that Russia attempted to use the Lomonosov Ridge as a "submarine elevation" and not a "ridge" to justify its claim to extend the outer limits of its continental shelf on the Arctic Sea floor up to and including the North Pole.

1. *The Lomonosov Ridge*

The Arctic Ocean Basin is made up of ". . . the deep central part of the Arctic Ocean . . . underlain by oceanic crust that is separated from the surrounding continental shelves by continental slopes" making up three main continental bordering landmasses.²¹⁸ Located on the Arctic Sea floor are three roughly parallel "oceanic ridges"²¹⁹ that run from the Eurasian landmass to the North American landmass, namely the Alpha-Mendelev Ridge, the Lomonosov Ridge, and the Gakkel Ridge.²²⁰ The Lomonosov Ridge is the middle of the three oceanic ridges and runs nearly directly beneath the North Pole.²²¹ The ridge is approximately 1500 km long and approximately 50 to 70 km wide, rising approximately 3 km above the Arctic Sea floor.²²² Scholars have provided various explanations as for the origins of the Lomonosov Ridge.

²¹⁷ See *infra* Appendix B.

²¹⁸ Arthur Grantz, *Treatment of Ridges and Borderlands*, in LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS 201, 208-209 (Myron H. Nordquist, John N. Moore & Thomas H. Heidar, eds., 2004).

²¹⁹ *Id.*

²²⁰ See *infra* Fig. 1, p. 52.

²²¹ *Id.*

²²² See W. Jokat, G. Uenzelmann-Neben, Y. Kristoffersen & T.M. Rasmussen, *Lomonosov Ridge-A Double-Sided Continental Margin*, 20 GEOLOGY 887 (1992).

Although the exact origins of the ridge are not entirely clear,²²³ it is generally accepted that the ridge is of “continental origin.”²²⁴ Specifically, it is believed that the Lomonosov Ridge is a “continental sliver”²²⁵ that detached from the Barents-Kara continental shelf and moved to its current position through sea floor spreading.²²⁶ Another scholar explains that it appears that the southern end of the Lomonosov Ridge, the edge located closest to the Russian “Laptev” continental shelf, disconnected from that shelf in the past and “. . . moved as a separate plate”²²⁷ to its current location, supporting the contention that the ridge is of continental origin. Regardless of the ridges’ origin, the same scholar concludes that the three Arctic ridges, including the Lomonosov Ridge, “were either constructed upon oceanic crust . . . or lie between areas of oceanic crust created by seafloor spreading.”²²⁸ This means that the Lomonosov Ridge is not currently part of any of the surrounding continental margins²²⁹ because it is surrounded by oceanic crust, not connected to continental crust, even if the ridge may be made of continental material.

²²³ See Wilfried Jokat, *The Sedimentary Structure of the Lomonosov Ridge between 88° N and 80° N*, 163 *GEOPHYS. J. INT.* 698, 701, (2005) (discussing the origins of the Makarov-facing margin of the Lomonosov Ridge).

²²⁴ *Id.* at 700.

²²⁵ See Y. Kristoffersen & N. Mikkelsen, *On Sediment Deposition and Nature of the Plate Boundary at the Junction Between the Submarine Lomonosov Ridge, Arctic Ocean and the Continental Margin of Arctic Canada/North Greenland*, 225 *MARINE GEOLOGY* 265, 267, (2006) (discussing the geological and oceanographic setting of the Lomonosov Ridge).

²²⁶ See Martin Jakobsson, *First High-Resolution Chirp Sonar Profiles from the Central Arctic Ocean Reveal Erosion of the Lomonosov Ridge Sediments*, 158 *MARINE GEOLOGY* 111 (1999).

²²⁷ See Grantz, *supra* note 218, at 208.

²²⁸ *Id.*

²²⁹ *Id.* at 208-209.

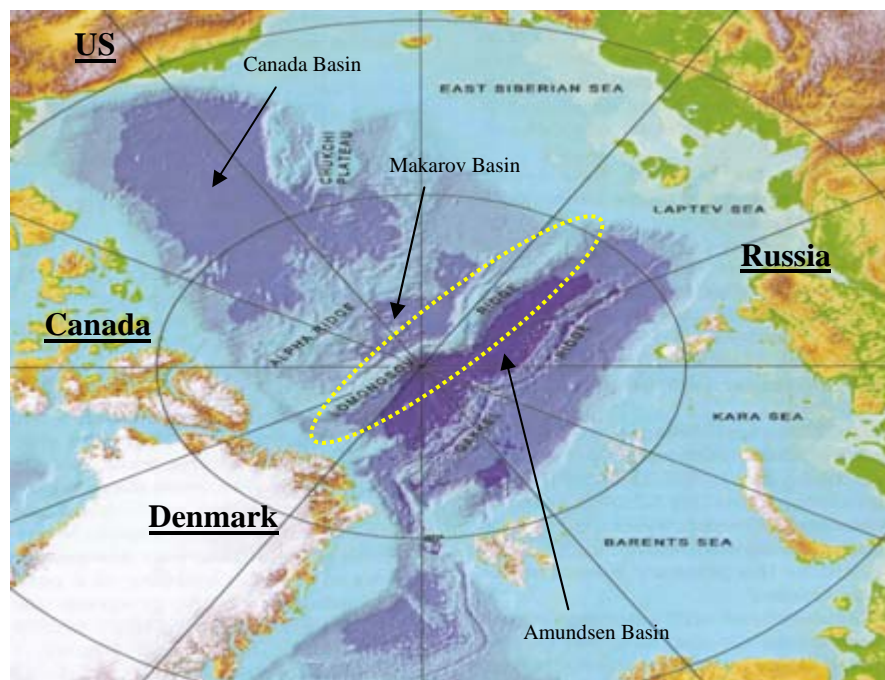


Fig. 1 The Lomonosov Ridge is encircled by a yellow dotted oval. See Andy Armstrong, *The Joint Hydrographic Center and the Center for Coastal and Ocean Mapping, Research and Education in Hydrographic and Ocean Mapping*, slide #28, unpublished PowerPoint Presentation, http://www.csc.noaa.gov/mcsd/briefs/unh_2.ppt. The above graphic was annotated and modified by the author for the convenience of the reader and the availability of space on this page.

2. Key Definitions within Article 76

There are several important terms used in Article 76, the meaning of which can help determine whether a coastal state may be justified in seeking to extend its continental shelf rights beyond the 200 nautical mile limit. For a coastal state to make such a claim the nation must first determine the extent of its “continental margin.” Article 76(5), provides:

The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical

miles from the 2,500 metre isobath,²³⁰ which is a line connecting the depth of 2,500 metres.²³¹

A review of this provision reveals that without some restriction the 2500 meter isobath provision could potentially allow a coastal state to extend its continental shelf claim to a distance that exceeds 350 nautical miles from its baseline so long as the depth of the continental margin never dips below 2500 meters. The reason is because the language states that the outer limit boundary of the continental shelf “either shall not exceed 350 nautical miles from the baselines . . . or shall not exceed 100 nautical miles from the 2500 metre isobath . . .”²³² Thus, in theory, if the 2500 meter isobath is not reached until a distance of 350 nautical miles, the coastal state may then add an additional 100 nautical miles beyond that distance, giving the nation a continental shelf of roughly 450 nautical miles from the baseline.

Article 76 places restrictions on a coastal state’s use of the 2500 meter isobath provision, namely that the continental margin may not include the “deep ocean floor,” “oceanic ridges,” or may not exceed 350 nautical miles when dealing with “submarine ridges.”²³³ These restrictions do not apply to the geomorphic formations referred to in Article 76 as “submarine elevations.”²³⁴ Knowing the definitions and characteristics of the preceding terms is also key to knowing the extent a coastal state may seek to push out its continental shelf rights under Article 76.²³⁵

UNCLOS III does not define the terms listed in the preceding paragraph. As Symonds and Brekke have pointed out, the issue of ridges is “variable in nature” and will continue to cause disagreement in their

²³⁰ CONTINENTAL SHELF LIMITS: SCIENTIFIC AND LEGAL INTERFACE 325 (Peter J. Cook & Chris M. Carleton eds., 2000) (“isobath” is defined as “[a] line representing the horizontal contour of the seabed at a given depth.”)

²³¹ 1982 Convention, *supra* note 93, at art. 76(5).

²³² See generally *supra* footnote 231 and accompanying text (emphasis added).

²³³ See 1982 Convention, *supra* note 93, at art. 76(3)-(6), discussing the fact that if a particular ridge is an oceanic ridge, then it is part of the deep ocean floor and may not be used to calculate the extension of the continental shelf beyond 200 nautical miles. If the ridge in question is a submerged ridge, then the ridge may be used to calculate the extension of the continental shelf beyond 200 nautical miles, but not more than 350 nautical miles.

²³⁴ 1982 Convention, *supra* note 93, at art. 76(6).

²³⁵ See *infra* Appendix C.

interpretation.²³⁶ During the negotiations for UNCLOS III, a group of ten states recommended a definition for “submerged oceanic ridges” as “long narrow submarine elevations formed of oceanic crust, in such a manner that the outer limit of the continental shelf in areas of such ridges does not exceed the . . . 350-mile distance.”²³⁷ Later, Japan recommended that the issue of “ridges” be further defined to include “ridges formed of oceanic crust.”²³⁸ However, as was discussed earlier, the notion of including a crustal criterion to Article 76 was rejected.²³⁹

²³⁶ Philip A. Symonds and Harald Brekke, *Scientific Overview of Ridges Related to Article 76 of the UN Convention on the Law of the Sea*, in *LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS* 161 (Myron H. Nordquist, John N. Moore & Thomas H. Heidar, eds., 2004).

²³⁷ A COMMENTARY, *supra* note 45, at 867.

²³⁸ *Id.*

²³⁹ See *supra* note 121 and accompanying text.

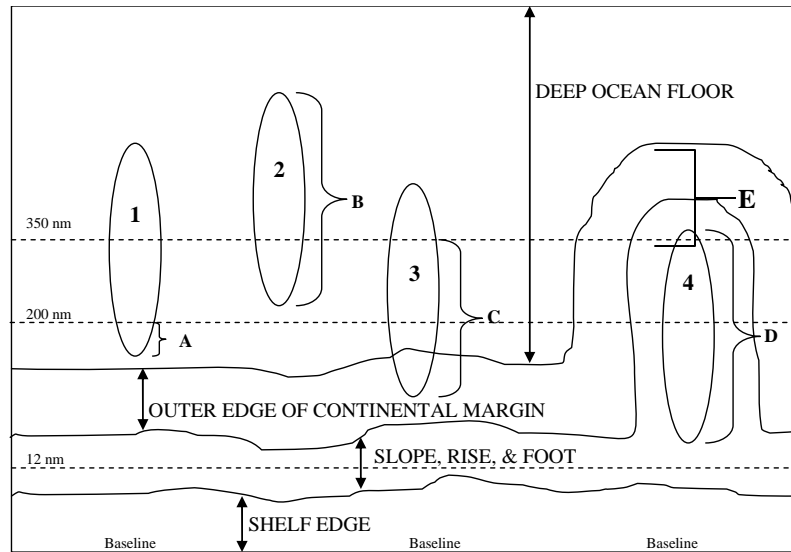


Fig. 2 The diagram is viewed as though looking down on to a coastal state's shoreline. **Objects 1-3** are "ridges." **Objects 1 & 2** are "oceanic ridges" because they are surrounded by the deep ocean floor. **Object 3** is a "submarine ridge" because it falls within the continental margin. **Object 4** is a "submarine elevation," such as a

During the development of UNCLOS III the International Hydrologic Organization (IHO) defined "oceanic ridge," "deep ocean floor," and "submarine ridge."²⁴⁰ The IHO defined "oceanic ridge" as "[a] long elevation of the deep ocean floor with either irregular or smooth topography and steep sides."²⁴¹ The "deep ocean floor" was defined as "[t]he surface lying at the bottom of the deep ocean with its oceanic ridges, beyond the continental margin."²⁴² Finally, the IHO defined "submarine ridge" as, "[a]n elongated elevation of the sea floor, with either irregular or relatively smooth topography

²⁴⁰ A COMMENTARY, *supra* note 45, at 876.

²⁴¹ *Id.*

²⁴² *Id.*

and steep sides which constitutes a natural prolongation of land territory.”²⁴³ As for the definition of “submarine elevation,” Brekke and Symonds derive the following definition:

Consequently, a submarine elevation that, along its entire length, shares geologic characteristics and origin with the landmass of the coastal State, and that forms an integral part of the continental margin based on the foot of the continental slope, may be categorized as being an elevation that is a natural component of the continental margin of that State.²⁴⁴

With the exception of Japan’s proposal to include a crustal criterion as part of the definition of ridges and elevations, and arguably Brekke and Symonds’ use of the term “geologic” in their definition of “submarine elevation,”²⁴⁵ all of the preceding definitions focus mainly on characteristics having to do with shape or formation. However, as Brekke and Symonds have argued, form alone is not enough to distinguish between a “submarine ridge” and a “submarine elevation.”²⁴⁶

The definition of the continental margin in Article 76²⁴⁷ offers one of the first express limitations on what may be included in the definition of the continental margin. The continental margin may “not include the deep ocean floor with its oceanic ridges or the subsoil thereof.”²⁴⁸ Thus, if the submerged geomorphic structure adjacent to a coastal state protruding out beyond 200 nautical miles actually constitutes the deep ocean floor such as an “oceanic ridge,” then the coastal state’s claim will be limited to a distance of 200 nautical miles.²⁴⁹ Fig. 2, ridge 1 offers a conceptual example of this set of facts. Typically, no part of an oceanic ridge is subject to a coastal state’s jurisdiction, unless part or all of it is situated within that coastal state’s EEZ. Ridge 1.A of Fig. 2 is subject to the coastal state’s jurisdiction, even though the ridge is “oceanic.” However, no other part of ridge 1 beyond 200 nautical miles may be

²⁴³ *Id.* at 880.

²⁴⁴ See Brekke and Symonds, *supra* note 121, at 189, discussing the definition of “submarine elevation” and also noting that Article 76 provides some examples of submarine elevations, e.g., plateaus, rises, caps, banks, and spurs. Fig. 2, object number 4 depicts a “submarine elevation.”

²⁴⁵ See *supra* note 144 and accompanying text.

²⁴⁶ See Symonds and Brekke, *supra* note 236, at 160.

²⁴⁷ 1982 Convention, *supra* note 93, at art. 76(3).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

subject to its claim. Ridge 2.B of Fig. 2 is not subject to the coastal state's jurisdiction because it is an "oceanic ridge" and falls beyond 200 nautical miles.

Article 76 places another limitation on the extension of the continental margin. Paragraph 6 further forbids a coastal state from claiming as part of its continental margin beyond 350 nautical miles "submarine ridges."²⁵⁰ Because a submarine ridge extends out from the continental margin it constitutes a natural prolongation of the coastal state and may therefore be subject to a greater degree of claim by the coastal state, but still subject to limits. Thus, the furthest distance from the baseline of a coastal state that may be claimed as the continental margin upon a "submarine ridge" is 350 nautical miles.²⁵¹ Regardless of the fact that the 2500 meter isobath had not yet been reached by nautical mile 350, the measuring stops, and the outer edge of the continental margin is set at 350 nautical miles.²⁵² Fig. 2 ridge 3.C provides a conceptual example of the total distance along ridge 3 the coastal state may extend its jurisdiction. Any portion of the ridge beyond 350 nautical miles may not be subject to the coastal state's claim.

If the formation in question is in fact a "submarine elevation," such as a plateau, then a coastal state is not automatically prevented from pushing its continental margin out beyond 350 nautical miles.²⁵³ The only inherent limit would be that the state may not push the outer edge of its continental margin out beyond 100 nautical miles from the 2500 meter isobath line.²⁵⁴ Fig. 2 object 4.D depicts a submerged geomorphic structure that falls within the foot of the slope of the continental margin. As such, the coastal state in Fig. 2 would not only be entitled to object 4.D, but also E, because a submarine elevation will possess its own continental margin, including foot, rise, and slope. This could constitute a considerable distance out into the open seafloor, thus making the distinctions between an "oceanic ridge," "submarine ridge," and "submarine elevation" very important.

3. *Analysis of Russia's Claim Under Article 76*

In the case of Russia's claim over the central Arctic Ocean, the exact meaning of the preceding terms is potentially of paramount importance when it

²⁵⁰ *Id.* at art. 76(6).

²⁵¹ *Id.*

²⁵² 1982 Convention, *supra* note 93, at art. 76(6).

²⁵³ *Id.*

²⁵⁴ See Brekke and Symonds, *supra* note 121, at 189 (discussing that a submarine elevation is "a natural component of the continental margin" if it is located "within the common envelope of the foot of the continental slope").

comes to making a claim as far north as the North Pole. An examination of the graphic Russia included with its submission to the Commission located in Appendix B indicates that the basis of Russia's claim to extend its continental shelf to the North Pole must be based on the Lomonosov Ridge formation.²⁵⁵ The graphic depicts a cone shaped area reaching as far as the North Pole²⁵⁶ indicating the area Russia intends to claim as its extended continental shelf. Located directly in the middle of the shaded area is the Lomonosov Ridge, which runs almost directly under the North Pole and continues in the direction of Greenland and Canada.²⁵⁷

The distance between Russia and the North Pole easily exceeds 350 nautical miles from its nearest baseline.²⁵⁸ Russia's northern most baseline boundary is located at the Polyarnyy Glacier on the north edge of Komsomolet Island,²⁵⁹ approximately 534 nautical miles from the North Pole.²⁶⁰ However, the beginning point for the measurement of Russia's continental margin cannot start from Komsomolet Island and then proceed toward the North Pole, but must begin approximately where the Lomonosov Ridge begins. The reason for this is because of the basic customary international law principle of "natural prolongation."²⁶¹ For Russia to claim all of the submerged land between Komsomolet Island and the North Pole the submerged land would need to be the

²⁵⁵ See *infra* Appendix B.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ U.S. DEP'T OF DEFENSE, MARITIME CLAIMS REFERENCE MANUAL 489, 508 (23 June 2005), available at <http://www.dtic.mil/whs/directives/corres/html/20051m.htm> [hereinafter MARITIME CLAIMS MANUAL].

²⁵⁹ *Id.* at 508.

²⁶⁰ This figure is based on calculations made by the author in Google Earth version 4.1. by taking the latitude and longitude of Russia's northern most baseline point from the Maritime Claims Reference Manual, see *supra* note 244, and measuring the distance in nautical miles to the North Pole.

²⁶¹ See North Sea Continental Shelf, *supra* note 63, at 31, discussing the fact that "whenever a given submarine area does not constitute a natural—or the most natural—extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of another State, it cannot be regarded as appertaining to that State" The ICJ concluded that a deep trough between Norway and the rest of the North Sea shelf was adequate to interrupt the natural prolongation of Norway's land territory, such that the shelf could not be considered to be adjacent to Norway despite its close proximity to its coast.

natural extension of its territory with no interruption.²⁶² An examination of the map Russia provided in its submission to the Commission²⁶³ located in Appendix B reveals that there is a large gap between Komsomolet Island and the North Pole,²⁶⁴ called the Eurasian Basin.²⁶⁵ Like the trough between Norway and the rest of the North Sea shelf,²⁶⁶ the Eurasian Basin interrupts the natural prolongation of the submerged land from Komsomolet Island to the North Pole. It would be improper to calculate distance from Komsomolet Island over the Eurasian Basin to the North Pole because the continental margin does not maintain its continuity²⁶⁷ and therefore is not the natural prolongation of Russia. It appears that Russia must agree with this assessment because its chart indicates that its extended continental shelf claims proceed around the Eurasian Basin, not across it.²⁶⁸ Russia's claim runs along the length of the Lomonosov Ridge toward the North Pole, not from the direction of Komsomolet Island but from Bennetta Island,²⁶⁹ located approximately 790-800 nautical miles from the North Pole.²⁷⁰

The evidence would appear to support the conclusion that the Lomonosov Ridge is an "oceanic ridge" and part of the deep ocean floor.²⁷¹ As such, the ridge may not be used as the basis to support Russia's claim. However, if the Lomonosov Ridge is a "submarine ridge," then Russia would be able to argue for an extension of its continental margin along the length of the ridge toward the North Pole, as it has done.²⁷² However, the outer limit of the continental margin would still fall well short of the North Pole because of the 350 nautical mile limit when using a "submarine ridge" to justify expansion of

²⁶² *Id.*

²⁶³ *See infra* Appendix B.

²⁶⁴ *Id.* *See also* Fig. 1 *supra*.

²⁶⁵ Ron Macnab, The Outer Limit of the Continental Shelf in the Arctic (published PowerPoint Presentation on CD attached to the back cover of LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS (Myron H. Nordquist, John N. Moore & Thomas H. Heidar, eds., 2004) (given as part of a presentation in Reykjavik in 2003. The graphic on slide #5 clearly shows a large basin located approximately between Komsomolet Island and the North Pole. The basin is called the Eurasian Basin).

²⁶⁶ *See supra* note 261 and accompanying text.

²⁶⁷ *See generally* Gudlaugsson, *supra* note 119, at 68.

²⁶⁸ *See infra* Appendix B.

²⁶⁹ *Id.*

²⁷⁰ These facts and figures are based on calculations made by the author in Google Earth version 4.1.

²⁷¹ *See supra* notes 224-29 and accompanying text.

²⁷² *Id.*

the continental shelf.²⁷³ Finally, if for the sake of argument the Lomonosov Ridge is a “submarine elevation,” then the 350 nautical mile limit does not automatically apply as it does with submarine ridges.²⁷⁴ Assuming that the Lomonosov Ridge formation never dips below 2500 meters in depth, Russia could conceivably continue to push its claim along the elevation toward the North Pole. Under these circumstances, the only limitation to total Russian control of the entire Lomonosov Ridge formation would be Article 76(10) which provides, “[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.”²⁷⁵ On the other end of the Lomonosov Ridge is Greenland (Denmark) and Canada.²⁷⁶ Presumably, Denmark and Canada could make similar claims to the Lomonosov Ridge formation and push their own claims, until the three nations derive an equitable delimitation of the formation. As stated earlier, the facts indicate that the Lomonosov Ridge was once part of the Eurasian landmass, but has since broken off and moved to its current position.²⁷⁷ Although the Lomonosov Ridge shares geologic characteristics with the landmass of its continental origin, the ridge is now surrounded by the deep ocean floor and is therefore an “oceanic ridge” of the deep ocean floor. Thus, Russia is not permitted under UNCLOS III to use the Lomonosov Ridge as justification to extend its continental shelf claim along its length to the North Pole.

Whether Russia may still be able to sustain a claim to the North Pole greatly depends on how the Commission will categorize the Lomonosov Ridge. It is unclear exactly what future recommendations the Commission will issue regarding Russia’s claim. The indications are that the Commission, at the very least, does not consider the Lomonosov Ridge a “submarine elevation.” In 2001, a research group concluded that most of the Arctic Sea floor was juridical continental shelf of one country or another.²⁷⁸ However, once the Commission’s summary of its recommendations was released, the research group revised its conclusions regarding the Lomonosov Ridge to indicate that the central portions were not part of the extended continental shelf of Russia.²⁷⁹ The reason for the group’s modification of the ridge’s classification was due to unconfirmed

²⁷³ 1982 Convention, *supra* note 93, at art. 76(6).

²⁷⁴ *Id.*

²⁷⁵ *Id.* at art. 76(10).

²⁷⁶ *See infra* Appendix B.

²⁷⁷ *See supra* notes 223-234 and accompanying text.

²⁷⁸ Ron Macnab, *The Outer Limit on the Continental Shelf in the Arctic Ocean*, in *LEGAL AND SCIENTIFIC ASPECTS OF CONTINENTAL SHELF LIMITS* 302 (Myron H. Nordquist, John N. Moore & Thomas H. Heidar, eds., 2004).

²⁷⁹ *Id.* at 305.

reports that the Commission took issue with Russia's characterization of the ridge.²⁸⁰

V. CONCLUSIONS

In a twist of irony, it was the Soviet Union that recommended during UNCLOS III negotiations in 1979 that continental margins not include "ocean ridges," yet it is Russia that is now attempting to use the Lomonosov Ridge to justify its claim to the North Pole.²⁸¹ It appears that science would conclude that the Lomonosov Ridge constitutes an oceanic ridge of the deep ocean floor,²⁸² making Russia's claim to extend its continental shelf beyond 200 nautical miles along the Lomonosov Ridge unsupportable under UNCLOS III. The Commission is not, however, bound by pure science when making its recommendations.²⁸³ Even if the Commission finds that the Lomonosov Ridge is a "submarine ridge," a claim to the North Pole would still be unsupportable under UNCLOS III because the North Pole is much further away than 350 nautical miles from Russia. In addition, the symbolic act of planting a flag under the North Pole, however impressive, will not change the geology of the Arctic Sea floor beneath, nor lend any more legal credibility to Russia's claim.

The future over the sovereign rights of the seafloor beneath the North Pole is still very much in question due to the uncertainty in applying limited science to Article 76 of UNCLOS III. Nations are not allowed to review the particulars of Russia's submission to the Commission, nor are they allowed to view the particulars of the Commission's recommendations back to Russia. This "lack of transparency"²⁸⁴ makes peer review and oversight over the process difficult, if not impossible. Once Russia acts in accordance with the recommendations of the Commission, Russia's actions are final and binding upon the international community.²⁸⁵ This deficiency does not exist under UNCLOS I. However, UNCLOS I remains woefully inadequate in assisting coastal states in determining the extent of their continental shelves. This is not to say that a coastal state cannot legally make a claim to extend its rights to its outer continental shelf without first being a party to UNCLOS III, because it can do so under customary international law.²⁸⁶ However, such a claim would lack legitimacy because the criteria for determining the outer limits of the shelf

²⁸⁰ *Id.* at 303.

²⁸¹ A COMMENTARY, *supra* note 45, at 862.

²⁸² *See supra* note 224-29 and accompanying text.

²⁸³ *See supra* note 199 and accompanying text.

²⁸⁴ Eiriksson, *supra* note 208, at 252.

²⁸⁵ *See supra* note 191 and accompanying text.

²⁸⁶ *See supra* note 44 and accompanying text.

would be arbitrary, unilaterally derived, and driven by self-interest, opening the door to excessive claims the world over. Likewise, coastal state claims to the outer continental shelf may be legally made under UNCLOS I, but would again lack legitimacy. The exploitability criterion of UNCLOS I opened the door for excessive continental shelf claims that were only in the interest of those nations able to exploit the deep ocean floor, that is at least until other nations attempt to do the same thing. A global feeding frenzy to the world's ocean floors is in no country's interest. Despite the deficiencies in its continental shelf provisions, UNCLOS III still represents a great improvement to UNCLOS I by providing greater guidance to coastal states in determining the extent of their continental shelf rights.

Since Russia made its submission to the Commission in 2001, the Commission has received fifteen more submissions, representing the outer continental shelf claims of Brazil, Australia, New Zealand, Ireland, France, Spain, the United Kingdom of Great Britain and Northern Ireland, Norway, Mexico, Barbados, Indonesia, Japan, the Republic of Mauritius and the Republic of Seychelles, Suriname, and Myanmar.²⁸⁷ Russia's 2001 submission was the shot that sounded around the world, starting a race of nations to claim the final frontier left on earth. If, as Emerson says, the "sea is the key to all the lands,"²⁸⁸ UNCLOS III is the key to the sea and its natural resources in a world striving to adhere to the rule of law.

²⁸⁷ http://www.un.org/Depts/los/clcs_new/clcs_home.htm (last visited Dec. 28, 2008).

²⁸⁸ See *supra* note 1 and accompanying text.

Appendix A.

Article 76

Definition of the continental shelf

1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.
2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.
3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.
4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
 - (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
 - (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.
- (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.
5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the

territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.

6. Notwithstanding the provisions of paragraph 5, on submarine ridges, the outer limit of the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured. This paragraph does not apply to submarine elevations that are natural components of the continental margin, such as its plateaux, rises, caps, banks and spurs.

7. The coastal State shall delineate the outer limits of its continental shelf, where that shelf extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.

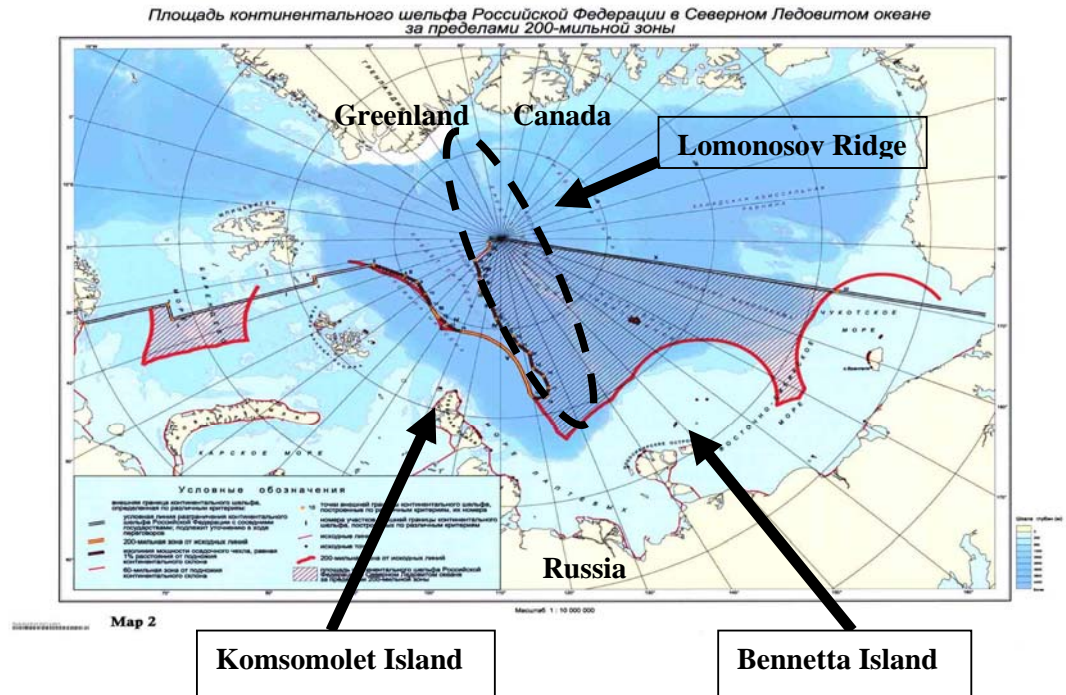
8. Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

9. The coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary-General shall give due publicity thereto.

10. The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.

Appendix B.

See Letter, Secretary General, Receipt of the Submission by the Russian Federation to the Commission on the Limits of the Continental Shelf, CLCS.01.2001.LOS (Continental Shelf Notification) (Dec. 20, 2001). This map was attached to the letter.



Explanation: The shaded areas are those that Russia claims to be part of its continental shelf beyond 200 nautical miles under Article 76 of UNCLOS III. The bold red lines represent the 200 nm limit of the EEZ as measured from the baseline of Russia represented by the very thin red lines outlining the land. This chart was annotated by the author.

Appendix C.

Types of seafloor high	Art. 76 province that it relates to	Max. extent of continental shelf
Oceanic ridge	Deep ocean floor	200 nautical miles
Submarine ridge	Continental margin	350 M
Submarine elevation	Continental margin	350 M or 2500 m isobath + 100 M, whichever is greater

See Philip A. Symonds and Harald Brekke, *supra* note 236, at 144 (discussing the “ridge provision” of Article 76). This chart was reproduced from Table 1 located on the same page with only slight changes to formatting to fit the page.

NEW MODEL FOR DISASTER RELIEF: A SOLUTION TO THE *POSSE COMITATUS* CONUNDRUM

Timothy E. Steigelman*

I. INTRODUCTION

A hypothetical: on a bright spring morning in southern California, the roads are clogged as usual with people on their way to work. Between 7:45 and 8:15, the predictable traffic jams are interrupted by a series of explosions throughout the region. In a matter of minutes the freeways in the greater Los Angeles area are brought to a standstill. Simultaneously, dozens of gas stations in the area explode, along with several petroleum depots nearby.

Over the course of the morning, it becomes clear that several major traffic arteries in southern California were attacked by improvised explosive devices (IEDs). The target selection was deliberate, as revealed by a consistent method of attack and their occurrence at or near the busiest freeway interchanges. The most congested freeways in the country become little more than parking lots as frustrated, scared motorists leave their cars on the road to seek shelter. The attacks cause multiple casualties and incited panic. Fires rage and black smoke billows across southern California. The combination of attacks on the freeways and the petroleum infrastructure strike a purposeful blow to the California economy.

The area is paralyzed by fear and nothing moves on freeways that are now effectively sealed by the abandoned cars. A car explodes outside a federal building in Long Beach, and another outside the Los Angeles police headquarters. Casualties are unknown, but believed to be high. Southern California is under siege.

The Governor, recognizing the threat exceeds the capability of local and state police, calls up available members of the National Guard. They report

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for duty by day's end. A state-level response to a localized disaster is well understood and well rehearsed. But, on the other coast, the President determines that the attacks require a federal response and, as Commander in Chief, orders federal troops to prepare to move into California to secure the area, prevent future attacks, and reassure the citizenry. The appearance of uniformed troops in response to national disaster is more unusual and ad-hoc.

A question: is it legal? Can the President send federal troops to restore peace and uphold the rule of law within the United States? The unsettling answer is "maybe." The equivocation is due, in some part, to the *Posse Comitatus* Act (PCA). This law prohibits the domestic use of federal troops to enforce civil law.¹ But not only is the Act as it stands poorly understood, it also is being modified rapidly. Since September 11, 2001, the PCA has been the subject of academic² and legal debate,³ as well as Congressional revision.⁴ Commentators recommend a range of options, from scrapping the PCA entirely,⁵ to amending it,⁶ to keeping it in place without alteration.⁷ Congress

¹ 18 U.S.C. § 1385 (2000).

² See generally Linda J. Demaine & Brian Rosen, *Process Dangers of Military Involvement in Civil Law Enforcement: Rectifying the Posse Comitatus Act*, 9 NYU J. LEG. & PUB. POL'Y 167 (2005); Joshua M. Samek, *The Federal Response to Hurricane Katrina: A Case for Repeal of the Posse Comitatus Act or a Case for Learning the Law?*, 61 U. MIAMI L. REV. 441 (2007).

³ John A. McCarthy, et al., *Posse Comitatus and the Military's Role in Disaster Relief*, DISASTERS AND THE LAW 50 (Daniel A. Farber & Jim Chen eds., 2006).

⁴ See 10 U.S.C.A. § 2567 (West 2007) (effective Oct. 17, 2006); *repealed by* National Defense Authorization Act of 2008, Pub. L. No. 110-181, §1068, 122 Stat. 3 (2008) (10 U.S.C.A. § 333 (West 2008)).

⁵ See Lieutenant Colonel Donald J. Currier, *The Posse Comitatus Act: A Harmless Relic from the Post-Reconstruction Era or a Legal Impediment to Transformation?*, STRATEGIC STUD. INST. (2003).

⁶ See Demaine & Rosen, *supra* note 2 at 250; see also John R. Longley III, *Military Purpose Act: An Alternative to the Posse Comitatus Act—Accomplishing Congress's Intent With Clear Statutory Language*, 49 ARIZ. L. REV. 717, 718, 740-41 (2007); Ashley J. Craw, *A Call to Arms: Civil Disorder Following Hurricane Katrina Warrants Attack on the Posse Comitatus Act*, 14 GEO. MASON L. REV. 829, 850-56 (2007).

⁷ See Samek, *supra* note 2 at 465. See also Christopher Ligatti, *The Legality of American Military Troops Engaging in Law Enforcement in the Event of a Major Terrorist Attack*, 41 NEW ENG. L. REV. 199, 240-41 (2006) (providing a survey of several *posse comitatus* articles and opinions). Other authors simply bemoan the erosion of civil liberties, counting down the impending demise of *posse comitatus*. See Nathan Canestaro, *Homeland Defense: Another Nail in the*

seems similarly conflicted, repealing after only two years a 2006 law meant to clarify the PCA.⁸

A case study: the PCA was at issue most recently during Hurricane Katrina. While there were a multitude of causes for the devastating loss of life wrought by the storm and its aftermath, a substantive contributing factor was an endemic misunderstanding about *posse comitatus* regarding whether and how the President could order federal troops into a domestic disaster area. As will be discussed below, the power struggle regarding federal troops became a major point of contention, exacerbating an already slow disaster response.

The implicit goal of the PCA is a desire to keep the federal military out of the traditional state role of law enforcement. The challenge is to articulate the law in a way that upholds the tradition while also supporting effective disaster relief. The cost for not doing so, as seen in the Hurricane Katrina response, is the unnecessary loss of American lives. In the event there is a large-scale manmade disaster in the United States, a clear and ready application of the law will be even more urgent. The law as it stands probably affords the President all the power necessary to restore order after a disaster using federal troops.⁹ But as recent experience during Hurricane Katrina shows, the PCA as currently applied is insufficiently clear for lawmakers, military, and first responders to avoid *posse comitatus* proscriptions.

In order to address the lack of clarity, this article explores the limits of the domestic use of the federal military under the *Posse Comitatus* Act, and recommends a way to combine the valued goals of the PCA with an effective domestic disaster response. An ideal solution would be sub-statutory, that is, a solution effectuated within the executive branch, not requiring new legislation. Each new law generates unforeseen second and third-order effects; indeed, recent Congressional attempts to clarify the PCA have already been repealed. Instead, this article provides what has been missing from the academic debate of *Posse Comitatus* to date: a workable and timely solution for domestic disaster response that respects the goals of *Posse Comitatus*.

Coffin for Posse Comitatus, 12 WASH. U. J.L. & POL'Y 99, 143-44 (2003); Lieutenant Colonel Mary J. Bradley et al., *The Posse Comitatus Act: Does It Impact the Department of Defense During Consequence Management Operations?*, ARMY LAW. 68, 72-75 (2007); Matthew S. Belser, *Martial Law After the Storm*, 35 S.U. L. REV. 147, 221 (2007).

⁸ See 10 U.S.C. § 2567 (effective Oct. 17, 2006), *repealed* by National Defense Authorization Act of 2008, Pub. L. No. 110-181, §1068, 122 Stat. 3 (2008) (10 U.S.C.A. § 333 (West 2008)).

⁹ See Samek, *supra* note 2, at 465.

To that end, this article reviews the Act's history, its role in the Hurricane Katrina response, and recent PCA legislation, and then outlines and applies a new model based on current analogs. Part II is a primer on the PCA and how it works, including its history, exceptions, and jurisprudence. Part III examines how a misapplication of the PCA was unnecessarily burdensome to federal disaster relief following Hurricane Katrina, showing what can go wrong when the law is misapplied. Part IV explores how Congress reacted to Katrina with legislation meant to clarify the PCA—then proceeded to reverse course little more than a year later. Part V looks at current government analogs that might be adapted when re-thinking domestic disaster response under the PCA. Part VI recommends a plan synthesizing the PCA with effective disaster relief, and applies the new model to the above hypothetical.

II. PRIMER: PCA MEANING, EXCEPTIONS, AND HISTORY

A. Beginnings of the Act

The *Posse Comitatus* Act¹⁰ is not just a mere regulatory proscription, but is in fact a criminal statute:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a *posse comitatus* or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.¹¹

Posse comitatus is Latin for “power of the county,” and is defined as “[a] group of citizens who are called together to help the sheriff keep the peace.”¹² The plain text of the statute makes it a federal crime to use any portion of the Army or Air Force to enforce the law.¹³ While the Navy and Marine Corps are not mentioned in the statute, internal regulations place similar restrictions on the use of these military branches as well.¹⁴ Simply saying that the military may not

¹⁰ 18 U.S.C.A. § 1385 (West 2008).

¹¹ *Id.*

¹² BLACK'S LAW DICTIONARY (3rd pocket ed. 2006).

¹³ 18 U.S.C. § 1385 (2008).

¹⁴ U.S. DEP'T OF DEFENSE, DIR. 5525.5, MILITARY SUPPORT TO CIVIL AUTHORITIES 13 – 21 (15 Jan. 1993) hereinafter DOD DIR. 5525.5]. *See also* U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5820.7C, COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS 5 (26 Jan. 2006) [hereinafter SECNAVINSTR 5820.7C] (recognizing that DOD DIR 5525.5 applies PCA proscriptions to the Navy and Marine Corps, though not required by statute).

enforce the law, however, only begins the inquiry. A full understanding of the law requires an historical, textual, and legal inquiry.

I. Posse Comitatus Antecedents

The concepts behind the PCA predate the republic. A national army is perhaps the most threatening arm of a federalized government, and the Framers feared its reach. In *The Federalist No. 26*, Alexander Hamilton underscored the wisdom of requiring funding for an army to be reauthorized every two years, as required in the “new Constitution.”¹⁵ He predicted this biannual debate over a standing army would provide the states with the opportunity to focus their citizenry on any possible “encroachments from the federal government.”¹⁶

James Madison also felt a standing army was “dangerous, at the same time that it may be necessary.”¹⁷ He agreed with Hamilton that “the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support.”¹⁸ Their opinions reflect the mood of the Framers and their arguments convinced the burgeoning nation to ratify the newly drafted Constitution.¹⁹ The fact that this coordinated propaganda campaign addressed and downplayed the reach of a federal military is evidence of an historical American distrust of a standing army.²⁰

¹⁵ THE FEDERALIST No. 26, at 139 (Alexander Hamilton) (Clinton Rossiter ed., 1999). See also U.S. CONST. art. I, § 8, cl. 12.

¹⁶ THE FEDERALIST No. 26, at 140 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

¹⁷ THE FEDERALIST No. 41, at 225 (James Madison) (Clinton Rossiter ed., 1999).

¹⁸ *Id.* at 227.

¹⁹ Charles R. Kesler, *Introduction to THE FEDERALIST PAPERS*, i, viii (Clinton Rossiter, ed., 1999).

²⁰ Interestingly, the Constitution memorializes distrust only in federal ground forces. The Constitution grants Congress the power to “raise and support Armies,” with appropriations limited to two years. U.S. CONST. art. I, § 8, cl. 12. State militias, however, were authorized and armed by Congress, with no similar requirement for periodic reauthorization, *id.* at cl. 16, even though state militias could be called into federal service. *Id.* at cl. 15. Similarly, Congress may “provide and maintain a Navy,” *id.* at cl. 13, but is not constitutionally required to periodically review funding for naval forces. *Id.* This disparity between the constitution’s treatment of land and naval forces shows America’s historical wariness towards a standing army, also evidenced by the text of the *Posse Comitatus Act*. 18 U.S.C.A. § 1385 (West 2008).

Once the Constitution was ratified, Congress established the federal District Courts with the Judiciary Act of 1789.²¹ The Act also provided the courts with U.S. Marshals.²² The U.S. Marshals, in turn, used the local citizens as the common law “power of the county,” or *posse comitatus*, to help the Marshal enforce the laws as needed.²³ Federal soldiers were not often used by the Marshals, and for the century between the American Revolution and passage of the PCA, it remained an open question as to whether the federal marshals could legally require military members to become part of a *posse comitatus*.²⁴

While the nascent court system developed and matured, deep and abiding distrust of federal troops remained part of the national psyche. Chief Justice Burger acknowledged this fact in a hotly contested case about domestic military surveillance, writing that there exists

[a] traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibition[s'] . . . philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime.²⁵

That traditional insistence dates back at least as far as Madison and Hamilton, who penned the opening volleys addressing the distrust of federal military power. This distrust carried forward 100 years from the nation's founding, and under somewhat different circumstances, led to the passage of the original *Posse Comitatus* Act.

²¹ An Act to Establish the Judicial Courts of the United States, 1st Cong., 1 Stat. 73 (1789).

²² *Id.*

²³ Currier, *supra* note 5, at 2.

²⁴ *Id.* at 2 – 3.

²⁵ *Laird v. Tatum*, 408 U.S. 1, 15 (1972).

2. *Passage*

Congress passed the PCA during Reconstruction.²⁶ During that time, the earlier wariness of central federal authority intruding on states' rights was strengthened by new political and racial concerns. The catalyzing events leading to *Posse Comitatus* were repeated uses of the federal army to intervene in antebellum Louisiana, Arkansas, and South Carolina; these interventions affected state politics, and were necessary to keep the peace in the face of dangerous elements such as the Ku Klux Klan or armed factions striking at the state governments.²⁷ The introduction of federal troops, perceived as an insult to state sovereignty, made domestic use of the military a major issue in the election of 1876.²⁸ As a result, the 45th Congress, with recently repatriated southern congressmen, passed the original *Posse Comitatus* Act as part of the army's appropriation bill.²⁹ Though there was much discussion about the historical wariness towards a centralized government,³⁰ the background of Reconstruction and contemporaneous racial retrenchment made clear the intent of *Posse Comitatus* was to prevent further federal meddling in southern states' internal affairs.³¹ From this ignoble beginning came the longstanding law that has come to represent a general respect for civilian supremacy in law enforcement.

A. *Posse Comitatus in Context*

Having explored the historical antecedents and passage of *Posse Comitatus*, a fuller understanding of the law's operation requires learning about the Act's function in both Constitutional and statutory context, along with judicial interpretation. This inquiry will later inform a recommendation for an effective, *Posse Comitatus*-compliant, disaster relief plan.

1. *Constitutional Underpinnings*

Several Constitutional provisions provide the framework for analyzing the PCA. The Constitution requires the President to "take Care that the Laws be

²⁶ 18 U.S.C.A § 1385 (West 2008) (originally passed June 18, 1878). *See also* Currier, *supra* note 5, at 3.

²⁷ Currier, *supra* note 5, at 4-5.

²⁸ Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 175 MIL. L. REV. 86, 112 (2003).

²⁹ Currier, *supra* note 5, at 5.

³⁰ *Id.*

³¹ Felicetti & Luce, *supra* note 28.

faithfully executed.”³² Additionally, the President is the Commander in Chief of the federal armed forces, and state militias when in federal service.³³ Congress’s powers under the Constitution are equally relevant to the PCA. Congress funds and regulates the federal military,³⁴ and funds and regulates the state militias.³⁵ Additionally, Congress is empowered to pass laws “provid[ing] for calling forth the [state] Militia to execute the laws of the Union, suppress Insurrections and repel Invasions.”³⁶

2. *Statutory Exceptions*

There are two broad categories of statutory exceptions to the PCA. The first category refers to insurrections, and is Congress’ guidance to the President concerning the employment of state militias and federal troops domestically.³⁷ The second category of exceptions, the one most pertinent to this discussion, is Congress’ instructions to the President concerning use of the military to assist civilian law enforcement.³⁸

³² U.S. CONST. art. II, § 3.

³³ *Id.* at § 2.

³⁴ *Id.* at art. I, § 8, cl. 12 – 14.

³⁵ *Id.* at cl. 16.

³⁶ *Id.* at cl. 15.

³⁷ 10 U.S.C. §§ 331 – 334, 12406 (2000). For a thorough treatment of the insurrection statutes, see Stephen I. Vladeck, *The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 81 TEMPLE L. REV. 391, 432-436 (2007).

³⁸ 10 U.S.C. §§ 372 – 382 (2000). Other authors include the Defense Department’s Immediate Response Authority as part of similar discussions. See Ross C. Paolino, Note, *Is it Safe to Chevron Two-Step in a Hurricane? A Critical Examination of How Expanding the Government’s Role in Disaster Relief Will Only Exacerbate the Damage*, 76 GEO. WASH. L. REV. 1392, 1401-02 (2008). The Immediate Response Authority is not addressed in this piece because the directive creating the authority is an intradepartmental regulation creating civil Department of Defense emergency response coordinators, and implementing the Stafford Act, discussed *infra*. U.S. DEP’T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES 1-2 (15 Jan. 1993) [hereinafter DOD DIR. 3025.1]. Additionally, regarding the “Immediate Response” specifically, it is a power granted to local commanders immediately following a disaster when communication with higher headquarters is unavailable. *Id.* at 7. Law enforcement may perhaps be exercised in such an exigency, but such an allowance is, at best, implicit. *Id.* at 7-8. The Immediate Response Authority, therefore, is an individual commander’s decision to use available troops before a full-scale recovery effort is launched, akin to the

The guidance for the President in responding to insurrection is permissive, granting the President the discretion to call forth the militia “as he considers necessary.”³⁹ These “calling forth” statutes, as they are referred to, give the President explicit power to use state militias and federal military forces in specific circumstances.⁴⁰ Some examples include restoring order in the event of insurrection against a state,⁴¹ quelling rebellion or other unrest against federal authority,⁴² responding to threat of invasion,⁴³ and restoring order after a major public emergency.⁴⁴

While the “calling forth” statutes give the President wide latitude, the law enforcement statutes are more specific, and can be read as enabling legislation. The law enforcement statutes grant power directly to the Secretary of Defense⁴⁵ to share equipment and facilities,⁴⁶ information gleaned through surveillance,⁴⁷ and even military training and uniformed experts, with law enforcement.⁴⁸ While these statutes seem to allow a blurring of the lines between military and civilian law enforcement, accompanying sections state that these laws are not intended to grant any greater law enforcement powers to

commander of the Presidio using federal troops to help fight fires after the San Francisco earthquake of 1906. Because this piece addresses disaster response from the federal level, the Immediate Response authority will not be discussed any further.

³⁹ 10 U.S.C. §§ 331 (2000).

⁴⁰ The term “militia” is generally used today to refer to the National Guard, and that will be its use in this article. National Guard Bureau, About the National Guard, <http://www.ngb.army.mil/About/default.aspx>, (last visited Nov. 20, 2008). Though not discussed further herein, it is interesting to note that several states continue the tradition of maintaining separate state militia organizations. These organizations include the Maryland Defense Force, <http://www.mddefenseforce.org/> (last visited Nov. 20, 2008); the Texas State Guard, <http://www.txsg.state.tx.us/> (last visited Nov. 20, 2008); the Alabama State Defense Force, <http://sdf.alabama.gov/default.htm> (last visited Nov. 20, 2008); and the New York Guard, <http://dmna.state.ny.us/nyg/nyg.html> (last visited Nov. 20, 2008), and New York Naval Militia, <http://www.dmna.state.ny.us/nynm/naval.php> (last visited Nov. 20, 2008).

⁴¹ 10 U.S.C. § 331.

⁴² *Id.* at § 332.

⁴³ *Id.* at § 12406.

⁴⁴ *Id.* at § 333.

⁴⁵ *See, e.g.*, 10 U.S.C. § 372(a).

⁴⁶ 10 U.S.C. §§ 372, 374.

⁴⁷ 10 U.S.C. § 371 (2000).

⁴⁸ 10 U.S.C. § 373.

military members than was present before the laws' passage.⁴⁹ The Constitution provides for Congressional regulation of Presidential power with respect to use of the military and militia domestically. The PCA generally forbids military members from acting as civil law enforcement. In short, the "calling forth" statutes give the "when," and the military law enforcement statutes provide the "how" for statutory PCA exceptions.

3. *Judicial Interpretation*

By deciding cases and controversies in light of this constitutional and statutory framework, the judiciary at once illuminates and obfuscates the PCA, related laws, and the many common law exceptions.

a. *Related Case Law*

Judicial interpretation of the "support to law enforcement" statutes suggests a narrow reading of *Posse Comitatus* proscriptions. The text of the PCA applies only to the Army and Air Force.⁵⁰ It is conceivable to extend the law's proscriptions to the Navy, as a handful of courts have interpreted the PCA.⁵¹ The majority view, however, gives *Posse Comitatus* a narrow reading, allowing the Navy, operating in international waters, to provide indirect support to law enforcement missions, even when the missions depend upon that military support.⁵²

However, though most courts read PCA proscriptions narrowly, most courts also grant the President broad discretion with respect to the insurrection and calling forth statutes. In one stark example, a federal appeals court abrogated its power in this area of law:

[T]he decision whether to use troops or the militia (National Guard) in quelling a civil disorder is exclusively within the province of the president. The Courts also have made it clear that presidential discretion in exercising those powers granted

⁴⁹ 10 U.S.C. §§ 375, 387.

⁵⁰ 10 U.S.C. § 1385. Early drafts of the act included naval forces in the proscriptions. The language was dropped in the final version. See Felicetti & Luce, *supra* note 28, at 111.

⁵¹ *United States v. Kahn*, 35 F.3d 426, 431 n.6 (9th Cir. 1994).

⁵² See, e.g., *United States v. Rasheed*, 802 F.Supp. 312, 325 (D. Haw. 1992); and *State v. Short*, 775 P.2d 458, 459 (Wash. 1989).

in the Constitution and in the implementing statutes is not subject to judicial review.⁵³

In that case, not only was the President ruled the sole authority to declare when insurrections were occurring, but the court also denied the existence of a cause of action, on constitutional and statutory grounds, against the President for damages caused by his failure to protect property when declining to exercise his “calling forth” power.⁵⁴

Just as there is generally no cause of action against a President who fails to exercise his authority under the “calling forth” statutes, so do most courts similarly disallow suing the government for taking affirmative steps in preparation for using the “calling forth” powers. For example, in 1963, Governor George Wallace sought an injunction to prevent federal troops from being placed within Alabama.⁵⁵ In a terse single paragraph, the Supreme Court cited one of the “calling forth” statutes as authority for “alerting and stationing military personnel in the Birmingham area.”⁵⁶ Finding the President’s actions were within the statute, and moreover that the statute did not provide a cause of action, the Court dismissed Wallace’s complaint.⁵⁷

Courts are reluctant to contravene the President’s broad authority under the “calling forth” statutes. In one case involving a coal mine strike, a federal court refused to certify the need for federal troops to quell civil unrest, as requested by the plaintiff coal company.⁵⁸ Claiming violence was a certainty if they attempted to move coal past striking miners, the coal company requested certification of a state of insurrection as one alternative form of relief.⁵⁹ Denying the request, the court reasoned that the President’s power to send troops into a state was a decision left entirely to the executive branch, to the exclusion of the judiciary.⁶⁰ Additionally, once the President declares territory

⁵³ *Monarch Ins. Co. v. District of Columbia*, 353 F.Supp. 1249, 1255 (D.D.C. 1973). See also *Martin v. Mott*, 25 U.S. 19, 30-32 (1827) (entrusting the power to declare the existence of an insurrection solely to the President).

⁵⁴ *Monarch Ins. Co.*, 353 F.Supp. at 1257 – 61.

⁵⁵ Brief for Plaintiff at 11, *Alabama v. United States*, 1963 WL 81838 (U.S. 1963).

⁵⁶ *Alabama v. United States*, 373 U.S. 545, 545 (1963).

⁵⁷ *Id.*

⁵⁸ *Consolidated Coal & Coke Co v. Beale*, 282 F. 934, 936 (S.D. Ohio 1922).

⁵⁹ *Id.* at 934 – 35.

⁶⁰ *Id.* at 936.

to be in a state of insurrection, that designation remains in effect until the President declares the insurrection to be over.⁶¹

Taken together, judicial interpretation of the law enforcement and “calling forth” statutes show a reluctance to infringe upon the sphere of the executive branch in many areas of the law that overlap with the PCA. Beyond mere statutory interpretation, however, the judiciary has several modes of analysis to determine when an executive branch action oversteps the bounds of the PCA.

b. Tests for PCA Violations

There are three methods of analysis that courts use to determine whether the PCA has been violated. After an exploration into each of the three tests, the tests will be applied to a real fact pattern, to demonstrate their relative probity.

“The first test [is] whether civilian law enforcement agents made ‘direct active use’ of military personnel to execute the laws.”⁶² This “direct active use” interpretation of the PCA language applies to military personnel,⁶³ including “any unit of federal military troops of whatever size or designation to include one single soldier or large units such as a platoon or squadron.”⁶⁴ When first articulated in *United States v. Red Feather*,⁶⁵ the court held as a matter of law that the PCA could not be violated by sharing material resources between the military and law enforcement.⁶⁶ However, defendants could defeat criminal charges by successfully proving that military personnel had assisted law enforcement.⁶⁷ The charges in *Red Feather* alleged the defendants impeded law enforcement officers who were “lawfully engaged in the lawful performance of [their] official duties.”⁶⁸ If the defendant could prove that law enforcement violated the PCA by using members of the Army or Air Force to enforce the

⁶¹ *Hamilton v. Dillin*, 88 U.S. 73, 95 (1875).

⁶² *United States v. Yunis*, 681 F. Supp. 891, 892 (D.D.C. 1988).

⁶³ *United States v. Red Feather*, 392 F. Supp. 916, 921- 22 (D.S.D. 1975). *See also* 10 U.S.C. § 375 (passed in 1981, this statute effectively codifies the *Red Feather* holding and prohibits the military from directly participating in search, seizure, or arrests).

⁶⁴ *Red Feather*, 392 F. Supp. at 922.

⁶⁵ *Id.* at n.63.

⁶⁶ *Id.* at 924.

⁶⁷ *Id.* at 923 – 24.

⁶⁸ 18 U.S.C. § 231(a)(3) (2000).

civil laws, the police were necessarily acting unlawfully, which would defeat the charge.⁶⁹

Perhaps most interesting to the “direct and active use” test is that, after finding a possible PCA violation, the *Red Feather* court went out of its way to limit the impact of its opinion.⁷⁰ The court drew a distinction between military personnel executing the laws, as proscribed by the PCA, and aiding civilian investigations, which courts generally allow.⁷¹ This distinction between executing the laws and assisting investigations is generally considered correct and unambiguous. In any event, this test of “direct and active use” is perhaps the clearest and easiest of the three PCA tests to apply.⁷²

The second test weighs whether the “use of any part of the Army or Air Force pervaded the activities of the civilian law enforcement agents.”⁷³ First articulated in *U.S. v. Jaramillo*⁷⁴, the “pervaded” test is akin to a “totality of the circumstances” analysis.⁷⁵ *Jaramillo*, like *Red Feather*, was a criminal case arising from the events at Wounded Knee in 1973,⁷⁶ and again one of the charges required law enforcement officers to have been acting lawfully.⁷⁷ The court drew attention to the actions of Colonel Volney Warner, U.S. Army, and the unique role he played during the standoff.⁷⁸ Col. Warner received orders to report to Wounded Knee to observe events, and advise the Defense Department whether or not federal troops were required.⁷⁹ Although Col. Warner advised against the need for troops, his observation crept towards advice to law enforcement, and his advice arguably crossed the line into assistance.⁸⁰ Col. Warner recommended the law enforcement officers change their rules of engagement, and provided military vehicles to law enforcement officials.

⁶⁹ *Red Feather*, 392 F. Supp. at 923 – 24.

⁷⁰ *Id.* at 924 – 25.

⁷¹ *Id.* See also *Burns v. State*, 473 S.W.2d 19 (Tex. Crim. App. 1971); *United States v. Walden*, 490 F.2d 372 (4th Cir. 1974).

⁷² See also *United States v. Hartley*, 796 F.2d 112, 115 (5th Cir. 1986) (passing information from the Air Force to Customs did not amount to “direct participation of the military”).

⁷³ *United States v. Yunis*, 681 F. Supp. 891, 892 (D.D.C. 1988) (quoting *United States v. Jaramillo*, 380 F. Supp. 1375, 1379 (D. Neb. 1974)).

⁷⁴ *United States v. Jaramillo*, 380 F. Supp. 1375, 1379 (D. Neb. 1974).

⁷⁵ *Id.* at 1381.

⁷⁶ *Id.* at 1376.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1379 – 80.

⁷⁹ *Jaramillo*, 380 F. Supp. at 1379.

⁸⁰ *Id.* at 1379 – 80.

Because one condition for using the vehicles was that the police use tactics prescribed by Col. Warner, the colonel's conditions became *de facto* orders that were promulgated to the law enforcement officers.⁸¹

On the basis of these facts, the court acquitted the defendants.⁸² Being careful to stop short of an explicit finding of a *Posse Comitatus* violation, the court held that Col. Warner's participation raised a reasonable doubt, under the PCA, as to whether the law enforcement personnel were acting lawfully.⁸³ In short, there likely was a PCA violation by Col. Warner, because his participation in the stand-off at Wounded Knee "pervaded the activities" of civilian law enforcement.⁸⁴

"The third [and final] test is whether the military personnel subjected citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature."⁸⁵ Another case arising from the Wounded Knee standoff, *U.S. v. McArthur*⁸⁶ first formulated this test, finding the earlier "direct and active use" and "pervade" tests inadequate.⁸⁷ The court in *McArthur* applied a "regulate, proscribe, or compel" test to the same facts discussed in *Red Feather* and *Jaramillo*.⁸⁸ Taking Col. Warner's presence at Wounded Knee to be preparatory in nature, and his advice to civilian law enforcement to be incidental, the court in *McArthur* ruled that Warner's assistance did not run afoul of the PCA.⁸⁹ The court reasoned that it was the civil authorities who gave the orders, so that Warner's advice did not compel civilian law enforcement to do anything; therefore, the PCA was not violated.⁹⁰

Applying these judicial tests to another factual scenario will better illustrate the three analyses of the PCA. For example, imagine if an Air Force

⁸¹ *Id.*

⁸² *Id.* at 1381.

⁸³ *Id.*

⁸⁴ *Jaramillo*, 380 F. Supp. at 1379.

⁸⁵ *United States v. Yunis*, 681 F. Supp. 891, 892 (D.D.C. 1988).

⁸⁶ *Monarch Ins. Co. v. District of Columbia*, 353 F.Supp. 1249 n.53 (D.D.C. 1973).

⁸⁷ *United States v. McArthur*, 419 F. Supp. 186, 194 (D.N.D. 1975).

⁸⁸ *Id.* at 193.

⁸⁹ *Id.* at 195.

⁹⁰ *Id.* at 194 – 95. The court in *McArthur* does not make the "regulate, proscribe, or compel" test as clearly distinct as was perhaps intended. In fact, the court circles back to the "pervade" test, almost rhetorically challenging the *Jaramillo* court on its conclusion. *McArthur*, 419 F. Supp. at 195. Though there may only be a fine conceptual difference, the third test is still a useful point of view for evaluating possible PCA violations.

helicopter pilot flew a search mission to help civilian law enforcement capture a fugitive.⁹¹ During the search, the pilot lands in a field and injures a bystander when debris is sent flying by the helicopter's rotor downwash.⁹² In a resulting civil action, the plaintiff seeks to hold the government liable for the pilot's actions, arguing that the aerial search was within the pilot's scope of employment.⁹³

To help illustrate the differences between the three tests and discover any disparity in result, the fact pattern above will be analyzed with each test. First, the "direct and active use" test would almost certainly find that the law enforcement officials violated the PCA. By flying search patterns, the military pilot was a direct and active participant in the fugitive search. Just as the defendant in *Red Feather* was allowed to prove active participation in the law enforcement action, here, the helicopter pilot seems both an archetype of "direct and active use," as well as a modern analogue to the *mounted cavalry helping the sheriff track down a cattle rustler*. Because it was prohibited when on horseback, so too is the "direct and active use" of a military helicopter prohibited by the PCA.

The second test, whether military assistance "pervades" the law enforcement action, is less satisfying when applied to the above facts. The helicopter pilot, depending on the storyteller, could be either the linchpin of the whole search operation, or a mere last minute addition, unimportant to the overall search. Given the *Jaramillo* decision and the extent of Col. Warner's egregious direction in the Wounded Knee standoff, the pilot above probably did not violate the PCA. The pilot was in the air and had some part in directing the search by communicating with the civilian law enforcement, but there is no suggestion that the pilot set conditions and rules like Col. Warner. Because the pilot's participation likely helped shape the search, however, in a manner that was somewhat pervasive, the pilot's assistance could run afoul of PCA under the "pervade" test; there is no clear answer using this test.

Finally, the "regulate, proscribe, or compel" test is almost certainly not violated on the above facts. Just as the *McArthur* court used the same Wounded Knee facts and found no violation, the pilot in the above facts would likely not

⁹¹ Facts in this hypothetical are drawn from *Wrynn v. United States*, 200 F. Supp. 457 (E.D.N.Y. 1961).

⁹² *Wrynn*, 200 F. Supp. at 465.

⁹³ *Id.* In *Wrynn*, though the court did not reach the question, removing the federal government's liability, as the court did, should have allowed the plaintiff to pursue a tort claim against the pilot personally. Restatement (Third) of Agency § 7.01 (2006).

violate the PCA under this test. Although the pilot's input to the search may have amounted to some level of control, the pilot's direction and communications cannot fairly be considered regulation, proscription, or compulsion. The *McArthur* court was focused on the fact that the colonel's advice had to be enforced by a supervisory law enforcement officer. Similarly, the pilot's descriptions of what he did or did not see would probably have been advisory, and the law enforcement personnel on the ground could continue to direct their search however they saw fit, regardless of what the pilot said. It seems, then, that unless a military member directs civilians on threat of force, or exercises some unequivocal authority over a civilian, the "regulate, proscribe, or compel" test is very difficult to violate.

As the preceding discussion illustrates, each of the three tests looks at different aspects of military involvement in law enforcement. For that reason, all three tests must be kept in mind when suggesting a working model for disaster relief.

Having reviewed the foundational case law and political antecedents of *Posse Comitatus*, the next analysis turns to a recent example of misunderstanding the law. Exploring the damage caused by misapplying the PCA will highlight the need to clarify the system, so that the military may legally and effectively perform domestic disaster relief.

III. HURRICANE KATRINA: POSSE COMITATUS AS IMPEDIMENT

Hurricane Katrina became a Category Five hurricane while swirling at sea on August 28, 2005.⁹⁴ The storm was 150 miles across, and at the time was predicted to produce flooding nearly twenty feet above normal tidal levels.⁹⁵ The damage wrought by the storm itself, as well as by the slow response and misapplication of *Posse Comitatus*, reveals the need to revise the way federal troops are provided to disaster relief efforts.

A. Storm Damage

Hurricane Katrina was the most destructive natural disaster in American history; it was the deadliest American disaster in eight decades, and adjusted for inflation, the storm and its aftermath exceeded property damage in any previous natural disaster.⁹⁶ There were an estimated 1,330 deaths caused by

⁹⁴ STEPHEN FLYNN, *THE EDGE OF DISASTER* xix (2007).

⁹⁵ *Id.*

⁹⁶ The White House, *The Federal Response to Hurricane Katrina: Lessons Learned* 5-9, in *DISASTERS AND THE*

the storm and flooding, and more than 1 million evacuees.⁹⁷ Property damage neared \$100 billion, including the destruction of 300,000 homes.⁹⁸

Economic and environmental maladies have beset the Gulf Coast since the storm: unemployment, damaged infrastructure, oil spills and other toxic hazards, and the loss of hundreds of thousands of residents who may never return to their homes in Louisiana and Mississippi.⁹⁹ An incredible 90,000 square miles of land were devastated, an area the size of the United Kingdom.¹⁰⁰ One commentator likens the enormity of the storm to the damage that a nuclear detonation would cause.¹⁰¹ The storm's formation off the Gulf Coast was an act of nature that could not be averted. The government's response to the disaster, however, was itself disastrous.

B. Slow Federal Response

It is hard to imagine a city more poorly situated topologically to weather a heavy storm than New Orleans. It has been slowly sinking into the swamp for centuries, and presently averages an elevation six feet below sea level, with some sections eleven feet below sea level.¹⁰² It has been said that but for the levee system, "much of the city would be a shallow lake."¹⁰³

Because of the unique geographic features and the region's propensity for hurricanes, the idea of a hurricane hitting New Orleans was contemplated well before August 2005. In fact, the near-miss of Hurricane Georges in 1998 spurred New Orleans to plan for a major hurricane disaster. The city received funding five years later, and the region ran a hurricane response exercise called "Hurricane Pam" in 2004.¹⁰⁴ Many of the shortcomings discovered in Hurricane Pam were replayed with real life consequences following Hurricane Katrina.¹⁰⁵

LAW 2, 2-4 (Daniel A. Farber & Jim Chen eds., 2006).

⁹⁷ *Id.* at 4-5.

⁹⁸ *Id.* at 3.

⁹⁹ *Id.* at 4-5.

¹⁰⁰ U.S. Senate, *Hurricane Katrina: A Nation Still Unprepared*, in *DISASTERS AND THE LAW* 5, 6 (Daniel A. Farber & Jim Chen eds., 2006).

¹⁰¹ FLYNN, *supra* note 94, at xx.

¹⁰² *Id.* at 48.

¹⁰³ *Id.*

¹⁰⁴ U.S. Senate, *supra* note 100, at 7.

¹⁰⁵ *Id.* See also Paolino, *supra* note 38, at 1392-94 (discussing Hurricane Pam as foreshadowing Katrina).

In spite of these preparations, however, the federal government was slow to provide assistance to the region when Hurricane Katrina hit. And this was not for a failure to recognize the seriousness of the situation. On August 28, 2005, while Katrina moved towards New Orleans, President Bush had already declared Louisiana and Mississippi disaster areas.¹⁰⁶ The President spoke with the governors of Alabama, Florida, Louisiana, and Mississippi, and urged residents in the storm's path to evacuate, although it was probably too late by the time he made his short speech.¹⁰⁷ Though he referred to federal agencies that would assist in disaster relief, conspicuously absent from his remarks was any mention of military assistance.¹⁰⁸ Weeks later, the Department of Defense was unable to pinpoint exactly when the military was first contacted and requested to assist with storm recovery.¹⁰⁹

The first uniformed presence in New Orleans was, not surprisingly, the Louisiana National Guard.¹¹⁰ Some members were sent to the Superdome, where they kept order fairly well for a time.¹¹¹ The enormous crowds challenged the relatively small number of Guardsmen present, however, and the ultimate consensus was that the Guard overpromised and under delivered aid to the evacuees.¹¹² This may have been affected by the overseas deployment of much as 40 percent of the National Guard of Louisiana and surrounding states.¹¹³

In a gesture of solidarity, Governor Bill Richardson of New Mexico sent a contingent of his own state's National Guard to Louisiana to assist in the recovery.¹¹⁴ Embarrassingly for the Defense Department, the New Mexico National Guard arrived in Louisiana before any federal troops.¹¹⁵ Inexplicably,

¹⁰⁶ DOUGLAS BRINKLEY, *THE EDGE OF DISASTER: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST* 100-01 (2006).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 100.

¹¹⁰ *Id.* at 421.

¹¹¹ BRINKLEY, *supra* note 106, at 421.

¹¹² JED HORNE, *BREACH OF FAITH: HURRICANE KATRINA AND THE NEAR DEATH OF A GREAT AMERICAN CITY* 52 (2006).

¹¹³ BRINKLEY, *supra* note 106, at 416. *See also* PHILLIP CARTER, *REBUILDING AMERICA'S RESERVES*, PROGRESSIVE POL. INST. POLICY PAPER (2007), available at <http://www.ppionline.org/documents/RebuildingReserves111407.pdf>.

¹¹⁴ BRINKLEY, *supra* note 106, at 421.

¹¹⁵ *Id.* at 422.

the federal troops at Fort Polk, a mere 270 miles from New Orleans, were bypassed, and the 82d Airborne was sent from North Carolina instead.¹¹⁶

The President was slow in ordering the troops to leave for Louisiana as well. As one author editorializes, “[i]f the Pentagon had been purposely keeping the troops from Louisiana, it could not have done a better job of causing delays.”¹¹⁷ Although it is still unclear why the federal troops were so slow to respond,¹¹⁸ it is undeniable that the political battle and legal confusion around *Posse Comitatus* were contributing factors.

The delayed, piecemeal military response to Katrina is indicative of the problems surrounding use of *Posse Comitatus*. To borrow a phrase, assistance delayed is assistance denied. Four days after Katrina hit, while the disaster in Louisiana deepened, President Bush had yet to provide meaningful federal relief.¹¹⁹ As news from Louisiana kept getting worse, the Bush administration began to slowly piece together a plan that included federalizing the Louisiana National Guard.¹²⁰ Louisiana Governor Kathleen Blanco and President Bush were at odds over this idea. The White House argued for federalizing the troops but Governor Blanco strongly opposed the proposal.¹²¹ She opposed a federal takeover of her state militia as a sign of failure of her own governance, particularly as a member of the opposing party, and did not feel this was a necessary measure to secure the needed aid.¹²²

Ultimately, Governor Blanco neither requested nor acquiesced to the President’s request to federalize the Louisiana National Guard, and the President declined to do so without her support.¹²³ In the midst of this political infighting, people were dying.¹²⁴ It would be another 36 hours before the cavalry arrived in the form of 30,000 federal troops.¹²⁵ In the interim, the Louisiana National

¹¹⁶ *Id.* at 417.

¹¹⁷ *Id.* at 421.

¹¹⁸ *Id.*

¹¹⁹ BRINKLEY, *supra* note 106, at 562-63.

¹²⁰ *Id.* at 563.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 565.

¹²⁴ During this time, Governor Blanco’s office was dogged by reporters asking why she had not declared a state of emergency—when she had in fact done so three days before the storm struck. Apparently, the White House promulgated that misinformation, and the rumor would not go away. HORNE, *supra* note 112, at 97.

¹²⁵ *Id.*

Guard successfully evacuated the Super Dome on a shoestring and began evacuating the Convention Center. While there was still work to be done, the cavalry arrived too late to help the overwhelmed Guard with much of the initial relocation and relief.¹²⁶

C. Analysis

1. *Could the President Legally Send Federal Troops?*

Under the insurrection statutes¹²⁷ and the Constitution,¹²⁸ the President did have the power to federalize the National Guard of his own accord, and command them as if they were regular federal troops.¹²⁹ The White House, Governor Blanco, and the National Guard Bureau, however, fought over the legal effect of federalizing the National Guard.¹³⁰ Ultimately, opting not to federalize the state militia was probably more about public perception than legal authority.¹³¹ It would have been heavy-handed to grab the National Guard out from under the governor; federal suppression of an insurrection in Louisiana, after all, was one of the historical impetuses for passing *Posse Comitatus* in the first place.¹³² The Bush Administration wanted the governor to publicly request, or at least quietly acquiesce in, federalizing the National Guard.¹³³

Rather than forcibly recharacterize state militia into federal troops, the President opted to send 30,000 regular army troops into Louisiana.¹³⁴ This was clearly acceptable under the PCA. Likewise, however, *Posse Comitatus* would not have been offended by federalized National Guardsmen. Because the area was lawless and individuals were being denied their rights, the President's powers under the insurrection statutes would have allowed him to restore order with federalized troops.¹³⁵ After the Katrina disaster, one commentator who fully understood the President's constitutional and statutory authority unequivocally laid the blame for the slow response at the feet of the Administration: "[i]t's utterly clear that [the president has] the authority to

¹²⁶ *Id.* at 567.

¹²⁷ 10 U.S.C.A. §§ 331-334 (West 2008).

¹²⁸ U.S. CONST. art. II, § 2.

¹²⁹ BRINKLEY, *supra* note 106, at 569.

¹³⁰ HORNE, *supra* note 112 at 96. *See also* BRINKLEY, *supra* note 106, at 416, 487, 563-69.

¹³¹ BRINKLEY, *supra* note 106, at 569.

¹³² Currier, *supra* note 5, at 4-5.

¹³³ BRINKLEY, *supra* note 106, at 569.

¹³⁴ *Id.* at 417.

¹³⁵ 10 U.S.C.A. §§ 331-334.

preposition assets and to significantly accelerate the federal response . . . [He] did not need to wait for the state.”¹³⁶

2. *Would Troops Have Helped?*

Before discussing solutions to the legal impasse compounding the Katrina disaster, it is worthwhile to explore whether having troops in place earlier would have been helpful. Despite the huge outcry when the troops did not show up, there are commentators who believe that the military should have a lesser role in disaster relief than currently envisioned.¹³⁷ Similar if less informed commentary argues that military systems “such as fighter jets, tanks, heavy weaponry, and battleships, are simply not appropriate for law enforcement or disaster relief purposes.”¹³⁸ Without quibbling,¹³⁹ this reductive view ignores the experience from Katrina and other recent disasters which definitively show how helpful a military response can be in the face of calamity.

In a 1993 report, the Government Accountability Office (GAO) concluded that the Defense Department “is the only organization capable of providing, transporting, and distributing sufficient quantities of items needed” to

¹³⁶ IVOR VAN HEERDEN & MIKE BRYAN, *THE STORM: WHAT WENT WRONG AND WHY DURING HURRICANE KATRINA—THE INSIDE STORY FROM ONE LOUISIANA SCIENTIST* 147 (2006).

¹³⁷ Kathleen Tierny, et al., *Metaphors Matter: Disaster Myths, Media Frames, and their Consequences in Hurricane Katrina*, 604 ANNALS AM. ACAD. POL. & SOC. SCI. 57, 76-78 (2006).

¹³⁸ Dan Bennett, Comment, *The Domestic Role of the Military In America: Why Modifying or Repealing the Posse Comitatus Act Would Be a Mistake*, 10 LEWIS & CLARK L. REV. 935, 945 (2006).

¹³⁹ Bennett’s ultimate conclusion is not inaccurate, finding that the laws currently in effect are sufficient to allow for effective disaster relief while respecting a historical split between civil and military authority. *Id.* at 953-54. However, like his broader point discussed *supra* in the text, Bennett’s assertion about military hardware, sans citation, is unencumbered by fact. Glaring questions arise, such as why indeed fighter jets would be ordered into a disaster area, when helicopters would be a much more suitable platform; or why a “battleship” would be sent to a disaster area when an amphibious ship (discussed *supra* in text) would make more sense. Moreover, there has not been a single American battleship in commission since the U.S.S. MISSOURI (BB-63) was decommissioned the second time in 1992. U.S. Navy, *A Short History*, <http://www.navy.mil/navydata/ships/battleships/bbhistory.asp> (last visited Nov. 21, 2008).

respond to a disaster.¹⁴⁰ Working together in the early aftermath of Katrina, Coast Guard and National Guard helicopters and boats rescued 2,000 individuals.¹⁴¹ The Texas Air National Guard supplied rescue helicopters,¹⁴² Army personnel restored and maintained order on the streets,¹⁴³ and the Navy provided six ships to “serve as the launch pad for amphibious and air operations to deliver supplies . . . [and] establish a foothold . . . as massive recovery efforts continue[d].”¹⁴⁴ One of them, the amphibious ship U.S.S. IWO JIMA (LHD-7), hosted “thousands of police, fire and rescue personnel . . . onboard during recovery operations[,] and *Iwo Jima* operated as the central command and control hub,” thus becoming the floating command center and the emergency workers’ hotel for the recovery effort.¹⁴⁵

In addition to these tangible contributions, the military’s intangible contribution to the Katrina recovery effort was significant: the people wanted to know they were safe. There is one account of gunmen firing at doctors on the roof of a New Orleans hospital.¹⁴⁶ While there were some National Guardsmen present protecting the hospital staff,¹⁴⁷ had the Army’s 82d Airborne Division arrived earlier, they could have provided a highly visible show of force to counteract the sense of lawlessness and vigilantism compounding the civic breakdown.

The responses of those living through Katrina’s aftermath show how welcome military assistance is in time of need. When the New Mexico National Guard arrived, one soldier was greeted with a sigh of relief and told by a state utility worker that “there’s a million ways [to] help. I’m so glad to see you.”¹⁴⁸ The “can-do” attitude, operational readiness, and organizational skills that the

¹⁴⁰ VAN HEERDEN & BRYAN, *supra* note 136, at 148.

¹⁴¹ *Id.* at 100-101.

¹⁴² *Id.* at 103.

¹⁴³ Tierny, et al., *supra* note 137, at 72. See also BRINKLEY, *supra* note 106, at photo pages after 492 (picture of red-bereted 82d Airborne soldiers in downtown New Orleans; the caption states that the “primary goal was to establish law and order in the streets of New Orleans”).

¹⁴⁴ Mike Jones, *Iwo Jima Arrives to Assist Hurricane Katrina Recovery Efforts*, U.S. NAVY, Sep. 5, 2005, available at http://www.news.navy.mil/search/display.asp?story_id=19913.

¹⁴⁵ U.S. Navy, Fact File: Amphibious Assault Ships, http://www.news.navy.mil/navydata/fact_display.asp?cid=4200&tid=400&ct=4 (last visited Nov. 21, 2008).

¹⁴⁶ BRINKLEY, *supra* note 106, at 488-89.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 422.

New Mexico militiamen brought with them served as a morale boost for the state workers who were overwhelmed; they were grateful for the help.¹⁴⁹ Though not a rescuer by trade, New Orleans Councilwoman Jackie Clarkson tried to get on a boat herself and perform rescues.¹⁵⁰ Instead finding her niche working communications, Councilwoman Clarkson wished that the military had responded sooner, saying, “[g]ive me the Army, Marines, and Navy anytime. If they had come in, everything would have been better.”¹⁵¹

It is likely that the GAO was right: the military is the organization best equipped to respond to large scale disasters in a short period of time. In order to prescribe a workable method to allow that response within the bounds of *Posse Comitatus*, recent legislation surrounding the law needs to be explored to see whether a statutory solution would be effective.

IV. RECENT DEVELOPMENTS: CONFUSION REIGNS

In the past six years, there have been three major changes to statutes impacting *Posse Comitatus*. Before recommending a sub-statutory solution, an exploration of the most recent statutory changes to *Posse Comitatus* is appropriate to evaluate the efficacy of a statutory solution.

A. “Sense of the Congress”

In the wake of September 11, 2001, Congress passed a law that “reaffirmed” its view of “the continued importance and applicability of the Posse Comitatus Act.”¹⁵² Enacted as part of the Homeland Security Act of 2002,¹⁵³ this law describes how Congress believes the PCA is still relevant to federal law enforcement, and that it “has served the nation well in limiting the use of the Armed Forces to enforce the law.”¹⁵⁴ The statute goes on to state the non-controversial idea that the PCA is not a complete barrier to the use of federal troops, and that the President retains many powers to employ troops domestically if required to respond to an emergency.¹⁵⁵ The insurrection

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 359-60.

¹⁵¹ BRINKLEY, *supra* note 106, at 360.

¹⁵² 6 U.S.C.A. § 466 (West 2007).

¹⁵³ Demaine & Rosen, *supra* note 2, at 213.

¹⁵⁴ 6 U.S.C. § 466(a)(3).

¹⁵⁵ *Id.* at §466(a)(4).

statutes and the Stafford Act¹⁵⁶ are cited as specific exceptions to the PCA that may be invoked when necessary.¹⁵⁷

All of this verbiage serves no functional purpose other than creating a cross-reference to already existing and effective federal statutes. One commentator noted that this “sense of Congress” is not binding, as it neither compels nor prohibits.¹⁵⁸ Note that after the title and heading “Findings,” the law states that “Congress finds” the substantive portion of the statute that followed.¹⁵⁹ Because Congress found, rather than amended or altered any pre-existing law, its contents are simply the expression of an opinion.¹⁶⁰ The beginning of the final section of the statute declares that “Congress reaffirms the continued importance” of *Posse Comitatus*.¹⁶¹ All this finding and reaffirming shows that, at least in 2002, Congress was relatively happy with the state of the law regarding PCA and the domestic use of the military.

B. The Warner Amendment

The statutory status quo did not last. Having weathered September 11, 2001, with a mere reaffirmation of existing law, *Posse Comitatus* and related laws were due for an overhaul after the incredible loss of life following Hurricane Katrina. This overhaul lasted about fifteen months, and was recently repealed.

While working on the 2007 National Defense Authorization Act, both Houses considered the lessons of Hurricane Katrina.¹⁶² The White House similarly tried to look ahead to a different plan for the next major disaster, when military and civilian officials might better coordinate for a more effective

¹⁵⁶ See *infra* for discussion of Stafford Act.

¹⁵⁷ 6 U.S.C. § 466(a)(5).

¹⁵⁸ See generally Demaine & Rosen, *supra* note 2, at 214-218. See also *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

¹⁵⁹ 6 U.S.C. § 466(a).

¹⁶⁰ See Demaine & Rosen, *supra* note 2, at 213-14.

¹⁶¹ 6 U.S.C. § 466(b).

¹⁶² Michael Greenberger, *Yes Virginia: The President Can Deploy Federal Troops to Prevent the Loss of a Major American City From a Devastating Natural Catastrophe*, 26 MISS. C. L. REV. 107, 121 (2006 – 2007).

response.¹⁶³ It was in this environment that 10 U.S.C. § 333, one of the major “calling forth” statutory exceptions to the PCA, was changed.¹⁶⁴

The 2006 version of the statute, called the “Warner Amendment,” more explicitly stated the circumstances in which a President may “call forth” the militia. The latter half of the 2006 version of § 333 retains the entirety of the original, allowing the President to intervene when a domestic condition “hinders the execution of the laws of a State.”¹⁶⁵ An additional relatively minor change required the President to notify Congress when he invoked the law.¹⁶⁶

The biggest change, however, added a list of specific instances in which the President could act. The original version limited the President to intervening in the event of “insurrection, domestic violence, unlawful combination, or conspiracy.”¹⁶⁷ Under the Warner Amendment, however, § 333 allowed the President to intervene in the event of “natural disaster, epidemic, or other serious public health emergency,” in addition to the original list.¹⁶⁸ It seems a stretch that the idea of “natural disaster” is so removed from “domestic violence” or “unlawful combination,” as to give a policy maker pause when planning to send relief to a storm ravaged area. Indeed, the lessons of Katrina clarify how easily a natural disaster may give rise to violence within the ravaged area. However, at least one commentator believed that the Warner Amendment “remove[d] all doubt about the President’s ability to decide unilaterally to use federal troops to respond to a massive disaster.”¹⁶⁹ If that is accurate, perhaps Congress accomplished its goal by passing the Warner Amendment. It was a short-lived victory.

C. Repealing the Warner Amendment

Little more than a year after updating § 333 to clarify the President’s powers to send federal troops into disaster areas, Congress removed the articulated list provided in 2006. Opposition to the Warner Amendment included governors, National Guard lobbying organizations, and congressmen

¹⁶³ *Id.*

¹⁶⁴ John Warner National Defense Authorization Act of 2007, Pub. L. No. 109-364, § 1076, 120 Stat. 2404, *repealed* by National Defense Authorization Act of 2008, Pub. L. No. 110-181, §1068, 122 Stat. 3 (2008) (current version at 10 U.S.C.A. § 333 (West 2008)).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Greenberger, *supra* note 162, at 121.

on both sides of the aisle.¹⁷⁰ House Armed Services Chairman Ike Skelton (D-Mo.) stated that when complaints from state governors and others began to accumulate, his committee decided that the old law should be put back in place.¹⁷¹ These complaints included letters from two governors to the House and Senate Armed Services Committees, demanding that the Warner Amendment's "egregious intrusion upon the sovereignty and prerogatives of state governments [] should be stricken."¹⁷²

Though the White House expressed a desire to keep the new Amendment in effect, few spoke out to keep the changes. In comments that cut to the heart of whether the Warner Amendment should be repealed, National Guard commander Lt. Gen. H. Steven Blum testified in April 2007 that the Warner Amendment would not have helped the response to Hurricane Katrina.¹⁷³ With its major justification pulled out from under it, the 2006 Warner Amendment was repealed. The 2008 National Defense Authorization Act restored the original language of § 333, ending the supposed clarifications contained in the Warner Amendment.¹⁷⁴

The Warner Amendment was a failed attempt to solve *Posse Comitatus* problems without disrupting the policy goals represented by the law. In other words, it was a statutory attempt to avoid throwing out the baby with the bathwater. As Lt. General Blum made clear, however, a statutory list detailing the President's "calling forth" powers would probably not prevent another Katrina-like disaster response.¹⁷⁵ A more fruitful approach would honor the *Posse Comitatus* policy concerns separating the military from civilian law enforcement. A more clearly demarcated boundary, set in place by a quick sub-statutory solution, would allow for effective military disaster response in a domestic context.

¹⁷⁰ John M. Donnelly, *Bowing to Robust Lobbying by U.S. Governors, Members of Congress Appear Poised to Repeal a Law Enacted Just a Year Ago that Expanded the President's Power to Invoke Martial Law*, CQ TODAY, Oct. 19, 2007, available at <http://public.cq.com/docs/cqt/news110-0000026909356.html>.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ National Defense Authorization Act of 2008, Pub. L. No. 110-181, §1068, 122 Stat. 3 (2008) (current version at 10 U.S.C.A. § 333 (West 2008)).

¹⁷⁵ Donnelly, *supra* note 170.

V. CURRENT MODELS AND NEW ORGANIZATION

Two current organizational models are explored below. Together, the models can be synthesized to find a legal avenue to provide domestic military disaster relief, while still honoring the goal of keeping the military out of day-to-day law enforcement. These methods and models have as much to do with law and regulation as they do with training and coordination, which will be made clearer as each model is discussed and applied in turn, followed by a discussion of statutory limitations and recent developments.

A. The National Guard's Shifting Chains of Command

The National Guard is the modern incarnation of the militia.¹⁷⁶ The National Guard usually exists as the state militia and becomes part of the federal military, to the exclusion of state duties, when ordered to active federal service.¹⁷⁷ In normal conditions they serve under the governors of their respective states.¹⁷⁸ When called into federal service, however, they serve under the President as Commander in Chief of the military.¹⁷⁹ This shifting chain of command, from state to federal authority, from governor to President, could provide a useful model for the federal military in disaster relief. To more fully understand how the National Guard is shared by state and federal officials, it will help to examine the missions particular to each sovereign, and then examine disaster relief as a shared mission.

1. *Unique State Mission: Drug Interdiction*

The National Guard is specifically authorized to directly assist their respective state law enforcement agencies in performing law enforcement roles

¹⁷⁶ National Guard, About the National Guard, <http://www.ngb.army.mil/About/default.aspx> (last visited November 21, 2008).

¹⁷⁷ 32 U.S.C. § 325 (2000). *See also* *Perpich v. Dep't of Def.*, 496 U.S. 334, 347-49 (1990) (explaining the mutually exclusive roles of state militia member and federal soldier).

¹⁷⁸ *Perpich*, 496 U.S. at 343-44. This dichotomy extends beyond the power at the top of the chain of command.

See 10 U.S.C. § 12405 (2000) (applying U.S. Army and U.S. Air Force regulations to the National Guard and Air National Guard when militia members are called into federal service). *See also* *O'Toole v. United States*, 206 F.2d 912, 917 (3rd Cir. 1953) (explaining that National Guardsmen take an oath to obey the orders of their respective governors, as well as the orders of the President).

¹⁷⁹ U.S. CONST. art. II, § 2.

within the state, as allowed by the law of each state.¹⁸⁰ Funding is done at the state level, with some unusual contributions from the federal government. For example, federal law even allows the Secretary of Defense to fund state counter-drug missions performed by a state National Guard.¹⁸¹

At first glance, such a grant of authority for state militia and funding by the federal government seems to conflict with the *Posse Comitatus* Act. The PCA, however, includes an exception for “circumstances expressly authorized by the Constitution or Act of Congress.”¹⁸² Additionally, even if the text of the PCA did not include such an exception, the intent of the PCA is not endangered because National Guard members, when serving in their state capacity, are not part of the federal Army, regardless of funding.¹⁸³ Command and control is retained at the state level. When a state National Guard is called into federal service, however, the militia’s nature changes to become a federal entity.¹⁸⁴

The Sixth Circuit addressed the status of the National Guard when performing state law enforcement duties in *Gilbert v. United States*.¹⁸⁵ In *Gilbert*, the Kentucky National Guard worked with a state anti-drug task force, and arrested the defendants for multiple drug violations.¹⁸⁶ The defendants sought to challenge their arrest, claiming that the *Posse Comitatus* Act should bar the Kentucky National Guard from serving as a law enforcement entity.¹⁸⁷ The court, however, highlighted the difference between the National Guard serving as a state or federal entity: because the anti-drug task force was a state entity, the Kentucky National Guard was serving in its state capacity, and this remained the case even though there were federal civilian agents included in the task force.¹⁸⁸ It was irrelevant that the guardsmen were drawing their pay from federal funds, or that they “looked and acted like soldiers.”¹⁸⁹ The key fact to whether the Guardsmen were in a federal or state status was whether the President or state governor was the ultimate authority issuing orders. Because

¹⁸⁰ 32 U.S.C.A. § 112 (West 2007).

¹⁸¹ *Id.*

¹⁸² 18 U.S.C. § 1385.

¹⁸³ *United States v. Hutchings*, 127 F.3d 1255, 1258 (10th Cir. 1997).

¹⁸⁴ *See e.g.* 10 U.S.C. § 12405 (2000) (applying federal military regulations to the National Guard after being called into federal service).

¹⁸⁵ *Gilbert v. United States*, 165 F.3d 470 (6th Cir. 1990).

¹⁸⁶ *Id.* at 471-72.

¹⁸⁷ *Id.* at 472.

¹⁸⁸ *Id.* at 473.

¹⁸⁹ *Id.*

the governor maintained control of the guardsmen and the counter-drug operation, the guardsmen served in a state status, and the PCA did not apply.¹⁹⁰

As the *Gilbert* case shows, law enforcement may be undertaken legally by the National Guard. Law enforcement generally, and counter-drug operations specifically, may be undertaken by the state militia. The *Gilbert* court had little trouble upholding an arrest and seizure made by a Guardsman,¹⁹¹ while federal law requires administrative regulations to prevent the federal military from doing the very same.¹⁹² The key fact is that the Kentucky National Guard was working for the state of Kentucky at the time of the actions under scrutiny. This key distinction underscores the importance of shifting chains of command between the federal and state levels. This uniquely state mission of the National Guard can be contrasted with its uniquely federal missions.

2. *Unique Federal Mission: Overseas Deployment*

A brief history of the laws of the National Guard is necessary to frame the discussion of overseas deployment of the National Guard. In 1916, Congress turned the nascent National Guard from a system of affiliated state organizations into one federal organization administered separately by the states.¹⁹³ More than a distinction without a difference, this centralized structure maintained the state character of the militia, but gave the federal government the power to turn state militia members into federal troops when necessary.¹⁹⁴ Soon after the statutes were enacted, the Supreme Court ruled that membership in the National Guard did not preclude units being called forth to federal service.¹⁹⁵ Because the militia could be called into federal service, there was neither

¹⁹⁰ *Gilbert*, 165 F.3d at 473. Additionally, the court cited 32 U.S.C. § 112 (2000), the congressional authorization for federal funding of state-organized counter-drug missions performed by the National Guard. This statutory reasoning was an alternative ground, however, and is given relatively short treatment compared to the lengthy discussion about the varying chains of command between state and federal authority. *Id.* at 473 – 74. *See also* *United States v. Benish*, 5 F.3d 20, 25-26 (3rd Cir. 1993) (similarly holding that state militia may assist with law enforcement because PCA applies to the Army and Air Force, but not the National Guard).

¹⁹¹ *Gilbert*, 165 F.3d at 472-73.

¹⁹² 10 U.S.C. § 375.

¹⁹³ *Perpich v. Dep't of Def.*, 496 U.S. 334, 343-44 (1990).

¹⁹⁴ *Id.*

¹⁹⁵ *Arver v. United States*, 245 U.S. 366, 387-88 (1918).

constitutional nor statutory restriction against former state militia members being sent abroad when the President so directed.¹⁹⁶

More recently, however, the Governor of Minnesota sought to enjoin the federal government from sending members of the Minnesota National Guard abroad for training exercises.¹⁹⁷ In *Perpich v. Department of Defense*,¹⁹⁸ the Governor of Minnesota argued that the constitutional power of the President to call forth the militia does not allow the President to send National Guard members abroad for training unless the governor grants permission.¹⁹⁹ The gubernatorial permission requirement was amended only a few years prior to the case; the previous version of the law had required the governor's permission to federalize National Guard troops.²⁰⁰ The amendment limited the scope of the gubernatorial permission requirement, specifying that:

[t]he consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.²⁰¹

Governor Perpich, however, contended that Congress unconstitutionally narrowed the governor's power to prevent foreign deployment of National Guard personnel.²⁰²

For many of the same reasons that an earlier Court allowed the President to send militia members abroad,²⁰³ the *Perpich* court upheld the law as amended.²⁰⁴ The court reasoned that although National Guard members were not sent abroad during peacetime before the 1950s, the statutory scheme required that once the National Guard is called into federal service, the state's hold over the guardsmen is temporarily suspended.²⁰⁵ With no further hold over

¹⁹⁶ Cox v. Wood, 247 U.S. 3, 6 (1918).

¹⁹⁷ *Perpich*, 496 U.S. at 337-38.

¹⁹⁸ *Id.* at 343-44.

¹⁹⁹ *Id.* at 336-39.

²⁰⁰ *Id.* at 336 – 37.

²⁰¹ 10 U.S.C.A. § 12301 (West 2007).

²⁰² *Perpich*, 496 U.S. at 337.

²⁰³ *Id.* at 344-45, 349

²⁰⁴ *Id.* at 347-49.

²⁰⁵ *Id.*

the militia member, then, the state governor has no constitutional authority to prevent the federalized National Guard member from being sent abroad.²⁰⁶

The key point for this discussion is that the *Perpich* case shows how the federal government has the power to send National Guard troops overseas after asserting authority over the militia.²⁰⁷ The governor's brief in *Perpich* implicitly admitted that the state governors have no power to send their militias abroad.²⁰⁸ *Perpich* shows a mutually exclusive chain of command wherein state authority ends, and federal authority takes over.²⁰⁹ As a result, the overseas deployment of state militia members is uniquely within the province of the federal executive.²¹⁰

This federal power over state militias is clearly evidenced in the present conflicts in Iraq and Afghanistan, where significant portions of the deployed forces are federalized National Guard troops.²¹¹ For instance, the National Guard website states that "at one point in 2005, half of the combat brigades in Iraq were Army National Guard - a percentage of commitment as part of the overall Army effort not seen since the first years of World War II."²¹² With state militia members fighting the nation's wars half a world away, it is an easy step to conclude state and federal authority over the National Guard is an all-or-nothing proposition – in other words, the exercise of the President's authority

²⁰⁶ *Id.*

²⁰⁷ *Perpich*, 496 U.S. at 347-49.

²⁰⁸ *Id.* at 344.

²⁰⁹ See U.S. CONST. art. I, § 8, cl. 10 – 15 (detailing the military powers of the legislative branch); *id.* at cl. 16 (states will train the militias with Congressional assistance); U.S. CONST. Art. II, § 1 (President as the executive), *id.* at § 2, cl. 1 (President as Commander in Chief); *id.* at § 2, cl. 2 (foreign policy powers of the President curbed by Senate approval of treaties); U.S. CONST. art. VI (the Constitution and federal laws are the supreme law of the land); U.S. CONST. amend. X (powers not granted to the federal government nor the states are reserved for the people). A state's only role in military and foreign policy, it seems, is to train its militia.

²¹⁰ *Perpich*, 496 U.S. at 351-352. See also *id.* at 352 (leaving open the question of whether or not it would be unconstitutional to strip governors of the ability to object to foreign militia deployment, due to governors' emergency preparedness responsibilities; without answering the question, the court's tone is skeptical).

²¹¹ The National Guard, About the National Guard, <http://www.ngb.army.mil/About/default.aspx>, (follow National Guard History hyperlink to "2002 Global War on Terror") (last visited Nov. 21, 2008).

²¹² *Id.* The Air National Guard was also deployed, notably to Afghanistan. *Id.*

ends state control over its National Guard, as in the case with overseas deployments. But that is not the case.

3. *Disaster Response and Civil Order: State and Federal Overlap*

Domestic responses to emergencies are perhaps the best known uses of the National Guard. Key to this discussion is the fact that both state and federal authorities may exercise control over National Guard troops while responding to domestic emergencies.

The National Guard is normally a state entity, and as such the governors may call upon their respective militias to assist in time of emergency.²¹³ The historically common use of this power was to respond to provide disaster relief and to calm civil unrest.²¹⁴ In fact, the use of National Guard troops for disaster relief was so common that several states had standing agreements to provide troops to respond after hurricanes.²¹⁵

One infamous example of a militia acting under state control was Governor Faubus' order sending the Arkansas National Guard to Little Rock Central High School to prevent its racial integration in 1957.²¹⁶ The District Court for the Eastern District of Arkansas issued an injunction ordering Faubus to stop using his militia to obstruct the court-ordered integration.²¹⁷ Faubus argued that, as governor, he had the power to employ his militia, and needed to do so to preserve order.²¹⁸ Unimpressed, the appellate court upheld the injunction, effectively ordering the governor to stop impeding integration.²¹⁹

Most pertinent to this discussion, however, was that the *Faubus* court was careful to maintain the governor's appropriate sphere of action. The

²¹³ STEVE BOWMAN ET AL., CONGRESSIONAL RESEARCH SERVICE, HURRICANE KATRINA: DOD DISASTER RESPONSE 7 (2005). [hereinafter "CRS KATRINA"]

²¹⁴ *Id.* at 20-21.

²¹⁵ *Id.* at 7-8.

²¹⁶ *Faubus v. United States*, 254 F.2d 797, 801 (8th Cir. 1958). There are many examples of the National Guard responding to emergencies under state authority, but disaster response rarely makes for instructive jurisprudence, which was the key consideration for picking this case as the explanatory example.

²¹⁷ *Id.* at 803.

²¹⁸ *Id.* at 805-806.

²¹⁹ *Id.* at 807-808.

contested injunction from the district court “expressly preserved to Governor Faubus the right to use the Arkansas National Guard for the preservation of law and order,” provided that such use did not hinder the constitutional requirement to integrate schools.²²⁰ Similarly, the federal government did not challenge the governor’s authority to use the militia within the state to enforce the law.²²¹ Though opposed to the way Faubus employed the militia, the courts and the executive branch agreed that Faubus maintained the power as governor to use the militia to assist in keeping the peace, as long as that use did not otherwise break the law. Imprudent and even illegal use of the state militia did not require the governor to relinquish command of his forces.

State authority, however, is not the only way in which National Guard troops may be employed for disaster relief or for domestic disturbances. The “calling forth” statutes, discussed *supra*, provide the President with ample opportunity to employ the militia in a variety of situations.²²² This calling forth of the militia was employed in 1794, in President Washington’s response to the Whiskey Rebellion.²²³

Further complicating the National Guard’s shifting lines of authority is the fact that federal power over the militia is not a singular choice. There are at least three options, including state use of the National Guard,²²⁴ federal authority provided under the “calling forth” statutes, and the procurement authorizations of the Stafford Act.²²⁵ Under the Stafford Act, the President may “direct any Federal agency . . . to utilize its authorities and the resources granted to it under federal law . . . in support of State and local assistance response or recovery efforts.”²²⁶ The Stafford Act emergency powers include the power of the President to use the military for disaster relief, and do not preclude federalized militia members from being called into service domestically, though not for law enforcement.²²⁷

²²⁰ *Id.* at 798.

²²¹ *Faubus*, 254 F.2d at 805.

²²² 10 U.S.C. §§ 331 – 334 (2000).

²²³ THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* 196 (1986). The language of Washington’s proclamation closely follows current language at the end of 10 U.S.C. § 334.

²²⁴ PCA does not apply to state militias when under state control. CRS KATRINA, *supra* note 213, at 7.

²²⁵ 42 U.S.C. §§ 5121 – 5207 (2000).

²²⁶ 42 U.S.C. § 5170a (2000).

²²⁷ JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICE, *THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES* 5 (2007) [hereinafter “CRS Legal”]. Whether the federal troops were regular federal

There is yet another way that governors may employ their own militias for disaster response, beyond the normal state use of the militia. A National Guard member may be called to duty under state authority while receiving federal pay,²²⁸ in what is called “Title 32” status.²²⁹ The statute allows National Guard members to “perform training or other duty . . . [in] [s]upport of operations or missions undertaken by the member’s unit at the request of the President or Secretary of Defense.”²³⁰ Though it is not intuitively obvious from the text of the statute, this “Title 32 status” provides enough flexibility for militia members to perform state missions, and remain under control of the governor, while the federal government foots the bill.²³¹ Title 32 status is a useful National Guard status to avoid PCA proscriptions for disaster relief, because the federal government is better positioned than the states to ensure adequate funding, while the National Guard units are already physically present in the disaster area.²³²

While the substantive details of the National Guard and Title 32 status are interesting, they are collateral; the point is that the National Guard already has at least three distinct authorities,²³³ whether under state control, federal control, or the hybrid Title 32 status, with alternating reporting authority as required. This idea of shifting chains of command between federal and state authority might provide more options when deciding how best to respond to a domestic emergency.

Army or federalized National Guard troops, they would still be subject to the PCA because the Stafford Act is not itself a PCA exception. *Id.* See also 18 U.S.C. § 1385 (2000) (PCA exceptions must be “expressly authorized by the Constitution or Act of Congress”).

²²⁸ 32 U.S.C. § 502(f) (2000).

²²⁹ CRS KATRINA, *supra* note 213, at 8. For a thorough discussion of this duty status and its historical development, see generally Christopher R. Brown, *Been There, Doing That in a Title 32 Status*, ARMY LAW, May 2008, at 23.

²³⁰ 32 U.S.C. § 502(f).

²³¹ CRS KATRINA, *supra* note 213, at 8. The Defense Department authorized Title 32 status for disaster relief following Hurricane Katrina. See Brown, *supra* note 229 at 32.

²³² CRS KATRINA *supra* note 213 at 8-9. See also Brown, *supra* note 229, at 33, explaining why PCA does not apply to National Guard members serving in Title 32 status.

²³³ A fourth duty status may exist when a National Guard unit commander is authorized to serve simultaneously in both a federal and state capacity. 32 U.S.C.A. § 325 (West 2008). This is a small percentage of the overall troop levels, and not significant enough to affect disaster relief planning.

4. National Guard Model Applied

A multiple option approach is very helpful in organizing a disaster response utilizing the National Guard. As Congress allowed and the courts endorsed, National Guard troops may be employed by federal or state authority, or even under state authority while taking broad direction from the federal government.

A similar approach with multiple options could be employed with federal troops. To allow federal troops to assist in domestic disaster response and avoid *Posse Comitatus* proscriptions, entire units should be allowed to be temporarily transferred to the Department of Homeland Security. It is notable that there is already at least one model wherein organizations and individuals shift reporting authority between different executive branch departments.

B. Coast Guard Integration with the Navy

1. Inter-Service Assignment

The United States Coast Guard, an armed, uniformed service, is in the unique position of being able to operate under military or civilian authority. Federal law defines the Coast Guard as “a service in the Department of Homeland Security, except when operating as a service in the Navy.”²³⁴ The Coast Guard operates as part of the Navy “[u]pon the declaration of war if Congress so directs in the declaration or when the President directs.”²³⁵ When this happens, the Coast Guard is effectively part of the Department of Defense, because “[w]hile operating as a service in the Navy, the Coast Guard shall be subject to the orders of the Secretary of the Navy.”²³⁶

There is historical precedent for such an interdepartmental shuffle. Throughout its history, the Coast Guard and its forerunner organizations have fought alongside Navy sailors and vessels.²³⁷ Near the outbreak of World War

²³⁴ 14 U.S.C.A. § 1 (West 2008). See also 5 U.S.C.A. § 2101 (West 2007), defining the Coast Guard as part of the armed forces, irrespective of the executive department with which the service is working.

²³⁵ 14 U.S.C.A. § 3 (West 2008). See also 14 U.S.C.A. § 4 (West 2008), stating that Navy regulations apply to the Coast Guard when the Coast Guard operates as part of the Navy.

²³⁶ 14 U.S.C.A. § 3.

²³⁷ U. S. Coast Guard, The Coast Guard at War, http://www.uscg.mil/history/h_militaryindex.asp (last visited Nov. 21, 2008).

II, President Roosevelt ordered the entire Coast Guard into duty as part of the Navy.²³⁸ Its duties as part of the Navy included traditional Coast Guard missions of search and rescue and port security, as well as Navy missions of convoy duty and amphibious landings.²³⁹ Folding one entire armed service into another demonstrates that organizational lines of authority can be altered and rewritten as required by the exigencies of an emergency situation.

In addition to administratively moving the entire Coast Guard between cabinet-level departments, federal law provides for assigning Coast Guard units or individuals to the Navy as needed. In statutory language that gives the respective secretaries of the Navy and Homeland Security latitude to make their own determinations, Congress permits the two service secretaries to make “available to each other such personnel, vessels, facilities, and equipment, and agree to undertake such assignments and functions for each other as they may agree are necessary and advisable.”²⁴⁰ One manifestation of this broad grant of administrative discretion is that the Coast Guard maintains a staff presence overseas at the headquarters for the U.S. naval forces in the Persian Gulf, providing expertise and training assistance.²⁴¹ There are also Coast Guard vessels currently on station in the Persian Gulf.²⁴² These overseas deployments of Coast Guard personnel and vessels show that sharing personnel and resources between the Navy and Coast Guard is possible and sustainable at the unit level.

On a smaller scale, the Secretary of Homeland Security and Secretary of Defense may coordinate to place individual Coast Guard Sailors aboard Navy vessels in order to make arrests and conduct search and seizure.²⁴³ The specific statutory allowance for such placements is necessary because, in addition to *Posse Comitatus* proscriptions, the Department of Defense is generally prohibited from making arrests or conducting search and seizure.²⁴⁴

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ 14 U.S.C.A. § 145 (West 2008).

²⁴¹ See Press Release, U.S. Naval Forces Central Command, Coast Guard Patrol Forces Southwest Asia Changes Command (July 25, 2006) (<http://www.cusnc.navy.mil/articles/2006/139.html>).

²⁴² *CG Relieves Cutter Skipper in Persian Gulf*, NAVY TIMES, Feb. 20, 2008, http://www.navytimes.com/news/2008/02/coastguard_skipper_relieved_080219w/.

²⁴³ 10 U.S.C.A. § 379 (West 2008). The presence of Coast Guard personnel as law enforcement officials does not limit the range of responses available to the military. See 14 U.S.C.A. § 637 (West 2008).

²⁴⁴ 10 U.S.C.A. § 375 (West 2008). Like the PCA proscriptions, this section’s prohibition is not ironclad. A law seemingly inspired by Fourth Amendment

In order to make arrests at sea without running afoul of federal law, the Navy uses Coast Guard personnel as law enforcement officers. These individuals most commonly perform counter-narcotics missions, whereby the Navy searches for and pursues the drug runners, but the Coast Guard Law Enforcement Detachment (LEDET) boards the smuggling vessel.²⁴⁵ As the chase winds down and the LEDET prepares to board, the Navy vessel hoists the Coast Guard ensign,²⁴⁶ and in a nearly metaphysical transformation suddenly becomes a Coast Guard ship, the grey hull and missile launchers notwithstanding.²⁴⁷ The LEDET conducts the boarding, perhaps supplemented by Navy sailors. But as the sole law enforcement personnel present, the Coast Guardsmen in the boarding party will be the ones to search the vessel, seize whatever cargo or other evidence may be necessary, and arrest smuggling suspects if required.²⁴⁸ This elaborate process allows the Navy to conduct law enforcement at sea, assisted by personnel from its sister service, the Coast Guard.

2. *Coast Guard Model Applied*

The shifting of personnel, staffs, vessels, and even an entire uniformed service between cabinet-level departments shows that the federal government is capable of large, complex changes in organizational structure and reporting authority. Applying that model to disaster relief, and combining it with the National Guard model discussed above, the military departments should be able to shift forces from the Department of Defense and into the Department of Homeland Security in order to respond to emergencies.²⁴⁹

concerns, this statute prevents the Department of Defense from conducting search and seizure except as “otherwise authorized by law.” *Id.*

²⁴⁵ Douglas Daniels, *How to Allocate Maritime Responsibility Between the Navy and Coast Guard in Maritime Counterterrorism Operations*, 61 U. MIAMI L. REV. 467, 483 (2007).

²⁴⁶ The Coast Guard ensign, consisting of sixteen vertical red and white stripes and the service’s coat of arms, is its flag. It is the unique symbol of that service’s authority at sea. For a more complete explanation, see Daniels, *supra* note 245, at 483; see also 33 C.F.R. § 23.15 (2004).

²⁴⁷ Daniels, *supra* note 245, at 483.

²⁴⁸ *Id.*

²⁴⁹ See Felicetti & Luce, *supra* note 28, at 182. Before the creation of the Department of Homeland Security, authors Felicetti and Luce mentioned, in passing, shifting forces between executive branch departments, similar to the plan examined herein. Their thought recommended a statutory authorization to temporarily assign military forces to the then-prospective Department of Homeland Security. *Id.* The separate contribution of this article is to show that

As an example, if there were a need for aerial search and rescue following a disaster, Air Force helicopters should be made available to help in the search. That is not a change from how federal forces currently conduct disaster relief, but applying the National Guard and Coast Guard models would make the transition and operations smoother. Rather than have Air Force officials direct the movement and employment of the aircraft in response to a disaster, the Air Force would follow a model like the Coast Guard: the helicopters, their crews, and logistical support would be turned over to the Department of Homeland Security. The Pentagon would be out of the picture, and the helicopter pilots and squadron commander would report to the civilian Homeland Security rescue coordinator, rather than to the Defense Department. Like the Title 32 National Guardsmen who are paid by the federal government but work for the state, these helicopter pilots and aircrew would be paid by the Department of Defense, but would work for the Department of Homeland Security.

This model could be applied to any kind of federal military forces: infantry units could be assigned to restore order after a disaster, amphibious ships could be sent to provide logistical and medical support, and so forth. For the limited purpose of providing assistance, the detached people and forces would become Homeland Security personnel and assets, and then would return to the Defense Department when no longer needed. While such a scheme may sound like legal hair-splitting, it is based on well-trod legal ground consistent with established National Guard and Coast Guard practice regarding authority shifting and force sharing.

C. Statutory Stumbling Block

The National Guard and Coast Guard models show that executive departments are capable of sharing individuals and organizations between different authorities and departments. This comment, however, argues that a sub-statutory solution would be both expedient and effective. As discussed above, there are specific statutory allowances for shifting reporting responsibility for the National Guard²⁵⁰ and the Coast Guard.²⁵¹ A sub-statutory

temporary reassignment of military forces is possible under the current statutory scheme, feasible under current practice, and maintains proper respect for the *Posse Comitatus* Act. Additionally, this article fleshes out Felicetti & Luce's insightful passing comment in a comprehensive manner to show how it can be brought to fruition.

²⁵⁰ 10 U.S.C. §§ 331 – 334 (2000); 32 U.S.C. § 502(f) (2000); 42 U.S.C. §§ 5121 – 5207 (2000). *See also* U.S. CONST. art. II, §2, cl. 1 (granting the

solution would have to use existing federal law to allow federal military forces to shift into the Department of Homeland Security.

The entering argument supporting this recommended course of action is that the President is the Commander in Chief of the armed forces.²⁵² Because the Departments of Defense and Homeland Security are both statutory creations within the executive branch, it would not offend the Constitution for the Secretary of Homeland Security, rather than Defense, to temporarily take control of a military force for the purpose of augmenting domestic disaster relief.

The statutory scheme currently in place presents a two-fold problem for implementing the models described above. First, the statutes must allow, or at least not foreclose, such a shuffling of forces. Secondly, *Posse Comitatus* itself must be addressed; a recommendation that puts the federalist values of the PCA into action is only helpful if the recommendation itself does not run afoul of the PCA. As discussed below, the current statutes leave room for such departmental restructuring which respects *Posse Comitatus*.

There is sufficient room in federal law for the President and Secretary of Defense to reorganize the Defense Department by shifting forces, even to another department. Specific statutory provisions allow the Secretary of Defense to transfer or reassign “any function, power, or duty,” in order “to provide more effective [or] efficient” operation.²⁵³ Further, the law explicitly allows that, in time of “hostilities or imminent threat of hostilities,” the President may authorize the transfer or reassignment of “an officer, official, or agency [of the Department of Defense],” even if those duties are otherwise entrusted to the Department of Defense by law.²⁵⁴ Use of this statute for a PCA solution turns on a relatively generous interpretation of “hostilities or imminent threat of hostilities;” perhaps hostilities could be interpreted to include domestic disturbance or threat of a domestic disturbance following a disaster. Certainly some Hurricane Katrina survivors would have believed that the lawlessness following the storm constituted a “threat of hostilities.”

Case law interpreting this transfer authority shows a historically wide swath of discretion for decisions of the Secretary of Defense. In *Perkins v. Rumsfeld*, the Sixth Circuit upheld the Secretary of Defense’s decision under his

President Commander in Chief status over state militias when “called into the actual service of the United States”).

²⁵¹ 14 U.S.C.A. §§ 145, 379 (West 2008).

²⁵² U.S. CONST. art. II, §2, cl. 1.

²⁵³ 10 U.S.C § 125(a) (2000).

²⁵⁴ *Id.* at § 125(b).

transfer authority.²⁵⁵ Secretary Rumsfeld decided to move a communications equipment repair facility out of Kentucky, and plaintiffs, including the Kentucky congressional delegation, brought suit.²⁵⁶ In a terse opinion, the Sixth Circuit held that “the authority to transfer functions from one military establishment to another is vested in the Secretary of Defense by Congress pursuant to 10 U.S.C. § 125.”²⁵⁷ Interestingly, the text of § 125’s transfer authority does not require maintaining functions within the Department of Defense. This lack of specificity, combined with judicial deference to the Secretary of Defense’s decisions, and the § 125 allowances for the President to transfer any defense agency in time of emergency, leads to a helpful inference.²⁵⁸ Taken together, one can permissibly conclude that the current statutory scheme allows the transfer of federal military forces from the Department of Defense to the Department of Homeland Security.

1. Background on Memoranda of Understanding

Once the forces are in the Department of Homeland Security, however, *Posse Comitatus* may still prove an impediment. In order for military and civilian leadership to have a clear understanding of lines of authority, and to avoid violating the PCA, a memorandum of understanding ought to be signed in advance of any emergency.

Memoranda of understanding are relatively common instruments used to show agreement between parties. Though informal, a court may consider a

²⁵⁵ *Perkins v. Rumsfeld*, 577 F.2d 366, 368 (6th Cir. 1978). Donald Rumsfeld was the named defendant because the case originated while he served his first term as Secretary of Defense. Defense Department, Donald H. Rumsfeld, http://www.defenselink.mil/specials/secdef_histories/bios/rumsfeld.htm (last visited Nov. 21, 2008).

²⁵⁶ *Perkins*, 577 F.2d at 367-68.

²⁵⁷ *Id.* at 368. See also *Armstrong v. United States*, 354 F.2d 648, 649 (9th Cir. 1965) *affirming* 233 F. Supp. 188 (S.D. Cal. 1964) (9th Circuit agreed with District Court reasoning granting discretion to Secretary of Defense to shut down a naval repair facility).

²⁵⁸ But see DAVID M. WALKER, SUMMARY OF RECOMMENDATIONS: THE 9/11 COMMISSION REPORT, HOUSE MISC.

DOC. NO. B- 303692, at *25, 2004 WL 3104800 (Comptroller General’s report indicating that federal law placing command of military forces in the hands of Secretary of Defense would require statutory change before those military forces could be reassigned.)

memorandum of understanding sufficiently definite to enforce it as a contract.²⁵⁹ Memoranda of understanding may be signed between a multitude of parties, including nations,²⁶⁰ between the government and private industry,²⁶¹ between private parties,²⁶² between a military department and a U.S. territory,²⁶³ and between two different offices within the same executive branch.²⁶⁴ In short, parties from both outside and inside the government may agree to a memorandum of understanding.

The legal effect of memoranda of understanding is not uniform. Though a memorandum could be construed as a contract, courts will not necessarily bind the government to every memorandum signed. In *Missouri ex rel Garstang v. Department of the Interior*, the plaintiff brought a freedom of information challenge based on a memorandum of understanding between a corporation and the federal government.²⁶⁵ Created by several states, the public corporation entered into a memorandum of understanding with the Army Corps of Engineers and the Fish & Wildlife Service.²⁶⁶ Federal law allowed the Fish & Wildlife Service to provide unspecified assistance to the corporation, and the

²⁵⁹ See *Bauer v. Roman Catholic Diocese*, 457 N.Y.S.2d 1003, 1004 (App. Div. 1982) (holding the memorandum “appears to state the essential or material terms of the contract”).

²⁶⁰ *Self-Powered Lighting, Ltd. v. United States*, 492 F.Supp. 1267, 1274-75 (S.D.N.Y. 1980) (upholding a memorandum of understanding between U.S. Defense Department and the United Kingdom). See also *Standing Rock Sioux Tribe v. United States*, 182 Ct. Cl. 813, *2 (1968) (memorandum of understanding signed between the United States and the Sioux American Indian nation).

²⁶¹ *Sweetwater, A Wilderness Lodge LLC v. United States*, 72 Fed. Cl. 208, 211 (2006) (memorandum of understanding signed between the Forest Service and a private business).

²⁶² *Great Western Bank v. Office of Thrift Supervision*, 916 F.2d 1421, 1425 (9th Cir. 1990) (memorandum of understanding between two banks prior to merger).

²⁶³ *Abreu v. United States*, 468 F.3d 20, 24-28 (1st Cir. 2006) (memorandum of understanding between the Navy and Puerto Rico, regarding pollution at the Vieques range).

²⁶⁴ *United States Dep’t of Justice v. Fed. Labor Relations Auth.*, 39 F.3d 361, 363 (D.C. Cir. 1994) (memorandum of understanding between Department of Justice’s Office of Professional Responsibility, and the department’s Inspector General, regarding internal investigations).

²⁶⁵ *Missouri ex rel. Garstang v. United States Dep’t of Interior*, 297 F.3d 745, 747-750 (8th Cir. 2002).

²⁶⁶ *Id.* at 747.

memorandum of understanding established that the assistance would be in the form of the federal agency paying for a full-time coordinator to run the corporation.²⁶⁷ In ruling for the corporation, the Eighth Circuit ruled that “[t]he provision of federal resources, such as federal funding, is insufficient to transform a private organization into a federal agency.”²⁶⁸ This ruling implicitly condoned the memorandum of understanding as a mechanism to fund the corporation, while showing that such a memo does not require federal oversight of a recipient of federal funds.

Similar reasoning could be used if the concerned cabinet officials were to sign a memorandum of understanding to shift military forces within the executive branch. The memorandum of understanding in *Garstang* did not turn the corporation into a federal entity; similarly, if a memorandum of understanding provided for the transfer of military units to Homeland Security for disaster relief, that mechanism should not transfer the military character of the units into the Department of Homeland Security. In other words, if federal funds, provided based on a memorandum of understanding, do not create a federal agency, neither should federal forces, provided based on a memorandum of understanding, create another military service. Therefore, a memorandum of understanding is an effective conduit for transferring certain uses for military assets to the Department of Homeland Security without shifting ultimate control of the assets, or changing the character of the Department of Homeland Security while it controls the assets.

2. *Memorandum of Understanding as Firewall*

A memorandum of understanding ought to be employed as the document to execute a plan to shift forces between executive branch departments. The memorandum would cement relationships between the Departments of Defense and Homeland Security, and clarify, in advance, that sharing military forces in time of domestic emergency is encouraged. Such a memo would ideally be signed by the Secretaries of Defense and Homeland Security, as well as the Attorney General. The Secretary of Defense would sign on as the force provider, agreeing to detach units to the Department of Homeland Security as agreed upon by the two secretaries, or as directed by the President.²⁶⁹ The Secretary of Homeland Security would sign as the department

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 750.

²⁶⁹ As discussed *supra*, the statutory authority for such transfer of military forces flows from the power vested in the Secretary of Defense and the President in 10 U.S.C. § 125 (2000).

official that would receive the forces, and supervise the newly-acquired Homeland Security personnel and assets during disaster relief operations.

The Attorney General's signature would be central to making the memorandum effective. The Attorney General would sign the memorandum to underscore the sound legal footing of the transfer of forces agreement, indicating that assets shifted to the Department of Homeland Security are acting both within the law and in compliance with the PCA. *Posse Comitatus* is a federal criminal statute,²⁷⁰ so assurances by the top federal prosecutor would assuage fears of prosecution under the PCA.²⁷¹

Perhaps the best way to ensure the solidity of a Department of Justice agreement to refrain from prosecuting possible PCA violations would be to incorporate the common law PCA tests as the language that limits the memo's protection. In other words, the Attorney General could agree not to bring PCA charges, provided that personnel acting under the memo do not employ military forces (1) as direct, active participants in civil law enforcement,²⁷² (2) so as to pervade the activities of civil law enforcement,²⁷³ or (3) to regulate, proscribe, or compel the activities of civilian law enforcement.²⁷⁴ A memorandum so limited would amount to the Attorney General agreeing that as long as the PCA is not violated, there will be no federal charges under the Act.²⁷⁵

²⁷⁰ 18 U.S.C. §1385 (2000). The criminal sanctions of the law have never been enforced. Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J.L. & POL'Y 99 (2003).

²⁷¹ The Los Angeles Riots are a good, relatively recent example of such fears adversely affecting disaster response. The commanding general of federal forces sent to quell the riots was convinced that *Posse Comitatus* prevented him from using military forces to enforce the law. President George H.W. Bush, however, issued a proclamation directing the rioters to cease and desist. Such a proclamation should have been a clear signal that the President was invoking his statutory powers to stop an insurrection. The general's hesitation over *Posse Comitatus* shows he was misinformed. Currier, *supra* note 5, at 12. See also 10 U.S.C. §§ 331-334 & 12406 (2000).

²⁷² *United States v. Yunis*, 681 F.Supp. 891, 892 (D.D.C. 1988); *United States v. Red Feather*, 392 F. Supp. 916, 922-25 (D.S.D. 1975).

²⁷³ *United States v. Jaramillo*, 380 F. Supp. 1375, 1379-81 (D. Neb. 1974).

²⁷⁴ *United States v. McArthur*, 419 F. Supp. 186, 193-194 (D.N.D. 1975).

²⁷⁵ Whether such a memorandum could be binding upon individual U.S. Attorneys and their assistants, whether prosecutors would be estopped from prosecuting good faith infractions, and how Department of Justice policies affect prosecutorial discretion are interesting ideas beyond the scope of this discussion.

This memorandum provides an effective way to memorialize an agreement between the executive branch departments concerned. Military commanders, civil servants, and disaster relief coordinators would all be on notice that sharing military members and units between the Department of Defense and the Department of Homeland Security is not only legal under PCA, but encouraged as appropriate.

D. Baby Steps: NORTHCOM and the National Response Framework

Without going quite so far as formalizing an agreement in writing, there is already some movement in the direction of an organized military response to domestic disasters. The relatively recently established U.S. Northern Command is the lead military agency for coordinating disaster relief, while the federal government's National Response Framework is another small step mostly in the right direction.

I. U.S. Northern Command

In October 2002, the United States Northern Command (NORTHCOM) came into existence. A product of reaction to September 11th, it is a federal military organization whose mission is "to provide command and control of Department of Defense homeland defense efforts and to coordinate defense support of civil authorities."²⁷⁶ The NORTHCOM duties most pertinent to this discussion are the planning, organization, and execution of homeland defense missions.²⁷⁷

NORTHCOM has very few permanently assigned military forces; instead, forces are assigned to NORTHCOM as required by the President and Secretary of Defense.²⁷⁸ In practice, NORTHCOM serves as something of a clearinghouse for domestic emergency relief. For example, in early 2007, when harsh winter storms closed hundreds of miles of interstate and killed at least 13 people, NORTHCOM coordinated a relief effort.²⁷⁹ From all appearances, the federal military did not take charge of the rescue operations. Instead, National Guard units from nearly a dozen states were deployed under their own

²⁷⁶ U.S. Northern Command, About USNORTHCOM, <http://www.northcom.mil/About/index.html>, (last visited Nov. 21, 2008).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ Jim Greenhill, *National Guard Rescues People, Cattle After Severe Winter Storms*, U.S. NORTHCOM NEWS, Jan. 5, 2007 available at <http://www.northcom.mil/News/2007/010807.html>.

cognizance, along with the Federal Emergency Management Agency (FEMA) and state emergency organizations, as organized by NORTHCOM.²⁸⁰

Using the federal military Northern Command as a clearinghouse for domestic disaster relief is not the role recommended herein. Nevertheless, having a standing organization with the sole purpose of coordinating disaster relief can only help the confused process that was so muddled during the response to Katrina. As a positive sign, in August 2007, NORTHCOM coordinated the deployment of an Army unit to St. Thomas in advance of Hurricane Dean's arrival. Though NORTHCOM did not command the team in St. Thomas, it provided a communications node and helped liaison with FEMA to get the team there in advance of the storm.²⁸¹ Sending and communicating with an advance team may not demonstrate a total victory over the problems of Katrina, but it is at least a start.

NORTHCOM recently gained an active duty Army brigade.²⁸² The unit is the 3rd Infantry Division's 1st Brigade Combat Team, from Fort Stewart, Georgia, assigned to NORTHCOM on October 1, 2008.²⁸³ The assignment is the first time an active unit has been assigned to NORTHCOM en masse. The brigade is expected to be attached for a year, and then replaced by a new unit.²⁸⁴ The NORTHCOM brigade is expected to be on call to respond to domestic disasters, including chemical, biological, nuclear, and natural disasters.²⁸⁵

There seems to be a mismatch between the NORTHCOM brigade's training and its planned purpose. The brigade commander discussed impending training to use the Army's "first ever nonlethal package," including traffic control equipment and nonlethal weapons including shields, batons, beanbag

²⁸⁰ *Id.*

²⁸¹ Press Release, ARNORTH Deploys Team in Preparation for Hurricane Dean Arrival, U.S. Northern Command (Aug. 16, 2007) (<http://www.northcom.mil/News/2007/081607.html>).

²⁸² Press Release, U.S. Northern Command Gains Dedicated Response Force, U.S. Northern Command (Sep. 30, 2008) (<http://www.northcom.mil/News/2008/093008.html>).

²⁸³ *Id.*

²⁸⁴ Gina Cavallaro, *Brigade Homeland Tours Start Oct. 1*, ARMY TIMES, Sept. 7, 2008, available at http://www.armytimes.com/news/2008/09/army_homeland_090808w/.

²⁸⁵ Press Release, Patti Bielling, Exercise Readies First Units for NORTHCOM Assignment, U.S. Army (Sept. 29, 2008) (<http://www.army.mil/news/2008/09/29/12779-exercise-readies-first-units-for-northcom-assignment/>).

bullets, and Tasers.²⁸⁶ The commander explained that “because of this mission,” the NORTHCOM brigade was “the first to get [the nonlethal weapons package].”²⁸⁷ However, nonlethal weapons are only intended for use in foreign war zones, to the exclusion of domestic use.²⁸⁸ It is interesting that the domestic disaster response mission enables the NORTHCOM brigade to get the nonlethal weapons first, and yet the brigade is not intended to use those nonlethal weapons domestically. Training the army as a domestic constabulary is problematic; the mismatch between training and justification raises the question whether the permanent assignment of an active duty infantry brigade to train for civil disaster response is really the right solution for domestic disaster relief.

2. *National Response Framework*

In addition to establishing NORTHCOM, the federal government has recently adopted the National Response Framework, “a guide that details how the Nation conducts all-hazards response – from the smallest incident to the largest catastrophe. This document establishes a comprehensive, national, all-hazards approach to domestic incident response.”²⁸⁹

In pertinent part, the new Framework maintains separate and clear lines of authority between civil and military organizations in disaster relief. In responding to an incident, the Framework envisions a FEMA representative leading the recovery, or a Department of Homeland Security official coordinating directly with the Secretary following severe disasters.²⁹⁰ Though these civilian officials would be in charge of a disaster response operation and assign tasks to other federal agencies, the positions’ descriptions are silent on whether that supervision extends to military forces.²⁹¹

In defining the responsibilities of military representatives, however, the Framework requires the military commander “be co-located with the senior on-

²⁸⁶ Cavallaro, *supra* note 284.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ Department of Homeland Security, National Response Framework (NRF) – Fact Sheet, *available at* <http://www.fema.gov/pdf/emergency/nrf/NRFOnePageFactSheet.pdf> (last visited Nov. 21, 2008).

²⁹⁰ Department of Homeland Security, National Response Framework: Frequently Asked Questions, *6, *available at* http://www.fema.gov/pdf/emergency/nrf/NRF_FAQ.pdf (last visited Nov. 21, 2008).

²⁹¹ *Id.*

scene [civilian] leadership . . . to ensure coordination and unity of effort.”²⁹² Based on this language, it would seem that under the Framework, the military commander does not answer to the civilian Homeland Security official leading the recovery effort. Retaining forces squarely within the military command structure, as the Framework does, does not address the *Posse Comitatus* problem.

3. *The 2008 Hurricane Season: Lessons Learned?*

NORTHCOM’s responses during the 2008 hurricane season were probably better than 2005, but the *Posse Comitatus* Act was still unaddressed. When Hurricane Gustav came ashore on September 2, 2008, the Louisiana National Guard began search and rescue missions, and quickly shifted to food and water distribution upon realizing that was the greater need.²⁹³ The Mississippi National Guard pre-positioned equipment and troops, and because of problems after Hurricane Katrina, were better able to anticipate what aid would be needed where.²⁹⁴

At the national level, Defense Secretary Gates authorized up to 50,000 National Guardsmen to be mobilized to respond to Hurricane Gustav, if necessary.²⁹⁵ The guardsmen were to serve “under the control of the governors,” which probably means in a Title 32 status.²⁹⁶ Under Secretary Gates’ authorization, at least 14,000 guardsmen were mobilized, evacuating 17,000 people from New Orleans and 600 special needs medical patients from the region.²⁹⁷ In addition to evacuation by land and air, the Guard also conducted 24-hour security patrols in New Orleans.²⁹⁸ Following Hurricane Ike,

²⁹² *Id.* at *7.

²⁹³ Press Release, Louisiana Guard’s Focus Shifts to Food, Water Distribution, Department of Defense (Sept. 4, 2008) (<http://www.defenselink.mil/news/newsarticle.aspx?id=51031>).

²⁹⁴ Press Release, Michael J. Carden, Mississippi Guard Applies Lessons Learned from Hurricane Katrina, Department of Defense (Sept. 3, 2008) (<http://www.defenselink.mil/news/newsarticle.aspx?id=51016>).

²⁹⁵ Press Release, Ellen Krenke, Gates OKs Call-up of 50,000 Guard Troops for Hurricane Support (Sept. 2, 2008) (<http://www.defenselink.mil/news/newsarticle.aspx?id=51007>).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

active duty military contributions included search and rescue missions and logistical preparations both ashore²⁹⁹ and afloat.³⁰⁰

The response provided was largely adequate to respond to Hurricanes Gustav and Ike. But, at risk of minimizing the damage brought to the Galveston area, it was fortunate that the damage and human suffering were not on the same scale as that following Hurricane Katrina. The 2008 hurricane season left the current framework relatively untested. It remains an open question how this level of response would function if the National Guard troops patrolling New Orleans after Gustav were overwhelmed either by evacuees or lawless banditry on a city-wide scale. In other words, the *Posse Comitatus* Act is still the elephant in the room for disaster response planning. The 2008 hurricane season did not fully test either NORTHCOM or the National Response Framework insofar as transitioning to a full-scale active military relief effort. For that reason, the recommendation below could improve the current Framework, and create a workable model for military assistance in disaster recovery.

VI. THE WAY AHEAD

A. Recommendation

Using a model like the shifting chains of command for the National Guard, and the Coast Guard's shifting between the Department of Homeland Security and the Department of Defense, national disaster response could be set up for better coordination. Using these models, the President should be able to order either federal forces or nationalized militia forces into the Department of Homeland Security, and then Homeland Security would take operational control of those units. There is no constitutional problem implicated, as the President remains the Commander in Chief.³⁰¹ This change of authority would be similar to the way the Coast Guard, as a service, as units, or as individuals, can and do move between the Department of Homeland Security and the Department of Defense. Similarly, this recommendation would place military units under the operational control of the Department of Homeland Security, shifting chains of command the way National Guard units shift between state and federal authority.

²⁹⁹ Press Release, U.S. Northern Command Provides Additional Support in Wake of Hurricane Ike, U.S. Northern Command (Sept. 13, 2008) (http://www.northcom.mil/News/2008/091308I_c.html).

³⁰⁰ Elizabeth Merriam, Press Release, USS Nassau Responding to Hurricane Ike at 'Best Speed,' U.S. Navy (Sept. 17, 2008) (http://www.navy.mil/search/display.asp?story_id=39801).

³⁰¹ U.S. CONST. art. II, § 2.

Once the President authorized the Department of Homeland Security to take control of specified military forces, no further advice or permission would be necessary from the Pentagon. The forces on-scene providing disaster relief would report to the Department of Homeland Security on-scene coordinator, who reports to the Secretary of Homeland Security.³⁰² Just as when a Coast Guard member directs Navy assistants during a drug seizure, a Homeland Security relief coordinator directing military forces places the expertise in charge of the wherewithal.

This is only a partial solution. Even if an infantry brigade were temporarily assigned to the Department of Homeland Security, it would still arguably be “any part of the Army or Air Force” as defined in the PCA.³⁰³ It is possible to argue that when working for the Secretary of Homeland Security, a federal Army brigade is no longer “part of the Army” *per se*. But as nothing in PCA jurisprudence supports this contention, however, prudence requires more process.

A memorandum of understanding would be a useful tool. The Secretaries of Defense and Homeland Security could sign the memorandum, whereby Defense would agree to provide military forces to Homeland Security for disaster relief. To strengthen the legality of such a memo, the shuffling of forces should perhaps only happen at the President’s direction, lending both statutory³⁰⁴ and inherent Commander in Chief powers³⁰⁵ to the agreement.

With the Attorney General also signing the memorandum, civil and military officials would be assured that good faith errors would not result in prosecution under *Posse Comitatus*. The Attorney General would agree that the contemplated actions were legal and did not violate the *Posse Comitatus* Act, provided that the military forces involved were not direct, active participants in civil law enforcement,ⁱ and did not pervadeⁱⁱ or regulate, proscribe, or compelⁱⁱⁱ the activities of civilian law enforcement. This memorandum would reassure leaders using military forces that they would not be prosecuted, and provide the leaders’ legal advisors with relatively clear guidelines going into a disaster.

302 Department of Homeland Security, National Response Framework: Frequently Asked Questions, *6, *available at* http://www.fema.gov/pdf/emergency/nrf/NRF_FAQ.pdf (last visited Nov. 21, 2008).

³⁰³ 18 U.S.C. §1385 (2000).

³⁰⁴ 10 U.S.C.A. § 125 (West 2008).

³⁰⁵ U.S. CONST. art. II, § 2.

This recommendation does not implicate the traditional concerns reflected in the PCA. Rather than reporting through the traditional military channels, a unit temporarily assigned to the disaster relief effort would report to the Department of Homeland Security. Moreover, the Department of Homeland Security's official in charge of the recovery effort would likely not need "to execute the laws,"³⁰⁶ as a primary concern, when there is search and rescue and evacuation to perform.³⁰⁷

Even if some law enforcement support were required during recovery, the varying PCA tests might not be violated. The Department of Homeland Security directing military forces during a recovery would almost certainly not run afoul of the "regulate, proscribe, or compel" test. Recall that in formulating that test, the court found no PCA violation when the civilian officials gave the orders during the course of an operation.³⁰⁸ Disaster relief under the National Response Framework, with a Department of Homeland Security civilian leading the effort, would likely provide a similar level of protection from the PCA.³⁰⁹

The "pervade" test requires careful shepherding. When this test was formulated, the court stopped short of finding an explicit PCA violation, but found functionally the same in ruling that the colonel's advice and direction "pervaded the activities" of civilian law enforcement.³¹⁰ If this is the standard applied, the Department of Homeland Security relief coordinator would have to be careful to put civilians and state militia members in as many positions of responsibility as possible, to avoid the contention that the federal military "pervaded" the law enforcement. Assuming a disaster area were small enough, or that there were ample National Guard and state and local law enforcement and emergency responders, it is likely that a well managed relief effort would not run afoul of the PCA. In any event, civilian leadership over the military forces, following force realignment into the Department of Homeland Security, would likely preclude a finding that military assistance "pervaded" the relief effort.

³⁰⁶ *Id.*

³⁰⁷ Some commentators believe, however, that even simple patrols to maintain order after a disaster would run afoul of the PCA. CRS LEGAL, *supra* note 229, at 5.

³⁰⁸ *United States v. McArthur*, 419 F. Supp. 186, 194-95 (D.N.D. 1975).

³⁰⁹ Cynically, one could argue that this test boils down to little more than asking whether the person in charge is wearing a uniform. Such a superficial threshold was met in *McArthur*, *id.*, and would be met with a Department of Homeland Security official leading the disaster relief.

³¹⁰ *United States v. Jaramillo*, 380 F. Supp. 1375, 1379 (D. Neb. 1974).

The “direct and active participation” standard might be yet more difficult to clear, but not insurmountable. This test allows the military to incidentally aid civilian investigators, but not to execute the laws.³¹¹ Imagine federal troops patrolling a city street after an emergency, like the 82d Airborne Division did after Katrina. To avoid violating this test, federal troops’ presence must be intended to keep the peace, rather than execute the laws. The relief coordinator could follow the Coast Guard counter-drug model, and ensure that a civilian law enforcement officer or state militia member is present with any federal forces that might be called on to enforce the laws. Like the naval ship that suddenly becomes a Coast Guard vessel for purposes of making a drug arrest at sea, a mixed patrol of federal soldiers and state police could operate as a bifurcated unit: the state militia or police enforce the law by making the arrest, while the federal troops incidentally aid in the investigation, as is more consistent with case law.³¹²

Paradoxically, the bifurcated patrol would create exactly the situation the PCA originally intended to avoid: local law enforcement bringing along the federal Army to help enforce the law.³¹³ If a disaster area is so lawless that there are insufficient law enforcement and state militia members present, there may be no clear way to avoid PCA proscriptions. The Department of Homeland Security-controlled troops are not well-suited for this eventuality. The most viable option legally, if not politically,³¹⁴ under these facts would be for a President to invoke the “calling forth” power and insurrection statutes,³¹⁵ and provide federal troops and federalized militia to enforce the laws as long as the danger persists.

The working model, then, would be a two-step process, assuming the period immediately following a disaster was particularly dangerous. In the first step, the President would call forth the National Guard³¹⁶ in affected states, neighboring states, and other states where the Guard could get to the disaster area most quickly. Additionally, federal troops would be sent to stop any

³¹¹ *United States v. Red Feather*, 392 F. Supp. 916, 924- 25 (D.S.D. 1975).

³¹² *Id.*

³¹³ 18 U.S.C. § 1385 (2000).

³¹⁴ HAROLD C. RELYEA, CONGRESSIONAL RESEARCH SERVICE, MARTIAL LAW AND NATIONAL EMERGENCY 4-5 (2005). Martial law is certainly legal under § 332, but it is unclear if a declaration of martial law is required to invoke § 332 to quell a civil disturbance. In any event, as the experience in Hurricane Katrina shows, federalizing the local National Guard or sending the federal Army into a U.S. state uninvited may have ugly political consequences.

³¹⁵ 10 U.S.C. § 331-334 (2000).

³¹⁶ 10 U.S.C. § 332.

violence. The first relief worker on scene need not be a soldier with a rifle, but if there is violence in the area perpetrated by fellow victims, criminals, or terrorists, the military could conduct peace enforcement operations. While the military responds to secure the scene, the federal government would be coordinating between Homeland Security and the affected state and local leaders.

Posse Comitatus is not yet implicated, because the “calling forth” and insurrection statutes are themselves statutory exceptions. As soon as possible, the President should cancel his insurrection power, ending military management of the situation, and turn the relief operation entirely over to the Department of Homeland Security and state leadership.

At this point, the shifting lines of authority would be crucial. The federal military units would be turned over to the Department of Homeland Security to assist in any permissible way: logistical support, distributing aid, search and rescue, medical support, liaison with federal military authorities – essentially anything short of directly enforcing the civil law. The federal military would not report to the Pentagon, but instead would temporarily report to the Department of Homeland Security. The National Guard would revert to either a state status or hybrid Title 32 status, avoiding PCA problems. The National Guard members, along with civilian law enforcement, would provide all of the direct law enforcement. If there should be an outbreak of violence, the Department of Homeland Security would coordinate a response. Even if there were violence, the federal military could respond with force as necessary, provided that state militia and law enforcement were the individuals making necessary arrests and otherwise enforcing the civil law. This would keep the Department of Homeland Security coordinator and the subordinate military commanders in compliance with the criminal prohibitions of the PCA.³¹⁷ As long as the local military commanders, temporarily subordinate to the Department of Homeland Security civilian leadership, were careful not to directly or actively participate in law enforcement, they would not run afoul of the law. The memorandum of understanding between the executive branch heads should provide the clarity needed to ensure the PCA was not violated.

If a violent incident or trend were too great for the military forces on hand, the only lawful way to reduce the violence and allow disaster relief to continue would be for the President to once again invoke the calling forth statutes for insurrections.³¹⁸ Federal troops involved in quelling the violence would be permitted to directly and actively enforce the civil law for the brief

³¹⁷ 18 U.S.C. § 1385.

³¹⁸ 10 U.S.C. § 332-333.

duration of the “unlawful obstruction,”³¹⁹ or the “domestic violence [or] unlawful combination.”³²⁰ The “calling forth” would start the process over again, with the military taking the lead role in quelling the violence while providing aid to those in need. As soon as violence abated, state militia and police forces would resume sole responsibility for law enforcement, with federal troops in supporting roles as described above. In any event, the memorandum of understanding between the Attorney General, Secretary of Defense, and Secretary of Homeland Security would provide metes and bounds of permissible action, giving the clarity needed for a rapid response action.

This plan of action ensures the federal military can provide assistance to those in need without violating *Posse Comitatus*. The original dislike of the domestic use of the federal military is respected in this plan because the level of coordination within the executive branch require transfer of individuals and units to Homeland Security, so that the transferred units are temporarily not part of the federal military. The memorandum of understanding would only be effective to the extent that the individuals acted within the common law standards for the PCA.

B. Application

To return to the introductory hypothetical, the explosions that rocked Southern California have caused thousands of casualties by midday, mostly due to the attacks on the petroleum infrastructure. Additionally, because the major roadways are blocked, first responders are slow in responding to calls for firefighting and medical assistance. Upon consultation with the state governors, the President exercises his insurrection power, federalizes the National Guards of California, Nevada, and Oregon, and sends the federalized National Guard and all federal ground forces in the western United States into California, providing physical security to the southern half of the state. Though the law does not compel him to make such an agreement, the President assures the governors that as soon as the situation is in hand, he will cancel the insurrection power, and return the Guard troops to their respective governors’ control.

In addition to ground forces, helicopter squadrons from the military services are ordered into the area to conduct search and rescue operations. The Navy sends one amphibious ship to dock at Long Beach and serve as a floating headquarters, while several other amphibious ships and aircraft carriers remain at sea to provide secure helicopter landing platforms and hospital services.

³¹⁹ *Id.* at § 332.

³²⁰ *Id.* at § 333.

While the military forces assemble and begin to secure the area, the alphabet soup of government agencies investigate the attacks. Twelve hours pass, and by nightfall federal investigators have an idea of the identity of the perpetrators, and are formulating a plan to prevent further attacks. Federal soldiers and armored vehicles patrol the streets, performing law enforcement missions as allowed under the “calling forth” statutes.³²¹

When 24 hours pass without incident, the President declares that the insurrection has passed, at least for the moment. By then the Homeland Security response team has had time to assemble and organize. As soon as the President cancels his insurrection power, the Homeland Security recovery coordinator fully takes over disaster response.

Under the plan recommended in this article, the President leaves all the federal military personnel in place, but turns them over to the civilian Department of Homeland Security recovery coordinator. The California National Guard is returned to state status for the governor to use as he deems fit, while the Nevada and Oregon Guards are put on Title 32 status, and by agreement of those two states’ governors, stay in California acting as state agents.

The Homeland Security relief coordinator supervises the on-scene military commander, who reports to him for the duration of the mission. NORTHCOM monitors and coordinates from afar but has no control or direction ability. The Department of Homeland Security coordinator and military commander are both aware of the limitations outlined in the *Posse Comitatus* memorandum of understanding, and take measures to employ the military to help in the recovery effort, sending the National Guard or civilian police for any law enforcement tasks. In so doing, neither the civilian coordinator nor military commander violates *Posse Comitatus*. Because of careful attention to the requirements of the law, disaster relief can legally go forward with military assistance in a clear, concise, and rapid manner.

In the following days, disaster relief continues, with military assistance provided at the direction of the Homeland Security coordinator. The plan to prevent further attacks is successfully implemented, with regular patrols by both police and military units reporting suspicious activity for further police investigation. The squadrons and ships remain on scene for nearly two weeks, providing medical support and emergency airlift until the roads can be reopened for emergency responders, and soon thereafter completely cleared and reopened. The Army units are released back to the Department of Defense within ten days,

³²¹ 10 U.S.C. § 331-334.

as patrols become less frequent, and the situation becomes smaller in scope and within the capability of the National Guard. The loss of life was significantly reduced by the quick availability of military hardware and personnel. Because *Posse Comitatus* was understood in advance, it was no longer a point of contention. The President and governor were able to quickly mobilize necessary manpower to respond to the emergency.

C. Conclusion

The *Posse Comitatus* Act reflects a longstanding American tradition of wariness towards military authority domestically. Respecting that historical wariness requires keeping *Posse Comitatus* as an effective prohibition against federal soldiers performing law enforcement.

Keeping the PCA while ensuring disaster response will require flexibility from federal and state officials, and a commitment to keeping the federal military out of law enforcement. Although a statutory solution is an alternative, the repeal of the recent Warner Amendment shows that Congressional solutions are not necessarily effective or permanent.

Legislation is not necessary. Working within the existing law while taking sufficient steps to clarify actions is sufficient. Shifting responsibility away from the federal military, directly to Homeland Security, is a good start. Transferring military units to the control of the Department of Homeland Security would maintain the spirit of *Posse Comitatus*, while limiting law enforcement duties to state militia and civilian police would meet the letter of the law. The Memorandum of Understanding would provide the clarity needed to enable decisive action.

If the above recommendations are followed, effective disaster relief is possible while respecting the goals the PCA. This plan will prevent another political and legal battle over *Posse Comitatus* like the one experienced during Hurricane Katrina. It allows the government to focus on the business of providing vital assistance rather than arguing about process while lives hang in the balance.

MITIGATING COLLATERAL DAMAGE TO THE NATURAL ENVIRONMENT IN NAVAL WARFARE: AN EXAMINATION OF THE ISRAELI NAVAL BLOCKADE OF 2006

Matthew L. Tucker*

*"We conceive . . . that as an operation of war, Blockade will continue. Many modifications however, will probably be introduced into the exercise of the right."*¹

*"[T]he real issue is how best to minimize the environmental impact of military operations without constraining the military commander with policies that have little chance of serious consideration in wartime."*²

I. INTRODUCTION

On July 14 and 15, 2006, Israeli warplanes bombed the Jiyeh power plant, a facility located approximately eighteen miles south of Beirut, Lebanon.³ The power station contained several fuel tanks situated within one hundred feet

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¹ H. BARGRAVE DEANE, *THE LAW OF BLOCKADE: ITS HISTORY, PRESENT CONDITION, AND PROBABLE FUTURE* 51 (1870).

² William H. Wright, *Naval Warfare and the Environment*, in 69 U.S. NAVAL WAR COLLEGE, *INTERNATIONAL LAW STUDIES, PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT* 35, 35 (1996).

³ Bogonko Bosire, *U.N. Fears Lebanon Oil Slicks Impact on the Environment*, COSMOS, July 31, 2006, available at <http://www.cosmosmagazine.com/node/496>.

of the Mediterranean Sea.⁴ At least two of those tanks were damaged in the bombings⁵ and began to leak oil.⁶ The tanks burned intensely for days, scattering soot and debris for miles and turning the underlying sand into glass.⁷ But the biggest environmental concern was the nearly four million gallons of oil flowing into the Mediterranean Sea.⁸ The resulting slick slowly spread north to the Syrian coast, polluting seventy-five miles of Lebanon's coastline along the way.⁹

Oil spills present significant environmental problems anywhere, but those problems are exacerbated by the geography of the Mediterranean Sea. Because the Sea is almost entirely surrounded by land, there is "a relatively slow renewal period of eighty to one-hundred years for its waters. The languid rate of recharge delays dilution by oceanic waters and contributes to accumulation of persistent hazardous pollutants."¹⁰ With that geography in mind, experts

⁴ *Id.* During the first attack one of the tanks was damaged, but retaining walls prevented the oil from spilling into the ocean. During the second attack a second and third tank were damaged and the retaining wall destroyed, and the oil flowed into the Mediterranean. U.N. Human Rights Council, *Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S- 2/1*, UN Doc. A/HRC/3/2, Nov. 23 2006, ¶210 [hereinafter Report of the Commission of Inquiry].

⁵ Bosire, *supra* note 3.

⁶ Carol Huang, *Oily Legacy of War Mars Lebanon Coast*, CHRISTIAN SCIENCE MONITOR, Aug. 23, 2007, at 6.

⁷ Hassan M. Fattah, *Casualties of War: Lebanon's Trees, Air and Sea*, N.Y. TIMES, July 29, 2006, available at

<http://www.nytimes.com/2006/07/29/world/middleeast/29environmental.html>.

One environmental expert determined that most of the oil at the facility burned, and the plume from the fires covered more than thirty miles, causing respiratory illness for residents in that area and raining drops of oil within four miles.

Richard Steiner, *Lebanon Oil Spill Rapid Assessment and Response Mission: Final Report 3*, Sep. 11, 2006, available at

http://www.greenline.org.lb/new/pdf_files/document_2_lebanon_oil_spill_rapid_assessment_and_response_mission.pdf.

⁸ Bosire, *supra* note 3.

⁹ Huang, *supra* note 6, at 6.

¹⁰ Dorit Talitman, *The Devil is in the Details: Increasing International Law's Influence on Domestic Environmental Performance—The Case of Israel and the Mediterranean Sea*, 11 N.Y.U. ENVTL. L.J. 414, 420 (2003). Indeed, the coast of Lebanon was heavily polluted before the conflict. But even with a relatively modest amount of oil spilled, the effect of any spill in the ocean is significant. Steiner, *supra* note 7.

predicted that the coast of Lebanon could take ten years to recover from the spill, that the fishing industry would take at least three years to recover, and that residents in the region were at an increased risk of cancer as a result of the “toxic cocktail” presented by the fuel oil.¹¹ The presence of so much oil in the water also threatened wildlife such as the endangered green sea turtle that lays eggs on Lebanon’s beaches and the migratory bluefin tuna that pass through coastal waters.¹² The many coastal archaeological sites in the region¹³ were also directly threatened by the oil,¹⁴ prompting the United Nations Educational Scientific and Cultural Organization (UNESCO) to call for “urgent measures to clean up the oil spill from the World Heritage edifices along the Byblos shore line.”¹⁵ In economic terms, the spill is projected to have caused \$200 million in environmental damage and an additional \$250 million in indirect costs.¹⁶ Such costs are difficult for Lebanon, which has a gross domestic product of \$24 billion,¹⁷ to bear.

The attack on the Jiyeh power plant occurred in the midst of the summer 2006 conflict between Israel and Hezbollah in Lebanon. That conflict began during the night of July 12, 2006, when Hezbollah¹⁸ guerrillas crossed the

¹¹ Mark Kinver, ‘Damage is Done’ to Lebanon Coast (BBC News Aug. 8, 2006), available at <http://news.bbc.co.uk/2/hi/science/nature/5255966.stm>. According to one expert, a rapid response is essential to containing a spill but that was not possible because the spill occurred in the midst of a conflict. “[I]ntervention can help within the first 48-72 hours of the spill; we are already 20 days too late (speaking as of Aug. 8, 2006).” *Id.*

¹² Fattah, *supra* note 7.

¹³ See <http://whc.unesco.org/en/statesparties/lb> (last visited Dec. 29, 2008).

¹⁴ UNESCO Mission Reports on War Damage to Cultural Heritage in Lebanon (Sept. 19, 2006), available at <http://whc.unesco.org/en/news/283>. Most significantly, the spill prompted a need to manually clean the stones at the base of two medieval towers at Byblos. *Id.*

¹⁵ *Id.* UNESCO noted that “major components of Lebanon’s cultural heritage had been spared by the recent conflict.” *Id.*

¹⁶ Huang, *supra* note 6, at 6. The amounts are based on estimates by Greenline, a nongovernmental organization in Lebanon. *Id.*

¹⁷ CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/le.html> (last visited Dec. 29, 2008).

¹⁸ Report of the Commission of Inquiry, *supra* note 4, at ¶ 37.

Hezbollah is a Shiite organization that began to take shape during the Lebanese civil war. It originated as a merger of several groups and associations that opposed and fought

“Blue Line” separating southern Lebanon and northern Israel.¹⁹ Once in Israel they kidnapped two Israeli soldiers and killed several others.²⁰

It is likely that Hezbollah merely intended to draw Israel into a limited skirmish that would lead to a prisoner exchange: Israeli soldiers for captured members of Hezbollah.²¹ However, Israel considered the abduction an act of war and blamed Lebanon²² for failing to control Hezbollah’s actions along their shared border.²³ Thus, instead of the anticipated border skirmish, Israel commenced a full-scale war²⁴ with Lebanon and Hezbollah.²⁵ The UN

against the 1982 Israeli occupation of Lebanon. Hezbollah has grown to an organization active in the Lebanese political system and society, where it is represented in the Lebanese parliament and in the cabinet. It also operates its own armed wing, as well as radio and satellite television stations.

Id.

¹⁹ Jacquelyn S. Porth, *Political Dynamic Shifted During 2006 Israel-Hezbollah Conflict: An Interview with International Peace Academy President Terje Roed-Larsen*, Oct. 16, 2007, available at <http://www.america.gov/st/peacesec-english/2007/October/20071016110513sjhtrop0.1880609.html>.

²⁰ Ze’ev Schiff, *Israel’s War With Iran*, 85 FOREIGN AFF. 23, 25 (2006).

²¹ Paul Salem, *The Future of Lebanon*, 85 FOREIGN AFF. 13, 13 (2006). The taking of prisoners was a common occurrence. On June 25, 2006 Hamas took an Israeli soldier prisoner and international mediators had been negotiating his release. *Id.* At the time of the conflict, Israel was holding hundreds of Palestinians and members of Hezbollah prisoner. *Id.*

²² *Israel Imposes Lebanon Blockade*, BBC NEWS, July 13, 2006, available at http://news.bbc.co.uk/2/hi/middle_east/5175160.stm [hereinafter *Israel Imposes Lebanon Blockade*]; Report of the Commission of Inquiry, *supra* note 4, ¶ 41 (“Lebanese Prime Minister Fouad Siniora denied any knowledge of the raid and stated that he did not condone it”).

²³ Report of the Commission of Inquiry, *supra* note 4, at ¶ 269. An Israeli spokesperson stated that “[t]he Lebanese government is openly violating the decisions of the Security Council by doing nothing to remove the Hezbollah on the Lebanese border, and is therefore responsible for the current aggression.” *Id.*

²⁴ The Israeli military chief of staff stated: “[I]f the soldiers are not returned, we will turn Lebanon’s clock back 20 years.” *Id.* at ¶ 43. Lebanon made several requests to the UN Security Council for a ceasefire. *Id.* at ¶ 45.

²⁵ Schiff, *supra* note 20, at 24. This conflict was not unique, as Israel remains at war with Hezbollah in Lebanon and Palestinian militants, including Hamas, in the Gaza Strip. New to this conflict, however, were the secondary actors of Syria and Iran, which both played a significant role in the training and financing

negotiated a cease fire that took effect on August 14, 2006, but sporadic fighting continued for weeks as Israeli forces that had moved into Lebanon were gradually replaced with members of the Lebanese army and the United Nations Interim Force in Lebanon (UNIFL).²⁶

The toll of the conflict was terrible. More than 1,000 Lebanese and 100 Israelis died during the eight-week war.²⁷ Neither side won a clear victory,²⁸ and many believe that the conflict ushered in a new, even more unstable era in the Middle East.²⁹ Israel was stunned by the fact that its military was unable to

of Hezbollah. Syria seeks the return of the Golan Heights, which it lost to Israel in the Six Day War of 1967. *Id.*

²⁶ U.N. S.C. Res. 1701 (2006). The unanimous resolution called on Hezbollah to cease its attacks and for Israel to halt its military operations. It also provided for an expansion of the UN Interim Force in Israel from a pre-conflict 2,000 to 15,000 and called for assistance from the Lebanese army to monitor the cease fire. Notably, the resolution also banned the delivery of all weapons to Lebanon, except for those intended for the Lebanese army. *Id.* While many agree that the presence of the UNIFL and Lebanese army will stabilize the region, the underlying problems remain as those forces are not expected to actively disarm Hezbollah. Secretary of State Condoleezza Rice commented: “You have to have a plan, first of all, for the disarmament of the militia, and then the hope is that some people lay down their arms voluntarily.” David Shelby, *Rice Expects Hezbollah to Disarm or Face International Pressure* (Aug. 16, 2006), available at <http://www.america.gov/st/washfile-english/2006/August/20060816135155ndyblehs1.354617e-02.html>. Some commentators have warned that a much more substantial military force will be needed, such as one provided by the North American Treaty Organization. James Cooper, Op-Ed, *International Force Without Much Force*, SAN DIEGO UNION TRIBUNE, Aug. 16, 2006.

²⁷ Report of the Commission of Inquiry, *supra* note 4, at ¶ 13. “According to Lebanese authorities, the conflict resulted in 1,191 deaths and 4,409 injured. More than 900,000 people fled their homes.” *Id.*

²⁸ The head of an Israeli five-member investigative panel said at a news conference that “Israel did not win the war. . . .” *Id.* While Hezbollah succeeded in denying Israel a decisive victory, its victory was at the expense of Lebanon’s infrastructure. According to Secretary Rice, “I would suggest that when the dust clears, Hezbollah has a lot to answer for.” Shelby, *supra* note 26. Lebanon was the undisputed loser in the conflict.

²⁹ See Richard M. Haas, *The New Middle East*, 85 FOREIGN AFF. 2 (2006).

secure a decisive victory.³⁰ Hezbollah, while weakened, was emboldened and used Israel's perceived failure to claim victory.³¹ It continued to operate in Southern Lebanon but promised to "refrain from any acts of violence against Israel."³² Lebanon lay in ruins, its infrastructure³³ and economy³⁴ devastated by the conflict.

A blockade was one of the primary methods of warfare used by Israel in that conflict.³⁵ Israel justified its use on the need to "block the transfer of 'terrorists and weapons to the terror organisations [sic] operating in Lebanon.'"³⁶ The blockade was multidimensional, drawing upon both sea and air assets. Israeli naval vessels took station off of the coast of Lebanon, and the Israeli air force imposed a "no fly zone" over the region.³⁷ Combined with the bombing of roads and bridges and the destruction of Lebanon International Airport,³⁸ the sea and air blockade served to effectively cut Lebanon off from the rest of the world.³⁹

³⁰ Schiff, *supra* note 20, at 28. "[T]he war has shaken Israel to its core. . . . [L]arge groups of reserve soldiers [are] complaining about the war's mismanagement." *Id.* at 28-29.

³¹ See *id.* at 28 ("That an Arab militia could stand up to the IDF, the most powerful military force in the Middle East, was counted a success, notwithstanding Hezbollah's heavy losses and the considerable destruction wrought in Lebanon").

³² *Id.*

³³ The destruction included "roads, bridges and 'other' targets such as Beirut International Airport, ports, water and sewage treatment plants, electrical facilities, fuel stations, commercial structures, schools and hospitals, as well as private homes." Report of the Commission of Inquiry, *supra* note 4, at ¶ 76.

³⁴ Israel also targeted economic infrastructure such as factories and the agricultural sector. Tourism also suffered for obvious reasons. Report of the Commission of Inquiry, *supra* note 4, at ¶144-45.

³⁵ *Israel Imposes Lebanon Blockade*, *supra* note 22.

³⁶ *Id.* "[T]he ports and harbours of Lebanon are used to transfer terrorists and weapons by terrorist organizations operating against the citizens of Israel from within Israel, mainly Hezbollah." Report of the Commission of Inquiry, *supra* note 4, at ¶ 269.

³⁷ James G. Stewart, *The UN Commission of Inquiry on Lebanon: A Legal Appraisal*, 5 J. INT'L CRIM. JUST. 1039, 1057 (2007).

³⁸ *Israel Imposes Lebanon Blockade*, *supra* note 22.

³⁹ *Id.*

France and Russia immediately criticized Israel's decision to impose a blockade, calling it a "disproportionate use of force."⁴⁰ That criticism mounted when on July 14 and 15, 2006, Israeli military aircraft bombed the Jiyeh power plant, resulting in a massive oil spill within the remaining blockaded area.⁴¹

Clean-up efforts related to the Jiyeh power plant oil spill did not commence in earnest until after the war ended.⁴² The government of Lebanon spent \$15 million for the initial effort in August 2006, but competing priorities⁴³ quickly diverted already scarce funds and the effort was abandoned after six months.⁴⁴ The Lebanese government reported that 60-70% of the oil was cleaned up in that six-month effort.⁴⁵ Encouraged, residents began to once again swim and fish in the Mediterranean.⁴⁶ But critics point out that the most difficult portion of the clean-up still remains: the oil that is "stuck to the rocks," which melts in the sun and washes out to sea, prolonging the problem.⁴⁷ The free floating 30% also remains a problem. In August 2007, one year after the spill, "[a] 3,000-sq.-ft. 'rubbery mat' of oil drifted ashore . . . at Edde Sands, a

⁴⁰ *Id.*

⁴¹ Bosire, *supra* note 3.

⁴² Richard Steiner identified three major obstacles to the clean-up effort. First, there was no responsible-party response because there was no ship owner or factory to be held responsible. Steiner, *supra* note 7. Second, Lebanon, as the affected coastal state, had a limited capacity to respond and had no prior existing environmental plan in place. *Id.* Third, the war and blockade prevented a rapid, significant response. *Id.* As an example of the hindrance of the blockade, on Aug. 15, 2006, the French embassy in Lebanon agreed to allow use of its helicopter for a rapid survey of the damage. The Israelis refused to grant clearance for that flight. *Id.*

⁴³ One year after the war ended,

[a] million Israeli cluster bombs remain unexploded - - barring 200,000 people in the south from returning home and injuring two to three children a day. The Lebanese Mediterranean coast is ecologically threatened with a massive oil spill. Lebanon faces a budget deficit of \$42 billion. Unemployment has risen from 13 percent before the war to about 20 percent.

Editorial, *Future of Lebanon Tied to Wider Conflicts*, SOUTH FLORIDA SUN-SENTINEL, Nov. 18, 2006, at 21A.

⁴⁴ Huang, *supra* note 6, at 6.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

high-end beach resort 22 miles north of Beirut.”⁴⁸ It is estimated that the government of Lebanon would need to raise an additional \$135 million to complete the clean-up.⁴⁹

A glance at the newspaper on any given day will reveal the importance the general public now places on protecting the natural environment.⁵⁰ Responding to this concern, militaries around the world have adapted their peacetime training to conform to this emerging emphasis.⁵¹ While most environmental harm may be traced to regularly occurring peacetime sources such as industrial pollution and accidents,⁵² a relatively small subset of damage to the natural environment occurs during wartime.⁵³ A dramatic, recent example of this is illustrated by the Jiyyeh power plant oil spill.

⁴⁸ *Id.*

⁴⁹ Huang, *supra* note 6, at 6.

⁵⁰ Paul Elias, *Captain in Bay Fuel Spill Tells of Fog*, SAN DIEGO UNION TRIBUNE, Apr. 5, 2008, at A4, *FRANCE: Oil Company, Others Must Pay \$285 Million For Spill*, SEATTLE POST-INTELLIGENCER, Jan. 10, 2008, at A2. Interest in protecting the environment is no longer limited to environmental activists. As an example see Neela Banerjee, *Southern Baptists Back a Shift on Climate Change*, N.Y. TIMES, Mar. 10, 2008, at A11 (describing a recently signed declaration by the Southern Baptist Convention entitled “A Southern Baptist Declaration on the Environment and Climate Change,” urging “Christians to return to a biblical mandate to guard the world God created”).

⁵¹ See generally U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW STUDIES, PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT xv (1996) (containing the proceedings and papers of the 1995 Naval War College Symposium entitled: *The Protection of the Environment During Armed Conflict and Other Military Operations*).

⁵² An obvious example would be oil spills caused by oil tankers. As a comparison, the Exxon Valdez spilled 40,000 tons of oil into Prince William Sound in Alaska. By way of comparison, the Jiyyeh oil spill was projected to be at about 25,000 tons. Fattah, *supra* note 7. In an interesting spin on war-related environmental pollution, some experts point out that much industrial pollution in the last century has been devoted to building and maintaining military forces. “The environmental damage caused by fifty years of weapons development, maintaining large standing forces, and exercising and operating their forces, has yet to be fully assessed.” Wright, *supra* note 2, at 35.

⁵³ War does arguably have some positive environmental impacts. Jeffrey A. McNeely, *War and Biodiversity: An Assessment of Impacts* in THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC, AND SCIENTIFIC PERSPECTIVES 365 (2000). Examples include the creation of no-go zones and slowing or stopping development projects. *Id.* at 366.

Environmental damage is an expected consequence of war,⁵⁴ and there are numerous historical examples of warring states deliberately targeting the environment as a means of furthering their objectives.⁵⁵ But even in the absence of deliberate targeting, the environment inevitably suffers as a collateral victim of warfare. In light of increased concern regarding damage to the natural environment and the inevitable occurrence of wartime collateral damage, military forces should be prepared to mitigate unnecessary environmental harm to the extent possible without impacting their ability to fight and win wars. In particular, when imposing a naval blockade, naval forces should have procedures in place that will allow for, at a minimum, a rapid survey of oil spills that result as collateral consequences of battle damage. Optimally, naval forces would permit vessels engaged in clean-up efforts to pass through a blockade in a manner similar to that afforded humanitarian relief. Additionally, navies should consider the possibility of maintaining their own oil spill response capability and

For example, “in Niger . . . researchers have been fascinated to discover that 19,000 square miles of savanna are more vegetated today than 20 or 30 years ago.” Some ecologists credit the phenomenon to global warming, but others believe “years of warfare and chaos . . . have depopulated the African countryside, allowing millions of acres to lie fallow and recover.” Paul Salopek, *Lost in the Sahel*, NATIONAL GEOGRAPHIC, Apr. 2008, at 54.

⁵⁴ “War by definition is a ‘no holds barred’ affair.” Wright, *supra* note 2, at 35. “Warfare will always have an adverse affect on the environment; the extent will rely on the willingness of warring nations to conform to environmental regulations that may constrain their ability to achieve victory in the war.” *Id.*

⁵⁵ Jay E. Austin & Carl E. Bruch, *Introduction*, in THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC, AND SCIENTIFIC PERSPECTIVES 1 (2000). The authors provide the following examples of wartime targeting of the environment:

In the Third Punic War, Roman legions salted the ground around Carthage to prevent the Carthaginians from recovering and challenging Rome; in the US Civil War, General Sherman cut a wide swath of destruction across the South in an attempt to break the morale of the Confederacy; in World War I, the British set afire Romanian oilfields to prevent the Central Powers from capturing them; in World War II, Germany and the Soviet Union engaged in “scorched earth” tactics; and in the Korean War, the United States bombed North Korean dams.

Id.

international organizations should be prepared to promptly organize an efficient response.

This article examines what responsibilities, if any, a blockading state has once the presence of an oil slick caused by collateral battle damage is known. Part II introduces the history of the naval blockade and its development in the law. Part III examines marine environmental damage and the law of armed conflict at sea. Part IV examines whether states must lift blockades to mitigate environmental damage. The article concludes by proposing actions, introduced above, that could be taken to prevent another avoidable wartime environmental catastrophe like the Jiyyeh power plant oil spill.

II. THE BLOCKADE: A BRIEF HISTORY OF ITS USE AND DEVELOPMENT IN THE LAW

A. Use of the naval blockade continues to evolve, but its primary effect is to thwart maritime communications in hostile waters.

An expansive history of the naval blockade is not necessary for this article, but selective historical examples are useful in understanding the contours of this particular method of warfare. The blockade is traditionally understood to mean one state's use of naval force to "suspend all maritime communications to and from an enemy coast."⁵⁶ The use of military vessels to disrupt enemy commerce goes back to ancient times, as evidenced by its use by the Greeks⁵⁷ and Carthaginians.⁵⁸ The popular conception of a blockade is that of a close-in blockade: the positioning of ships off the coast of a belligerent state for the purpose of prohibiting commerce. That formulation came about in the 17th century.⁵⁹ Its first use was by the States General of the United Provinces, which imposed a blockade on the ports of Flanders that were then under the possession of Spain.⁶⁰

⁵⁶ GEORGE P. POLITAKIS, MODERN ASPECTS OF THE LAWS OF NAVAL WARFARE AND MARITIME NEUTRALITY 158 (1998).

⁵⁷ E.B. POTTER, SEA POWER 2 (2d. ed. 1981). Greek sea power was already well established by the time of the Greco-Persian and Peloponnesian Wars. "Indeed there is reason to believe that Homer's *Iliad* is really a poetic description of prehistoric Greek sea power at work – that the siege of Troy was a commercial war to secure control of the Hellespont . . . and thus Black Sea trade." *Id.*

⁵⁸ DEANE, *supra* note 1, at 4.

⁵⁹ *Id.* at 10.

⁶⁰ *Id.*

In the 19th century the British exploited their unrivaled sea power by making extensive use of the blockade in its wars with France.⁶¹ It also was a central component of United States strategy during the Civil War⁶² and is considered a major contributor to the Northern victory.⁶³

The 20th century witnessed dramatic changes in naval warfare and corresponding changes in the employment of the blockade. World War I saw the first widespread use of the submarine and designated exclusion zones in which “wolfpacks” of German submarines waged unrestricted warfare.⁶⁴ The

⁶¹ POTTER, *supra* note 57, at 2.

⁶² SHELBY FOOTE, *THE CIVIL WAR: A NARRATIVE: FORT SUMTER TO PERRYVILLE* 111-12 (1958). General Winfield Scott is credited with devising the plan and it quickly became known, not necessarily favorably, as Scott’s Anaconda. The deep water Union naval blockade was to stretch “[a]ll down the eastern seaboard, from Chesapeake Bay to the Florida Keys, thence along the shores of the Gulf, counter-clockwise from the Keys to Matamoros.” Its purpose was to “wall off the Confederacy . . . from Europe and whatever aid might come from that direction.” Gunboats would also be sent down the Mississippi, “cutting Southerners off from the cattle and cereals of Texas as well as such foreign help as might be forwarded through neutral ports of Mexico.” *Id.*

⁶³ CARL SANDBURG, *ABRAHAM LINCOLN: THE PRAIRIE YEARS AND THE WAR YEARS* 449 (1954). In 1863, the Secretary of War reported that the Union blockade had achieved the following results: “[m]ore than 1,000 vessels had been captured [and] prizes amounted to \$13,000,000.” *Id.* Scott’s Anaconda was so successful that the Secretary saw the benefit of adding more ships to the fleet and “[n]ew Navy Yards were wanted.” *Id.* The Civil War blockade also prompted the development of significant new naval technologies. JAMES C. BRADFORD, *FROM CANNON AND CUTLASS TO AIRCRAFT AND MISSILES: READINGS IN THE HISTORY OF US SEAPOWERS* 155-56 (1997). The Confederate ironclad *Virginia*, built on the captured hull of the Union’s *Merrimack*, attempted to break the blockade of Hampton Roads, Virginia, and likely would have succeeded but for the timely arrival of the Union’s own ironclad *Monitor*. *Id.* What followed was the first ironclad vs. ironclad battle, an event that would influence naval architecture the world over. *Id.* Additionally, the Southern submarine *CSS Hunley* was sent to sea in an attempt to break the Union blockade of Charleston, South Carolina. Norman Polmar, *From One Man Submersible to High-Tech Behemoth*, *NAVAL HISTORY* 17 (Feb. 2008). The craft succeeded in ramming and sinking the *USS Housatonic* with a spar torpedo, but was so severely damaged during the attack that it also sank, with the loss of all hands. *Id.*

⁶⁴ POLITAKIS, *supra* note 56, at 40-54.

practice continued in the Second World War on a larger scale,⁶⁵ and the use of the traditional blockade seemed in the decline.⁶⁶ However, the close-in blockade reemerged during the Korean War when the United Nations Blockading and Escort Force took station off of both the west and east coasts of North Korea.⁶⁷ During the Vietnam War, one of the U.S. Navy's primary objectives was to disrupt the movement of weapons and supplies into North Vietnam and then from the North to forces in the South.⁶⁸ In 1972, the United States blocked access to North Vietnamese ports through the use of naval mines.⁶⁹

The blockade was by no means a uniquely American phenomenon in the 20th century.⁷⁰ There are numerous modern examples of other states using blockades. During the 1971 war between India and Pakistan, India imposed a blockade along a 180-mile stretch of Pakistan's coast.⁷¹ The blockading force launched two attacks on Karachi harbor, sinking several Pakistani warships and

⁶⁵ *Id.* at 57-64.

⁶⁶ *Id.* at 57-60.

⁶⁷ *Id.* at 65. The blockade was carefully planned to avoid conflict with Chinese and Soviet territorial seas. As North Korea did not have much in the way of a naval force, the squadron, which consisted almost entirely of U.S. warships, took to shore bombardment. *Id.*

⁶⁸ POLITAKIS, *supra* note 56, at 65. The extent to which the U.S. Navy went to disrupt arms shipments is only now coming to light. See Charles R. Larson et. al., *The Sculpin's Lost Mission*, NAVAL HISTORY 28 (Feb. 2008), for the tale of a nuclear submarine's top secret mission to track and destroy a freighter moving weapons from the North to the South.

⁶⁹ POLITAKIS, *supra* note 56, at 197. Before laying the mines, the United States informed the UN Security Council and "took great pains to ensure that the dictates of international law would be strictly observed." *Id.* As a condition to the peace agreement ending the war, all of the mines had to be cleared. *Id.*

⁷⁰ And the blockade is by no means an historical anecdote to U.S. foreign policy. Consider Republican Presidential Candidate Mitt Romney's response to a question regarding available U.S. responses to Iran's pursuit of weapons of mass destruction: "We have a number of options from blockade to bombardment of some kind, and that is something that we very much have to keep on the table." Chris Matthews Show, Oct. 28, 2007, *available at* 2007 WLNR 212581112. Additionally, there is significant concern about other states' development of blockading capabilities and the U.S. Navy's ability to respond. See Norman Palomar, *Is there a Mine Threat?*, PROCEEDINGS, Feb. 2008, at 88 ("The total Chinese mine inventory is estimated by U.S. Navy officials at between 50,000 and 100,000.")

⁷¹ POLITAKIS, *supra* note 56, at 69.

“inflicting significant collateral damage to neutral shipping.”⁷² During the 1950s and 1960s, Egypt imposed blockade-like measures in and around the Suez Canal for the purpose of excluding Israeli vessels.⁷³ In 1956 Israel declared those measures illegal, leading to the Suez crisis and Israeli control over an entrance to that Canal located in the Gulf of Aqaba.⁷⁴ In 1967, Egypt blockaded the Israeli port of Eilat to regain control over that entrance.⁷⁵ The blockade was lifted after the Six Day War in 1967.⁷⁶ As a result of the treaty ending the war, access to the Suez Canal was to remain open to all states.⁷⁷

B. Development in the Law

1. Initial focus

Just as use of the blockade as a means of naval warfare developed gradually, so too did the law regarding its use. Initially, states were concerned with the consequences of breaching a blockade more so than the constraints upon its use. In the early 17th century, Grotius argued:

[i]f a belligerent is hindered in enforcing his rights, by the importation of resources into his enemy's country, and knows who is the importer; for instance if a town is being besieged, or a port blockaded, the importer will be bound to make compensation for all the loss incurred by the Belligerent through his actions and the Belligerent may enforce that compensator by any means in his power.⁷⁸

The blockade of the Flanders coast, discussed previously, led to another important development.⁷⁹ The blockading force there announced its imposition of that measure in the form of an ordinance.⁸⁰ The ordinance was significant

⁷² *Id.*

⁷³ *Id.* at 70.

⁷⁴ *Id.* at 72.

⁷⁵ *Id.* at 73.

⁷⁶ POLITAKIS, *supra* note 56, at 74.

⁷⁷ *Id.*

⁷⁸ DEANE, *supra* note 1, at 9.

⁷⁹ *Id.* at 11.

⁸⁰ *Id.* at 10. The ordinance provided that all neutral vessels leaving the blockading ports, “or so near them as to erase all doubt,” could be confiscated in part because the blockade was “. . . from all times an ancient usage, after the example of all kings, princes, powers, and other republics which have exercised the same right on similar occasions.” *Id.*

because it limited “the restriction of trading to . . . ports actually blockaded.”⁸¹ As the law developed, it was asserted that neutrals had no right to trade with a blockaded port and that the blockading power may treat as an enemy any ship attempting to do so.⁸²

Gradually, rules began to develop governing other aspects of the blockade. Central to those rules were notions of notice, effectiveness, and impartiality. By the 19th century, the “law of nations” included generally agreed upon rules governing blockades.⁸³

2. *Custom and the San Remo Manual*

Much of the law of blockade that carries over to today is based in custom that developed in the 19th century.⁸⁴ Those customary requirements for lawful blockade include: a declaration of the blockade, notification of all affected nations, effectiveness, and impartiality.⁸⁵ Customary international law in this area also sets forth express limits. A blockade is prohibited if its sole purpose is to starve the civilian population,⁸⁶ and it is generally recognized that

⁸¹ *Id.* at 11.

⁸² *Id.* at 14-15.

⁸³ In 1862, the United States Supreme Court directly confronted these rules in the context of the American Civil War. *The Prize Cases*, 67 U.S. 635 (1862). The decision includes the arguments of both the United States and a representative of the seized vessels. A considerable part of those arguments deals with the legality of the Union imposed blockade on the South. Because the war was an insurrection rather than an inter-state conflict (the Confederacy was not an independent state), President Lincoln’s use of a blockade arguably gave legal effect to Southern claims of independence. The ability of the President to use such measures was addressed at length in the decision. But in terms of the legality of the seizures, attention in the decision was devoted to whether those ships had adequate notice of the blockade and whether they had the requisite intent to breach the blockade.

⁸⁴ U.S. Navy Commander’s Guide to the Law of Naval Operations, NWP 1-14M, ¶ 7.7.5 (2007) [hereinafter U.S. Navy Commander’s Guide]. “At the turn of the nineteenth century, the 1856 Paris Declaration Respecting Maritime Law and the 1909 London Declaration sought to regulate blockade. As those rules for the most part have stood the test of time, the *San Remo Manual* adopts them, though it makes some improvements.” J. Ashley Roach, *The Law of Naval Warfare at the Turn of Two Centuries*, 94 AM. J. INT’L L. 64, 71 (2000).

⁸⁵ U.S. Navy Commander’s Guide, *supra* note 84, at ¶¶ 7.7.1-7.7.2.4.

⁸⁶ *Id.* at ¶ 7.7.2.5.

neutral ships carrying relief supplies should be allowed to pass.⁸⁷ However, the ability of humanitarian relief to pass is not considered to be a positive right,⁸⁸ and the blockading state retains the ability to specify technical arrangements.⁸⁹ Evidence of these customary guidelines is found in the military manuals of numerous states in the international community, including the United States.⁹⁰

In the late 1980s a panel of experts attempted to draft a restatement of the law applicable to armed conflicts at sea, a process that resulted in the *San Remo Manual*.⁹¹ In addition to restating the customary aspects of the law, the participants injected innovations not previously considered in the context of armed conflicts at sea.⁹² Included in those innovations was the consideration of *jus ad bellum* regarding self-defense and UN Security Council actions.⁹³ A majority of participants determined that “the restraints of the law of self-defense⁹⁴ . . . will affect the rights of belligerents to make full use of all the

⁸⁷ *Id.* at ¶ 7.7.3.

⁸⁸ *Id.*

⁸⁹ Roach, *supra* note 84, at 71.

⁹⁰ See generally U.S. Navy Commander’s Guide, *supra* note 84.

⁹¹ International Institute of Humanitarian Law, *SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA* 5 (Louise Doswald-Beck ed., 1995) [hereinafter *SAN REMO MANUAL*]. The *San Remo Manual* was drafted between 1988 and 1994 by legal and naval experts. Their goal was a restatement of international law applicable to armed conflicts at sea. The group met in a series of round table meetings convened by the International Institute of Humanitarian Law. Such an endeavor had not been undertaken since 1913, and the experts felt a restatement necessary because “of developments in the law since 1913 which for the most part have not been incorporated into recent treaty law, the Second Geneva Convention of 1949 being essentially limited to the protection of the wounded, sick, and shipwrecked at sea.” *Id.*

⁹² *SAN REMO MANUAL*, *supra* note 91, at 67. The introduction states that the Manual contains a “few” progressive developments in the law, but that otherwise the provisions capture the law as it presently existed. *Id.*

⁹³ *Id.* at 68.

⁹⁴ The *Manual* incorporated the UN Charter’s provisions regarding self-defense and the concepts of necessity and proportionality. *Id.* Article 2(4) of the United Nations Charter provides a general prohibition against the use of force. That article provides that “[a]ll 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 United Nations.” U.N. Charter art. 2, para.4. However, there are exceptions. States may use force when authorized by the Security Council in accordance with its Chapter VII powers, and Article 51 recognizes a state’s

methods of naval warfare that the traditional law automatically allowed once a state of war existed.”⁹⁵ This was particularly the case with methods of warfare such as the blockade that impact neutral shipping and the economies of neutral states.⁹⁶ Thus, according to the *Manual*, the use of the blockade is subject to the *jus ad bellum* requirements of necessity and proportionality.

Even when force is lawfully used, the *Manual* provides limits as to the methods and means of warfare.⁹⁷ When employing the methods and means of warfare, a state may lawfully target military objectives.⁹⁸ Military objectives are defined as those “which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at that time, offers a definite military advantage.”⁹⁹ But military planners should take the collateral effects of those methods and means into consideration when considering their implementation. Specifically, the *Manual* states that “[m]ethods and means of

inherent right of self- defense. U.N. Charter art. 51. The breadth of the exception presented in Article 51 is the source of considerable debate, but it is generally recognized that a state may lawfully use self-defense in response to an armed attack so long as the use of force is necessary and proportional. While not expressly mentioned in the U.N. Charter, necessity and proportionality are considered to be customary international law limitations imposed on a state’s ability to use force in self-defense. “It is important to realize that ‘self-defense’ is a term of art in international law. The reference in Article 51 to self-defense is a reference to the right of the victim state to use significant offensive military force on the territory of a state legally responsible for the attack.” Mary Ellen O’Connell, *The Continuing Ban on War Between States*, 38 CAL. W. INT’L L.J. 47, 47 (2007). The armed attack must be significant and the force used must be “necessary to achieve a defensive purpose,” and must not result in a “disproportionate loss of life and destruction compared to the value of the objective.” *Id.* Professor O’Connell has articulated four conditions for the lawful use of force in self-defense: “1. A significant actual armed attack has occurred or is occurring; 2. The armed response is aimed at the attacker or those legally responsible for the attacker; 3. The response has the purpose of stopping the on-going attack and/or the next imminent attacks; 4. The response is necessary to remove the threat and is proportional in the circumstances.” *Id.* at 46.

⁹⁵ SAN REMO MANUAL, *supra* note 91, at 67.

⁹⁶ *Id.*

⁹⁷ *Id.* at art. 38.

⁹⁸ *See id.* at art 38-45.

⁹⁹ *Id.* at art. 40.

warfare should be employed with due regard¹⁰⁰ for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited.”¹⁰¹ Additionally,

[a]n attack shall not be launched if it may be expected to cause collateral casualties or damage which would be *excessive* in relation to the concrete and direct military advantage anticipated from the attack as a whole; an attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive.¹⁰²

Thus, the *Manual* suggests a balancing test weighing the means and methods of warfare against potential collateral damage. While the test tilts strongly towards permitting the attack, as the collateral damage would need to be “excessive,” the presence of the test suggests that military planners should consider seriously potential damage beyond that expected to the target of military value. The *Manual* also places a responsibility on the state launching the attack to continue to monitor for collateral damage and to cease that activity as soon as it is apparent that the balance has shifted.

The *Manual* specifically addresses the blockade in Section II, Methods of Warfare.¹⁰³ Interestingly, the preliminary remarks indicate that the subject was nearly left out all together.¹⁰⁴ The group engaged in an “extensive” discussion as to whether the blockade had a place in modern warfare.¹⁰⁵ A majority of the participants were persuaded that the blockade remained a viable method of naval warfare by “numerous” instances of its use since the Second

¹⁰⁰ “Due regard has two components. The first is awareness and consideration of either state interest(s) or other factor(s); the second is balancing the interest(s) or factor(s) into analysis for a decision.” George K. Walker, *Defining Terms in the 1982 Law of the Sea Convention IV: The Last Round of Definitions Proposed by the International Law Association (American Branch) Law of the Sea Committee*, 36 CAL. W. INT’L L.J. 133, 174 (2005). Due regard is further defined for applicable provisions of the LOS. As for situations of armed conflict, the author cautions: “In LOAC-governed situations under the ‘other rules of international law’ clauses in the Convention, a different definition may apply.” *Id.* at 177.

¹⁰¹ SAN REMO MANUAL, *supra* note 91, at art. 44.

¹⁰² *Id.* at art. 46(d) (emphasis added).

¹⁰³ *Id.* at 176.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

World War as well as its mention in the UN Charter.¹⁰⁶ The group defined a blockade as “the blocking of the approach of the enemy coast, or a part of it, for the purpose of preventing ingress and egress of vessels or aircraft of all states.”¹⁰⁷ The provisions for blockade that the group identified were largely unchanged from those appearing in previous treaties.¹⁰⁸

The *San Remo Manual* sets forth a series of requirements for lawful blockades. These requirements reflect the custom already identified in this article but provide additional guidance in the form of commentary. First, blockades must be declared.¹⁰⁹ All neutral and belligerent states must be notified¹¹⁰ and the declaration must specify the “commencement, duration, location, and extent of the blockade.”¹¹¹ Second, the blockade must be effective,¹¹² which is a question of fact.¹¹³ Third, it may be enforced by a

¹⁰⁶ SAN REMO MANUAL, *supra* note 91. See U.N. Charter art. 42:

Should the Security Council consider that measures provided for in Article 41 would be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, *blockade*, and other operations by air, sea, or land forces of Members of the United Nations.

Id. (emphasis added). However, “[t]he concept of a blockade (in Article 42) is not to be understood in a technical law-of-war sense. At issue is rather the effective sealing-off of particular coasts or land areas through a military action.” THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 632 (Bruno Simma ed., 1994). The fact that the naval blockade was very nearly left out of the *Manual* is surprising, especially in light of its use by states in the 21st century. See discussion and associated footnotes, *supra* section II. However, “recent developments in weapons systems and platforms, particularly submarines, supersonic aircraft, and cruise missiles, have rendered the in-shore blockade exceedingly difficult, if not impossible to maintain during anything other than a local or limited conflict.” Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations ¶ 7.7.5 (1997) (on file with author). The summer 2006 war between Israel and Lebanon was just such a conflict.

¹⁰⁷ SAN REMO MANUAL, *supra* note 91, at 176.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 177, art. 93.

¹¹⁰ *Id.* at art. 94.

¹¹¹ *Id.* at art. 95.

¹¹² SAN REMO MANUAL, *supra* note 91, at art. 95.

¹¹³ *Id.* at art. 96.

combination of legitimate means of warfare.¹¹⁴ Fourth, merchant vessels that seek to breach a blockade may be captured.¹¹⁵ Fifth, the blockading force must not block access to a neutral state's ports.¹¹⁶ Sixth, the blockade must be impartial, meaning that the blockade applies to all vessels regardless of nationality.¹¹⁷ Finally, any cessation of the blockade must be communicated.¹¹⁸

The *Manual* then identifies conditions that would make a blockade unlawful. A blockade is prohibited if: "(a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or (b) the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade."¹¹⁹ This provision was "one of the few aspects of the law of naval warfare which has been affected by the adoption of Additional Protocol I (to the Geneva Conventions)."¹²⁰ Article 54 section 1 of Additional Protocol I prohibits the "[s]tarvation of civilians as a method of warfare."¹²¹ Some participants in the Round Table meetings believed that inclusion of subsection (a) made blockades inherently illegal.¹²² However, the majority concluded that so long as starvation was not the *sole* purpose of the blockade, it could be legal.¹²³ Several participants expressed dismay at the possible prohibition of a means of warfare based on the "subjective purpose of the belligerents."¹²⁴ Indeed, starvation of the population could still be a valid purpose of the blockade so long as it was not the *only* purpose.¹²⁵ For that reason, subsection (b) was added to address the need for proportionality in the employment of the blockade.¹²⁶

Many of the provisions put forth in the *San Remo Manual* have been adopted into the naval operational guides and handbooks of various states,¹²⁷

¹¹⁴ *Id.* at 178, art. 97.

¹¹⁵ *Id.* at art. 98.

¹¹⁶ *Id.* at art. 99.

¹¹⁷ SAN REMO MANUAL, *supra* note 91, at art 100. The blockade also applies to vessels of the blockading power. *Id.*

¹¹⁸ *Id.* at art. 101.

¹¹⁹ *Id.* at 179 art. 102.

¹²⁰ *Id.* at 179.

¹²¹ SAN REMO MANUAL, *supra* note 91, at 179.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ SAN REMO MANUAL, *supra* note 91, at 179.

¹²⁷ Wolff Heitschel von Heinegg, *The Current State of the Law Of Naval Warfare: A Fresh Look at the San Remo Manual*, in U.S. NAVAL WAR

and the response to the *San Remo Manual* has largely been favorable even though many view it as progressive.¹²⁸ According to one author, “[i]t is difficult to overstate the importance of that ambitious ‘restatement’ . . . [i]t remains to be seen however, if and to what extent the *San Remo Manual* will incite, as its drafters aspire, further national and international action along its premises.”¹²⁹ One commentator suggested that the provisions were far from perfect,¹³⁰ but that that fact had not prevented states from adopting many of the provisions.¹³¹ According to that author, much of the criticism has stemmed from the provisions for action short of attack, such as blockade.¹³²

The *San Remo Manual*’s treatment of the blockade reinforces the balanced, permissive approach prevalent throughout the *Manual*. It recognizes certain principles that should be applied as well as some express limits (blockading for the *sole* purpose of starvation). But the principles and limitations are measured in light of the military advantage to be gained. Such rules are to be expected in a collection of customary rules, but they leave much to the interpretation of states looking to incorporate those standards into their military operating manuals. The ultimate decisions as to the proper balance to be struck between the damage to the belligerent state and the advantage of the

COLLEGE, INTERNATIONAL LAW STUDIES, THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE 269 (Anthony M. Helm ed., 2006) (“The 1994 *San Remo Manual* has met widespread approval as a contemporary restatement . . . [A] considerable number of states [have] adopt[ed] most of the San Remo rules into their respective manuals or instructions for their naval armed forces”).

¹²⁸ LOIS E. FIELDING, MARITIME INTERCEPTION AND U.N. SANCTIONS: RESOLVING ISSUES IN THE PERSIAN GULF WAR, THE CONFLICT IN THE FORMER YUGOSLAVIA, AND THE HAITI CRISIS 259 (1997).

¹²⁹ POLITAKIS, *supra* note 56, at 15-16.

¹³⁰ Von Henegg, *supra* note 127, at 269:

They (critics) refer to the provisions on measures short of attack and on methods and means of naval warfare, especially on blockade and operational zones. In their view, those provisions meet neither the necessities of modern operations, e.g. maritime interception operations (MIO) nor non-military enforcement measures decided by the U.N. Security Council, nor do they offer operable solutions to the naval commander.

Id.

¹³¹ *Id.*

¹³² *Id.*

blockading state are most likely left to the military commanders charged with waging the conflict. It should be no surprise then that situations arise wherein the international community protests what the blockading state deems to be a perfectly valid and justified use of that method.

III. MARINE ENVIRONMENTAL DAMAGE AND THE LAW OF ARMED CONFLICT AT SEA

Damage to the natural environment, as mentioned in the introduction, is an expected consequence of warfare. When it occurs, the conduct of states may be evaluated in light of several international legal regimes. Broadly, the law of the sea, international environmental law,¹³³ human rights law,¹³⁴ and

¹³³ The Barcelona Convention is a regional environmental agreement drafted between sixteen European states as well as the European Commission in 1976. Convention for the Protection of the Mediterranean Sea Against Pollution, adopted Feb. 16, 1976, 1102 U.N.T.S. 27 (entered into force Feb. 12, 1978). The treaty contains a general agreement that all contracting parties will “take all appropriate measures . . . to prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area . . .” *Id.* Specific provisions provide, among other things, that there be international cooperation in pollution control and a “polluter pays” principle. Talitman, *supra* note 10, at 424. Two of the treaty’s four protocols are in force: the Protocol for the Prevention of Pollution in the Mediterranean Sea by Dumping from Ships and Aircraft, and the Protocol Concerning Co-operation in Combating Pollution of the Mediterranean Sea by Oil and Other Harmful Substances in Cases of Emergency. *Id.* Israel is a party to the Barcelona Convention and, as required by the treaty, has implemented its provisions into its own domestic law. *Id.* Indeed, Israel was an enthusiastic supporter of that agreement. *Id.* However, “[t]he . . . regime has not functioned very well, not because of a lack of good intentions but because of the lack of administrative and financial capacity.” ELLI LOUKA, INTERNATIONAL ENVIRONMENTAL LAW: FAIRNESS, EFFECTIVENESS, AND WORLD ORDER 166 (2006).

¹³⁴ Environmental damage could be so severe that it would result in violations of human rights treaties such as the International Covenant on Civil and Political Rights. Article 6 of that Convention states that “[e]very human being has the inherent right to life.” International Covenant on Civil and Political Rights art. 6, Dec. 19, 1966, 999 U.N.T.S. 171. This right could arguably be denied as “[i]nhalation of excessive smoke and airborne toxics can lead to respiratory ailments and cancers, ingestion of persistent toxics and radionuclides can cause both short- and long- term health impacts, and many of the substances mobilized during environmental warfare are mutagenic or teratogenic, affecting not just the

humanitarian law are all implicated. In particular, environmental law is now a legal issue of great significance.

When regimes overlap in international law, it is often appropriate to look to the *lex specialis* to determine which is most applicable to that unique situation.¹³⁵ While determining *lex specialis* may be difficult and is indeed sometimes controversial,¹³⁶ the International Court of Justice has provided some guidance when in a time of armed conflict.

A. Lex Specialis and the ICJ's Nuclear Weapons Advisory Opinion

In 1974, the United Nations General Assembly requested an advisory opinion from the International Court of Justice as to whether the threat or use of nuclear weapons could at any time be permissible in international law.¹³⁷ In that decision, the Court determined that when human rights law and humanitarian law conflicted, during times of armed conflict humanitarian law was *lex specialis*.¹³⁸ The Court was specifically addressing the obvious inconsistencies between human rights and environmental law on one hand, and humanitarian law on the other. The Court considered article 6 of the International Covenant on Civil and Political Rights' absolute prohibition against arbitrary loss of life,

present population but also future generations." Austin & Bruch, *supra* note 55, at 5.

¹³⁵ International Law Commission, Study Group on Fragmentation, *Fragmentation of International Law: Topic (a): The Function and Scope of the Lex Specialis Rule and the Question of "Self-contained Regimes"* at 9; Nikolai Jorgensen, *The Protection of Freshwater in Armed Conflict*, 3 J. INT'L L. & INT'L REL. 57, 59 (2007).

¹³⁶ The relationship between human rights law and humanitarian law is especially challenging. In considering which law to apply to its evaluation of the conflict in Lebanon, the Report of the Commission of Inquiry on Lebanon concluded:

While the conduct of armed conflict and military occupation is governed by international humanitarian law, human rights law is applicable at all times, including during states of emergency and armed conflict. The two bodies complement and reinforce one another.

Report of the Commission of Inquiry, *supra* note 4, at ¶ 64.

¹³⁷ *Nuclear Weapons Advisory Opinion*, 1996 I.C.J. 226, 228 (July 8).

¹³⁸ *Id.* at 240.

and the loss of life inherent, and legal under humanitarian law, in warfare.¹³⁹ The Court stated, “whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.”¹⁴⁰

The ICJ spent a greater part of its decision discussing inconsistencies between environmental law and humanitarian law.¹⁴¹ There the Court sought to resolve the discrepancies between protections afforded in environmental treaties and the environmental devastation resulting from the use of nuclear weapons.¹⁴² The Court framed the issue as whether “the obligations stemming from those treaties were intended to be obligations of total restraint during times of armed conflict.”¹⁴³ The Court determined that environmental law, in the form of treaty or in the form of custom, did not prohibit the use of nuclear weapons in times of armed conflict.¹⁴⁴ The Court did note that states had an obligation “to take environmental considerations into account in assessing what is necessary and proportionate in the pursuit of legitimate military objectives.”¹⁴⁵ However, as with human rights law, the Court “indicated that the international law on the environment does not cease to apply once an armed conflict breaks out.”¹⁴⁶ With this final qualification, the ICJ left the door open regarding the effect of overlapping regimes. The decision does suggest that, during armed conflict,

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Christopher Greenwood, *Jus Ad Bellum and Jus in Bello in the Nuclear Weapons Advisory Opinion*, in *ESSAYS ON WAR IN INTERNATIONAL LAW* 284 (Christopher Greenwood ed., 2006).

¹⁴² *Id.*

¹⁴³ *Id.* (quoting *Nuclear Weapons Advisory Opinion*, 1996 I.C.J. at 242).

¹⁴⁴ Greenwood, *supra* note 141, at 284 (quoting *Nuclear Weapons Advisory Opinion*, 1996 I.C.J. at 242):

It would have been extraordinary for the Court to have concluded that nuclear-weapon states which had so carefully ensured that treaties on weaponry and the law of armed conflict did not outlaw the use of nuclear weapons had relinquished any possibility of their use by becoming parties to more general environmental agreements.

Greenwood, *supra* note 141, at 285.

¹⁴⁵ *Nuclear Weapons Advisory Opinion*, 1996 I.C.J. at 136.

¹⁴⁶ Greenwood, *supra* note 141, at 285.

humanitarian law is *lex specialis* but is informed and weighed against obligations arising under international environmental and human rights law.

In light of the *Nuclear Weapons* advisory opinion and its interpretation of *lex specialis*, this article will focus on the environmental law of war and the law of armed conflict at sea as the controlling international legal regimes governing the attack and aftermath of the destruction of the Jiyeh power plant.

B. The Environmental Law of War

It might seem somewhat trivial in light of the other tragedies of war to focus on harm to the environment.¹⁴⁷ Certainly as compared to loss of life and damage to property, collateral damage to the natural environment has traditionally ranked fairly low.¹⁴⁸ But the relatively recent trend towards environmental concern suggests that the peacetime obligation to be good stewards of the environment should not be entirely cast aside during war. Such a view is confirmed by the ICJ's decision in the *Nuclear Weapons Advisory Opinion*.¹⁴⁹ This seems to especially be the case when the damage to the environment is avoidable or easily mitigated.

The history of damage to the environment during war is well documented.¹⁵⁰ But concern about the legality of military actions that are damaging to the environment is relatively new. It was not until the Vietnam War, when the U.S. used defoliants to clear the jungle and "seeded" clouds in an attempt to alter weather patterns, that the issue of environmental damage was treated as distinct from humanitarian law obligations.¹⁵¹ The Iraq war of 1990 provided an even more dramatic example. In the face of coalition attacks, Iraq

¹⁴⁷ "Protecting the environment at the expense of human life does not meet anyone's sanity test." Wright, *supra* note 2, at 37.

¹⁴⁸ Austin & Bruch, *supra* note 55, at 5. "Given the broader context of wartime calamity, emphasis on the environment may seem inappropriate or misguided." *Id.* But "at some point, incidental or intentional environmental harm can become so severe that it harms human health, especially that of innocent civilians." *Id.*

¹⁴⁹ *Nuclear Weapons Advisory Opinion*, 1996 I.C.J 226 (July 8).

¹⁵⁰ See discussion, *supra* section I.

¹⁵¹ Austin & Bruch, *supra* note 55, at 2-3. The U.S. attempted to halt the flow of supplies from North Vietnam to South Vietnam along the Ho Chi Minh Trail by "setting forests ablaze, triggering landslides, denuding jungles with chemicals . . . [and] seed[ing] clouds to induce rain and floods." David Lamb, *Revolutionary Road*, SMITHSONIAN, Mar. 2008, at 63.

set fire to Kuwaiti oil wells and spewed oil into the Gulf.¹⁵² The extent of environmental damage that occurred during that conflict was so severe that it resulted in widespread international condemnation.¹⁵³ The UN Security Council declared that Iraq was responsible for all of the wartime environmental damage and, for the first time in history, an international body was created to review claims and award compensation.¹⁵⁴ It is not surprising then that subsequent conflicts have been closely watched.¹⁵⁵

A central concern and problem relating to the environmental law of war is the perception that there is a lack of adequate law. Until fairly recently, no

¹⁵² Michael N. Schmidt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 YALE J. INT'L L. 1, 21 (1997).

¹⁵³ The United States informed Iraq via diplomatic letter in Geneva before the war that the "destruction of Kuwait's oil fields and installations" would not be tolerated, warning that "[t]he American people would demand the strongest possible response" and that "your [Saddam Hussein's] country will pay a terrible price if you order unconscionable actions of this sort." GEORGE BUSH & BRENT SCOWCROFT, *A WORLD TRANSFORMED* 442 (1998). Iraqi Foreign Minister Tariq Aziz rejected the warning as "threats" and stated "[w]e accept war." *Id.* Aziz left the letter in Geneva, never showing it to Hussein. *Id.* The Iraqi military ignited 600 Kuwaiti oil wells, and "[s]moke from the fires created black rain in Iran and Turkey, and possibly extended as far east as India." Austin & Bruch, *supra* note 55, at 3. Additionally, Iraq "discharged 6 to 11 million barrels of crude oil directly into the Gulf, devastating the marine environment." *Id.* Coalition forces also contributed to environmental damage in the form of depleted uranium ammunition and unexploded ordinance. *Id.* at 4. There is debate as to whether and to what extent the environmental damage was undertaken to disrupt Coalition military operations. "[T]he degree of military advantage obtained from an act during war is a critical data point in assessing its lawfulness." Schmidt, *supra* note 152, at 1, 21. Regardless, "the damage inflicted so out weighed possible gains that the acts were wrongful under international law." *Id.*

¹⁵⁴ Austin & Bruch, *supra* note 55, at 3. For a proposal regarding adapting the United Nations Compensation Commission to serve as a mechanism for wartime environmental damage beyond the first Gulf War see Keith P. McManus, *Civil Liability for Wartime Environmental Damage: Adapting the United Nations Compensation Commission for the Iraq War*, 33 B.C. ENVTL. AFF. L. REV. 417 (2006).

¹⁵⁵ During the conflict in the former Yugoslavia, NATO aircraft bombed fuel and chemical plants. McManus, *supra* note 154, at 419. Among other concerns, the 2003 invasion of Iraq has resulted in concern about the U.S. military's use of depleted uranium ammunition. *Id.* at 420.

treaty provision specifically addressed damage to the natural environment during wartime.¹⁵⁶ However, article 35(3) of Additional Protocol I to the Geneva Conventions now addresses the issue by “prohibiting methods of warfare ‘expected . . . to cause widespread, long-term and severe damage to the natural environment.’”¹⁵⁷ Additionally, article 55(1) requires that special care be taken to protect the environment from widespread, long-term, and severe damage.¹⁵⁸ The difference between the two articles is that “article 35(3) protects the environment for a value in itself, whereas article 55(1) protects the environment for its value to the health and survival of the population.”¹⁵⁹ While the environmental provisions of Additional Protocol I are considered significant achievements,¹⁶⁰ they are also considered innovative and, as a result, have not become a part of customary international law.¹⁶¹

Prior to the drafting of those provisions in 1977, damage to the environment was governed by underlying law of war principles such as proportionality, discrimination, and necessity.¹⁶² Those principles are found in a number of international humanitarian law treaties¹⁶³ and require that military

¹⁵⁶ According to Michael Schmidt, the two most significant recent developments in protecting the environment in times of armed conflict are Additional Protocol I of the Geneva Convention and the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD). Schmidt, *supra* note 152, at 76, 83. However, ENMOD “covers only the special case of major uses of the forces of the environment as weapons, and is of no relevance to most instances of damage to the environment in war.” Adam Roberts, *The Law of War and Environmental Damage*, in *THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC, AND SCIENTIFIC PERSPECTIVES* 59 (2000).

¹⁵⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3. The United States has signed but not ratified Additional Protocol I. See International Committee of the Red Cross, International Humanitarian Law- Treaties & Documents, United States, <http://icrc.org/IHL.nsf/Pays?ReadForm&c=US#S> (last visited Dec. 29, 2008).

¹⁵⁸ *Id.*; Report of the Commission of Inquiry, *supra* note 4, at ¶ 216.

¹⁵⁹ Jorgensen, *supra* note 135, at 75.

¹⁶⁰ Christopher Greenwood, *A Critique of the Additional Protocols to the Geneva Conventions of 1949*, in *ESSAYS ON WAR IN INTERNATIONAL LAW* 141 (Christopher Greenwood ed., 2006).

¹⁶¹ Greenwood, *supra* note 141, at 284 n.34.

¹⁶² Roberts, *supra* note 156, at 50.

¹⁶³ According to Adam Roberts, those treaties are: the 1868 St. Petersburg Declaration, the 1925 Geneva Protocol, the four 1949 Geneva Conventions, the

force be applied in proportion to the attack sustained, that discrimination be used in determining the targets to be destroyed, and that force only be used to the extent necessary to defeat the enemy.¹⁶⁴ It is these underlying principles and their widespread recognition that arguably still provide “the strongest legal basis for asserting the illegality of much environmental destruction in war.”¹⁶⁵

There are a variety of responses to perceived shortcomings in the environmental law of war. Some propose a new Geneva Convention specifically addressing the environment.¹⁶⁶ Others believe that an international convention would be difficult to achieve and potentially ineffective.¹⁶⁷ They suggest that a better solution lies in domestic legislation,¹⁶⁸ such as military manuals.

C. Law of Armed Conflict at Sea

As limited as the environmental law of war is, it is even more so as applied to the largely customary law of armed conflict at sea. For that reason, the drafters of the *San Remo Manual* sought to include developments in the environmental law of war in their restatement.¹⁶⁹

Article 11 of the *San Remo Manual* provides, “The parties to the conflict are encouraged to agree that no hostile actions will be conducted in marine areas containing: (a) rare or fragile ecosystems; or (b) the habitat of

1954 Hague Cultural Property Convention, the 1967 ENMOD Convention, Additional Protocol I to the Geneva Convention (1977), the 1980 Certain Conventional Weapons Convention and Protocols, the 1997 Ottawa Ant-Personnel Mine Convention, and the 1998 Rome Statute of the International Criminal Court. *Id.* at 50-66.

¹⁶⁴ *Id.* at 50-51.

¹⁶⁵ *Id.* at 67.

¹⁶⁶ Greenpeace has called for a “Fifth Geneva Convention.” Schmidt, *supra* note 152, at 100. Schmidt proposes a new convention but suggests that, as of 1997, the timing was not right. Schmidt, *supra* note 152, at 102.

¹⁶⁷ *Id.* at 100.

¹⁶⁸ *Id.*

¹⁶⁹ “[T]he Round Table attempted to take into account developments in environmental law, although the extent to which many of these treaties are formally applicable during times of armed conflict is uncertain, as well as the need to pay due regard to the needs of the environment in general.” SAN REMO MANUAL, *supra* note 91, at 69.

depleted, threatened, or endangered species or other forms of marine life.”¹⁷⁰
The commentary states that the

growing number of treaty rules, international resolutions and constitutional provisions laying down the obligation of the State to protect the environment demonstrates at the very least that there is a general recognition of a need to protect the marine environment, and a duty upon every state to protect and to preserve the marine environment.¹⁷¹

In drafting the article, the Round Table looked to the Law of the Sea (LOS) Convention, in which “nearly 50 articles are devoted to the protection of the marine environment.”¹⁷² Broadly, article 192 of the LOS Convention requires states to “protect and preserve the marine environment.”¹⁷³ The panel recognized that article 11 of the *Manual* is “soft law” and hoped that the parties would agree to not conduct hostilities in an area containing protected marine

¹⁷⁰ *Id.* at 82.

¹⁷¹ *Id.*

¹⁷² *Id.* The LOS Convention is considered a framework document. “Many of the delegates who spoke during the UNCLOS III discussions stressed that the Law of the Sea’s Convention’s provisions on marine pollution should feature ‘basic articles which could later be supplemented,’ ‘basic principles and rules,’ ‘general principles,’ or ‘umbrella provisions.’” LOUIS B. SOHN & JOHN E. NOYES, CASES AND MATERIALS ON THE LAW OF THE SEA 699 (2004). The Convention “provides evidence of rules which have become widely accepted in many respects, and represents a significant contribution to the codification and development of international law relating to the marine environment.” PATRICIA W. BIRNIE & ALAN BOYLE, BASIC DOCUMENTS ON INTERNATIONAL LAW AND THE ENVIRONMENT 153 (1995). The Convention has resulted in a number of fundamental changes:

perhaps the most important . . . is that pollution can no longer be regarded as an implicit freedom of the seas; rather, its diligent control from all sources is now a matter of comprehensive legal obligation affecting the marine environment as a whole, and not simply the interests of other states.

PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 348 (2002).

¹⁷³ SAN REMO MANUAL, *supra* note 91, at 82.

species.¹⁷⁴ Of particular importance to the panel were the exclusive economic zone and the continental shelf.¹⁷⁵ Finally, the comments suggest that states consult sources such as the World Heritage List¹⁷⁶ before commencing military operations in an area.

Also, significantly and for the first time, the natural environment was included in the definition of collateral damage.¹⁷⁷ In the hierarchy of collateral damage, effects to humans are to be considered first, but “a commander should never the less consider the impact of his attack on the environment in the light of the need for the attack on the military objective.”¹⁷⁸ This provision is significant in that military commanders must now at least contemplate the possible environmental consequences of their actions.

IV. LIFTING BLOCKADES TO ALLOW ENVIRONMENTAL MITIGATION

As discussed in Part II above, blockades are not without limitations. The most recognized limitations on blockades relate to humanitarian relief. But, as of now, no parallel requirements apply with respect to environmental damage. The UN Human Rights Council, in the aftermath of the 2006 Israeli-Lebanon conflict, seems to peripherally suggest that such a requirement might exist.

The Human Rights Council replaced the Commission on Human Rights and was charged with “promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.”¹⁷⁹ To do so, the Council was, among other responsibilities, to serve in an educational, advisory, technical capacity with the member states,¹⁸⁰ serve as a forum for discussion of human rights,¹⁸¹ make

¹⁷⁴ *Id.* at 83.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* The United Nations Educational, Scientific, and Cultural Organization maintains a web site with links to the 660 cultural, 166 natural, and 25 mixed properties located in the 144 member states. The coast of Lebanon is included in that list. UNESCO World Heritage Centre, <http://whc.unesco.org> (last visited Dec. 29, 2008). Israel accepted the Convention on Oct. 6, 1999 but has not yet ratified it. *Id.*

¹⁷⁷ SAN REMO MANUAL, *supra* note 91, at 87.

¹⁷⁸ *Id.*

¹⁷⁹ G.A. Res. 60/251, ¶ 1, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

¹⁸⁰ *Id.* at ¶ 5(a).

¹⁸¹ *Id.* at ¶ 5(b).

recommendations to the General Assembly,¹⁸² and promote and monitor the actions of member states.¹⁸³

A. The Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1.

On August 11, 2006, the Human Rights Council established a high-level commission of inquiry to “investigate the systematic targeting and killings of civilians by Israel in Lebanon, . . . examine the types of weapons used by Israel and their conformity with international law, . . . [and] assess the extent and deadly impact of Israeli attacks on human life, property, critical infrastructure and the environment.”¹⁸⁴ The third aspect of that mandate was interpreted broadly by the Commission as requiring a consideration of “immediate as well as mid- and longer- term social, cultural, physical, economic *and environmental* impact of the conflict in Lebanon.”¹⁸⁵ The panel was to be independent and impartial and address all violations by all of the parties¹⁸⁶ under both human rights and humanitarian law.¹⁸⁷ Particular concern was expressed for the civilian population in Southern Lebanon who were in “dire need of food, water, and medical assistance, which humanitarian workers are no longer able to deliver.”¹⁸⁸ The Resolution noted with concern the “environmental degradation caused by Israeli strikes against power plants and their adverse impact on health.”¹⁸⁹

In its report, the Commission made several findings based on damage to the environment during that conflict. Notably, it determined that the attack on the Jiyeh power plant was “premeditated” and that “IDF’s failure to take the

¹⁸² *Id.* at ¶ 5(c).

¹⁸³ *Id.* at ¶ 5(d).

¹⁸⁴ Human Rights Council, Special Session Resolution S-2/1, *The Grave Situation of Human Rights in Lebanon Caused by Israeli Military Operations* (Aug. 11, 2006) [hereinafter Special Session Resolution]. The resolution was adopted by a vote of 27 to 11, with 8 abstentions. *Id.*

¹⁸⁵ Report of the Commission of Inquiry, *supra* note 4, at 16, ¶ 13 (emphasis added).

¹⁸⁶ Statement by Ms. Louise Arbour, UN High Commissioner for Human Rights, On the Occasion of the 2nd Special Session of the Human Rights Council, Aug 11, 2006 at 5 (hereinafter Statement by Ms. Louise Arbour).

¹⁸⁷ Special Session Resolution, *supra* note 184. “[H]uman rights law and international humanitarian law are complementary and mutually reinforcing.” *Id.*

¹⁸⁸ Statement by Ms. Louise Arbour, *supra* note 186, at 6.

¹⁸⁹ Special Session Resolution, *supra* note 184.

necessary precautionary measures violated Israel's obligations to protect the natural environment and the right to health.¹⁹⁰ In particular, it caused significant damage to the Byblos archaeological site, included in the UNESCO World Heritage List."¹⁹¹ The Commission said that even if the attack could be justified under the principle of military necessity, Israel "clearly ignored or chose to ignore the potential threats these attacks posed to the well-being of the civilian population."¹⁹² Further, the Commission criticized Israel for its use of cluster munitions,¹⁹³ finding that "these weapons were used deliberately to turn large areas of fertile agricultural land into 'no go' areas for the civilian population."¹⁹⁴

In regard to the blockade, the Commission analyzed its use from the perspective of the humanitarian situation, environmental damage, and its economic effects.¹⁹⁵ Overall, the Commission found that its use by Israel resulted in "great suffering by the civilian population, damage to the environment, and substantial economic loss."¹⁹⁶ In regard to the hampering of humanitarian relief, the Commission noted that international humanitarian law requires participants to a conflict to allow the "unimpeded passage of humanitarian relief for civilians in need."¹⁹⁷ The naval blockade, no-fly zone, and destruction of all roads leading into Lebanon had seriously disrupted the ability for relief supplies to enter that country.¹⁹⁸ Of note, two World Food Program vessels carrying food and fuel were not able to enter Lebanese waters because of lack of security guarantees.¹⁹⁹ Other relief vessels were also allegedly prevented from delivering humanitarian goods.²⁰⁰

¹⁹⁰ Report of the Commission of Inquiry, *supra* note 4, at ¶ 23.

¹⁹¹ *Id.*

¹⁹² *Id.* at ¶ 219.

¹⁹³ The Commission determined that "90 percent . . . were fired by IDF during the last 72 hours of the conflict. The Commission finds that their use was excessive and not justified by any reason of military necessity." *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Report of the Commission of Inquiry, *supra* note 4, at ¶ 271.

¹⁹⁶ *Id.* at ¶ 275. The Report has received criticism, particularly in light of its failure to equally consider the actions of Hezbollah in terms of violations of the law of war. See Stewart, *supra* note 37, at 1059.

¹⁹⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 23, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

¹⁹⁸ Stewart, *supra* note 37, at 1057.

¹⁹⁹ *Id.*

²⁰⁰ "[S]hips loaded with humanitarian assistance . . . were not able to enter Lebanese ports until late in the conflict because of the blockade as well as because of delays in obtaining the required authorization from the Israeli authorities." Report of the Commission of Inquiry, *supra* note 4, at ¶ 185.

In addition to the violations of humanitarian law, the report indicated that the blockade prohibited an effective response to the oil spill and that the blockade should have been lifted to mitigate further environmental damage.²⁰¹ The blockade was not lifted until September 7, 2006.²⁰² Israel was specifically faulted for not lifting the blockade in light of the need to quickly assess the extent of the oil spill and allow for clean-up.²⁰³ An additional concern was that “due to the air blockade, no air surveillance or assessment actions were possible. The only possibility left was to use satellite-remote sensing images.”²⁰⁴

In its recommendations, the Commission proposed that the Human Rights Council

call for the mobilization of professional and technical expertise necessary to cope with the ecological disaster on the maritime environment on the Lebanese coast and beyond. In this context, it should be useful to engage the Barcelona Convention system covering the Mediterranean and the Regional Marine Pollution Emergency Response Centre for the Mediterranean based in Malta.²⁰⁵

The Commission’s report has met with some criticism. Indeed, many view it as one-sided in that it focuses almost exclusively on the actions of Israel.²⁰⁶ In its defense, the Commission pointed out that its mandate had “limits

²⁰¹ *Id.* at ¶ 273.

²⁰² *Id.* at ¶ 49.

²⁰³ *Id.* at ¶ 212.

²⁰⁴ *Id.* at ¶ 212.

²⁰⁵ Report of the Commission of Inquiry, *supra* note 4, at ¶ 31(d).

²⁰⁶ Stewart, *supra* note 37, at 1059. The report certainly does not hold back in its condemnation. Consider the following:

The Commission considers that the *excessive, indiscriminate and disproportionate* use of force by the IDF goes beyond reasonable arguments of military necessity and proportionality, and *clearly* failed to distinguish between civilian and military targets, thus constituting a *flagrant* violation of international law. The Commission has formed a *clear view* that, cumulatively, the deliberate and lethal attacks by the IDF on civilians and civilian objects amounted to collective punishment.

ratione personae (actions by the Israeli military) and *ratione loci* (on Lebanese territory) and [did] not allow for a full examination of *all* of the aspects of the conflict, nor [did] it permit consideration of the conduct of *all* parties.”²⁰⁷ While the Commission received cooperation in the preparation of its report from Lebanon, Israel failed to similarly participate.²⁰⁸ Regardless of criticism about the report, it is undisputed that the attack on the Jiyyeh power plant had a tremendous and devastating effect on the natural environment.

B. Lift the Blockade?

The Commission’s assertion that Israel should have raised its blockade in light of severe environmental damage raises a number of questions, most significantly whether there was a legal requirement for Israel to do so. If not, then in light of the increased awareness and emphasis on the environment, should such a requirement become part of the international law governing armed conflict at sea?

Placing the legality of the use of the blockade²⁰⁹ and the attack on the power plant²¹⁰ aside, the issue remains whether Israel should have lifted the

Report of the Commission of Inquiry, *supra* note 4, at ¶25 (emphasis added).

²⁰⁷ *Id.* at ¶ 10. In establishing the Commission, the Human Rights Council did not refrain from condemning only the actions of Israel. As an example, the resolution states that the Council was “[a]ppalled at the massive violations of the human rights of the people of Lebanon by Israel resulting in the massacre of thousands of civilians.” Special Session Resolution, *supra* note 184.

²⁰⁸ Report of the Commission of Inquiry, *supra* note 4, at ¶19.

²⁰⁹ Israel would likely argue that the abduction of its soldiers amounted to an armed attack and that because Hezbollah launched the attack from Lebanon, that state was responsible. While such an argument would likely satisfy article 51 and even perhaps the element of necessity (further attacks may have been imminent), Israel would encounter more difficulty in arguing that the response, an eight week war consisting of an invasion and blockade, was proportionate.

²¹⁰ There is considerable precedent to support Israel’s attack on the plant, as such facilities are common targets in war. Even if the collateral environmental damage was foreseeable, it must have dramatically outweighed the military importance of the target before it contradicted the suggestions of the *San Remo Manual*. *Contra* Report of the Commission of Inquiry, *supra* note 4, at ¶ 25. Green Line, a Lebanese nongovernmental environmental organization that has closely monitored the oil spill, believes that Israel knew that the oil at the power plant was of a type that would only be useful to that facility. As a result, the organization concludes that Israel intended the spill. Press Release, Green Line, One Year Post Aggression . . . And Oil Spill: What happened to the Cleanup and

blockade to allow a more rapid assessment and clean-up of the oil spill. In its report, the Commission suggests that Israel should have done so but does not cite to any international law that would require such an act.²¹¹ Rather, the Commission paints with a broad brush and gives only a qualified opinion, stating

[i]n the view of the Commission, there is no reason that justifies a failure to do so (lift the blockade). Israel's engagement in an armed conflict does not exempt it from its general obligation to protect the environment and to react to an environmental catastrophe such as which took place on the Lebanese coasts.²¹²

Such a statement does little to calm the fears of those pointing to a lack of law in the field of the environmental law of war.

Assuming that the Israeli military manual substantially incorporates the environmental principles in the *San Remo Manual*, those principles are considered to be soft law and therefore permissive.²¹³ As examples, states "should" keep the environment in mind and are "encouraged" to avoid collateral damage to the natural environment.²¹⁴ Such soft law provisions do not provide for a prohibition against attacking otherwise valid targets because damage to the natural environment is a possibility. And they do not require the lifting of an otherwise valid blockade to allow for the cleanup of an environmental disaster. Israel was under no obligation to lift its blockade even in light of the oil spill's imminent environmental harm to the region.

Prosecution of Israel? (July 27, 2007)

(http://greenline.org.lb/new/pdf_files/270707e.pdf).

²¹¹ Report of the Commission of Inquiry, *supra* note 4, at ¶ 273.

²¹² *Id.* at ¶ 273.

²¹³ See discussion, *supra* section II.B.

²¹⁴ See discussion, *supra* section II.B.2.

V. PROPOSALS

Time is of the essence when responding to oil spills.²¹⁵ Because of the need for an efficient, rapid response, advance directives or regulations are needed to coordinate the actions of all parties involved. There are likely numerous ways to address a situation like the Jiyeh oil spill. This article proposes three solutions.

A. Military Manuals

Domestic procedures regarding the use and conduct of blockades are set forth in military operational manuals. These manuals, as has been noted, often contain what is considered to be customary international law. “Soft” provisions found in restatements such as the *San Remo Manual*, while of little effect alone, take on increased meaning when incorporated into the military manuals and procedures of states. Indeed, “[a]s countries incorporate relevant environmental and law-of-war norms into their military handbooks and training regimens, the often vague international law provisions constraining wartime environmental damage are given form and force.”²¹⁶ Therefore, the best hope for those who seek to further the environmental law of war would likely be to encourage states to incorporate protective procedures into their military handbooks.

This article suggests that navies imposing a blockade should have procedures in place that will allow for the mitigation of that damage.²¹⁷ These procedures should mirror those already in place for humanitarian purposes.²¹⁸ Specifically, unless there is an overriding operational need, safe passage should be granted to those vessels and aircraft that may be used to gauge the extent and severity of the environmental damage. Such procedures need not be overly complex, but they need to be considered beforehand and be available to those

²¹⁵ “Rapid response in the critical early stages of a spill is key to a successful response” according to the Marine Spill Response Corporation. <http://www.msrmc.org/> (last visited Dec. 29, 2008).

²¹⁶ Carl E. Bruch, *Existing and Emerging Wartime Standards*, in *THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC, AND SCIENTIFIC PERSPECTIVES* 40 (Jay E. Austin & Carl E. Bruch ed., 2000).

²¹⁷ “[M]ilitary commanders can legitimately be expected to show due regard for avoiding unnecessary environmental damage in the conduct of warfare.” Wright, *supra* note 2, at 36.

²¹⁸ “[A]s a practical matter, expansion of the law of war to cover environmental concerns could be done in a manner similar to the approach taken in addressing humanitarian concerns.” *Id.*

naval commanders facing a situation of collateral environmental damage to the natural environment.

As an example, the United States Navy's Operational Manual provides in paragraph 7.7.3 *Special Entry and Exit Authorization*:

Although neutral warships and military aircraft enjoy no positive right of access to blockaded area, the belligerent imposing the blockade may authorize their entry and exit. Such special authorization may be made subject to such conditions as the blockading force considers to be necessary and expedient. Neutral vessels and aircraft in evident distress should be authorized entry into a blockaded area, and subsequently authorized to depart, under conditions prescribed by the officer in command of the blockading force or responsible for maintenance of the blockading instrumentality (e.g. mines). Similarly, neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population, and the sick and wounded should be authorized to pass through the blockade cordon, subject to the right of the blockading force to prescribe the technical arrangements, including search, under which passage is permitted.²¹⁹

The addition of the following sentence at the end of that paragraph could be inserted to address collateral damage to the natural environment: "Additionally, neutral vessels and aircraft engaged in assessing, coordinating, and cleaning-up damage to the natural environment should be authorized to pass through the blockade cordon, subject to the right of the blockading force to prescribe the technical arrangements, including search, under which passage is permitted." This addition would give the military commander the express authority to allow such vessels to pass, subject to whatever requirements are deemed necessary, such as inspection and/or escort.

Arguably, such permission is already within the purview of the military commander. However, adding the specific language would place the consideration s of mitigating environmental damage on an equal footing with the current emphasis on preventing humanitarian harm. While this Article does not suggest that the interests are equivalent, it does suggest that the procedures for allowing humanitarian relief would, in many ways, be identical to those providing environmental relief. For example, according to the *San Remo Manual*, blockading forces may set the technical requirements when determining

²¹⁹ U.S. Navy Commander's Guide, *supra* note 84, at ¶ 7.7.3.

to which ships to allow passage.²²⁰ Those requirements include inspection as well as assurance of safe passage.²²¹ Those procedures are the same whether inspecting a ship filled with relief supplies or full of oil absorbent pads. The only difference is one of priority. It may be that a vessel containing oil response gear is not given the expedited priority afforded to a ship carrying medical supplies. And that is as it should be. But, especially in light of situations like the Jiyeh spill, navies should be prepared to allocate more resources to assist in environmental clean-up.

B. Expeditionary Oil Spill Response Units

Some navies around the world have adapted their missions to specifically include environmental protection. For example, the Danish navy has recently launched a national campaign to improve the protection of the maritime environment.²²² The campaign is focused on early detection of oil spills and employs volunteer civilian spotters to alert naval environmental response ships before the spill reaches the Danish coast.²²³ Similarly, the U.S. Navy has developed specialized craft of its own to rapidly address oil spills in port.²²⁴ Some of those vessels were developed in response to the need to rapidly fuel Military Sealift Command vessels deploying to the Persian Gulf in support

²²⁰ See discussion, *supra* section II.B.

²²¹ See discussion, *supra* section II.B.

²²² Nils Christian Wang, *The Commanders Respond, Danish Fleet*, PROCEEDINGS, Mar. 2008, at 34. Naval commanders-in-chief from around the world were asked "How do you explain to your government and fellow citizens why your navy is necessary and worth what it costs?" *Id.* at 28. Rear Admiral Nils Christian Wang responded that:

[a] good example of a successful attempt to create ties between the public and the navy is the national campaign launched by the Danish Navy in 2006. Its purpose was first and foremost to improve the protection of sea environment. This is accomplished through the timely detection of oil spills for our environmental response ships to prevent the oil from reaching the Danish shoreline.

Id. at 34.

²²³ *Id.*

²²⁴ *Spill Response- Anytime, Anywhere*, CURRENTS, Fall 2004, available at http://www.enviro-navair.navy.mil/currents/fall2004/Fall04_Spill_Response.pdf.

of Operation Iraqi Freedom.²²⁵ To accommodate those vessels, the U.S. Navy expanded fueling operations at its Souda Bay, Crete, facility.²²⁶ The Greek government requested an oil spill response “commensurate with the increased tempo of operations.”²²⁷ In response to that request, several specialized oil “skimmer” vessels were developed in the United States and flown to Greece.²²⁸ Countless instances of less formal measures have likely been taken over the years to protect the environment from potential harm during military operations.²²⁹

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* The vessels consisted of a 36-foot vessel rated at 1,234 barrels per day recovery, a Vessel of Opportunity Oil Skimmer rated at 1,371 barrels per day, a Fast Water Skimming Vessel rated at 1,509 barrels per day, and a 24-foot rigid hull inflatable boat for command and control. *Spill Response*, *supra* note 224. Interestingly, the craft had to be loaded aboard a Russian-built transport as there was no aircraft in the U.S. inventory capable of airlifting all of the equipment. *Id.*

²²⁹ *Id.* Admiral Stark recounts one such example that occurred during the UN and NATO embargo of the former Yugoslavia in the mid-1990s – *Operation Sharp Guard*. A major concern in that operation was the importation of oil, and on one occasion a 65,000 ton Russian ship attempted to break the embargo but was stopped by a group of British and Dutch Marines who were placed on the vessel by a helicopter. Admiral Stark observed that the outcome likely would have been different without the helicopter:

A 65,000 ton ship tends to be difficult to stop for a 5,000 ton destroyer. . . . [F]or a Master who is willing to risk some damage to his ship . . . there’s very, very little you can do to stop him unless you shoot at him . . . [W]hatever you do, you are going to get some leakage of oil into the water. And, for me, I felt very strongly that I was willing to do whatever was necessary to stop any type of ship from getting through. It certainly raised the . . . very disagreeable possibility, that there would be serious environmental contamination. That was a major concern for the Italian government at the time just as it was for the operational commanders enforcing the embargo.

We, the commanders, were particularly concerned after we talked to the shore establishment, the supporting staffs about it and they said it was our decision and our responsibility, so good luck . . . I am very pleased to relate to

This emphasis on oil spill response may be translated into an expeditionary oil spill clean-up capability. While such a capability would be limited (the Jiyeh power plant leaked four million gallons into the Mediterranean Sea, and the combined total response of the Souda Bay equipment is approximately four thousand gallons per day in an enclosed harbor²³⁰) any specialized equipment specifically allocated to the spill would likely be valuable, particularly in the early stages of the spill when its dimensions are much more confined.

Even in the absence of specialized equipment, blockading navies should consider surveying the environmental damage on their own. Use of military aviation and surface assets could be employed to accurately gauge the extent of the damage and direction of movement. Such information, particularly in the early stages of the spill, would be invaluable in planning later clean-up efforts.

C. United Nations and Regional Action

Clean-up efforts may, depending on geography, require regional cooperation. Such cooperation could be facilitated by UN or regional action. The United Nations is uniquely situated to recognize and coordinate a response to emergent situations. As an example, after the conflict in the South Atlantic over the Falkland Islands between Argentina and the United Kingdom, the United Nations General Assembly declared a “Zone of peace and co-operation of the South Atlantic.”²³¹ States in the “zone” were encouraged to cooperate for “social and economic development, the protection of the environment, the conservation of living resources and the peace and security of the entire region.”²³²

you that we were able to get the staffs to make arrangements to ensure that there would be procedures and assets, *i.e.*, tugs, and oil containment booms, that could be brought out at very short notice so that we could minimize whatever environmental impact that might result from our operations.

James R. Stark, *Welcoming Remarks*, in Vol. 69 U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW STUDIES, PROTECTION OF THE ENVIRONMENT DURING ARMED CONFLICT at 6-7 (1996).

²³⁰ See *supra* note 228.

²³¹ SOHN & NOYES, *supra* note 172, at 80.

²³² *Id.* (quoting G.A. Res. 41/11, ¶ 2, U.N. Doc. A/RES/41/11 (Oct. 27, 1986)).

While officially a mere recommendation,²³³ a General Assembly Resolution may serve to influence the actions of states. A zone like the one created in the South Atlantic could have been established in the Mediterranean immediately after the oil spill for the specific purpose of facilitating clean-up. Israel may have responded more favorably to a resolution, representing the views of the United Nations, than to sporadic international criticism. In the future, consideration should be given to drafting a resolution specifically identifying steps that could be taken to mitigate environmental harm during times of armed conflict.

Additionally, as pointed out by the Human Rights Commission, the states in the region could have drawn upon the framework for responding to maritime environmental disasters already set forth in the Barcelona Convention.²³⁴ At the very least, Israel should have called upon the other parties to the Convention for assistance.

VI. CONCLUSION

The law of armed conflict at sea should be informed and influenced by developments in international environmental law. While not ordinarily associated with the progressive development of international law, military manuals are an ideal place to implement environmentally responsible procedures associated with methods of warfare. Because they represent state practice and reflect and influence custom, they are uniquely situated to turn “soft law” into requirements of substance.²³⁵ Similarly, widespread adoption of serious environmental response capabilities by the world’s navies would further the emphasis on environmental response. Finally, increased awareness by international organizations could help to efficiently coordinate an international response to wartime environmental damage.

²³³ U.N. Charter art. 10.

²³⁴ Report of the Commission of Inquiry, *supra* note 4, at ¶ 31(d).

²³⁵ See PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 751 (2002). The authors observe that “customary rules often have an unhelpful generality [and] criticism [of the “soft” nature of international environmental law] ignores the interplay of custom and treaty regimes, which has become . . . the major means of giving specific content to otherwise amorphous principles.” *Id.* The authors believe that “soft-law” guidelines “are best treated as affording some evidence of *opinio juris* in appropriate cases, and as exerting a potential influence over state practice and the development of international law, but not as constituting law in and of itself.” *Id.* at 752. As a result, the authors pay particular attention to state practice. *Id.*

Damage to the environment during time of war may be inevitable. But with advance planning based on past lessons learned, the worst effects of that damage may be mitigated. In the case of an oil spill in a region that is subject to a naval blockade, modern navies need to be more alert and prepared in responding to environmental damage. The Jiyyeh power plant was likely a valid military target, but, in the long run, it could not possibly have been worth the devastating environmental cost. Modern navies can and must fight and win wars while still acting responsibly in the face of unexpected collateral damage to the natural environment.

WILLFUL AND OUTRAGEOUS ACTS OF PERSONAL ABUSE – NOW OK FOR THE CIA?

Major William T. Hennessy*

*An intelligence agency is not supposed to be above the law.*¹

I. INTRODUCTION

“Military necessity or expediency do not justify a violation of positive rules . . . [T]he rules of international law must be followed even if it results in the loss of a battle or even a war.”² Quite a bold statement, especially considering the author: the United States, lecturing during the post-World War

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¹ Jane Mayer, *The Black Sites*, NEW YORKER, Aug. 13, 2007, available at http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer (quoting Mariane Pearl, widow of murdered *Wall Street Journal* reporter Daniel Pearl who was abducted and beheaded in 2002 in Pakistan by Islamic militants).

² United States v. Wilhelm List (1948) in XI NUERNBERG MILITARY TRIBUNALS, TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1256, 1272 (1950).

II Nuremberg war crimes trials. The message was clear: the ends do not justify the means, at least when it comes to warfare and international law. This is especially true with regard to such universally prohibited practices as slavery, genocide, and torture.³

The U.S. military has officially, fully, and openly embraced this concept in its rules on the treatment of detainees.⁴ The Central Intelligence Agency (CIA), however, gets to play by its own set of rules, and apparently the ends do justify the means for it. On 20 July 2007, President Bush signed Executive Order 13440. The Order “interprets the meaning and application of . . . Common Article 3 with respect to . . . detentions and interrogations . . . operated by the Central Intelligence Agency.”⁵ Among its list of prohibited acts are “willful and outrageous acts of personal abuse *done for the purpose of humiliating or degrading the individual* in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency.”⁶

By inserting the magic language “for the purpose of,” the Executive Order craftily carves out an exception to the prohibition on “willful and outrageous acts of personal abuse.”⁷ Apparently, CIA interrogators are now authorized to perform “willful and outrageous acts of personal abuse” against detainees, as long as those acts are “done for the purpose of” collecting information, preventing future attacks, procuring confessions to crimes, or any other normal interrogation purpose. The actual, subjective purpose of the acts just cannot be humiliation or degradation of the detainee. As long as the sole desired end state of the interrogator is collecting relevant information, then such acts are authorized. Whether the detainee actually feels humiliated or degraded is apparently irrelevant.

³ See generally GAIL H. MILLER, *DEFINING TORTURE* 3 (2005) (providing discussion on torture and its universally accepted prohibition. “Under customary international law, the prohibition of torture is *jus cogens* – a peremptory norm that is non-derogable under any circumstances. It is binding on all nations. This . . . places torture on par with slavery and genocide.”); Vienna Convention on the Law of Treaties, Article 53 (1969), 1155 U.N.T.S. 331.

⁴ See discussion *infra* part IV (U.S. military interrogation rules).

⁵ Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 24, 2007).

⁶ *Id.* (emphasis added).

⁷ *Id.*

Hence, the CIA now has permission from the President to commit blatant violations of Common Article 3 to the Geneva Conventions.⁸ Common Article 3, which applies to the U.S. in its treatment of detainees captured in its war on terrorism,⁹ prohibits “willful and outrageous acts of personal abuse” committed against such detainees, without any exceptions. Having a proper, well-meaning purpose for committing the personal abuse is irrelevant. As a result, Executive Order 13440 further damages the United States’ reputation and standing in the international community, which has already been on an alarming downslide in recent years. Additionally, it creates a multitude of potential problems for U.S. service members. One such problem is the risk of reciprocity, by not only current but future enemies as well. Another problem is that it serves to lessen the chance of enemy surrender and a cessation of hostilities, fueling the enemy’s hatred of and desire to fight the U.S. instead.

This article examines the backdrop of Executive Order 13440 and the reaction it sparked, focusing particularly on the “purpose” language. Some of the CIA’s controversial interrogation techniques are closely considered and compared to Common Article 3, as well as the military’s interrogation program. Finally, the article explores some of the major problems created by Executive Order 13440.

II. EXECUTIVE ORDER 13440

A. Background

⁸ This provision is referred to as “Common Article 3” since it is present in all four Geneva Conventions. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. These are the four treaties that make up what is commonly known as the Geneva Conventions.

⁹ *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795 (2006); Dick Jackson & Lieutenant Colonel Eric T. Jensen, *Common Article 3 and Its Application to Detention and Interrogation*, ARMY LAW., May 2007, at 69, 70; *Pending Intelligence Matters: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. (2007) (statement of Robert Turner, Cofounder, Center for National Security Law, University of Virginia School of Law) [hereinafter Statement of Robert Turner].

“On the morning of September the 11th, 2001, our nation awoke to a nightmare attack.”¹⁰ This nightmare unleashed drastic and profound changes in the U.S. and worldwide which we are still experiencing. A new cabinet level executive department – Homeland Security – was born, which President Bush called “the most extensive reorganization of the federal government since the 1940s.”¹¹ Afghanistan and Iraq are completely new entities. And the “Global War on Terrorism” began, resulting in thousands of detainees from various countries being held and interrogated by U.S. personnel.

The President’s position has always been that members of Al Qaeda, the Taliban, and associated detainees are unlawful enemy combatants who are not entitled to the full protections provided to prisoners of war under the Third Geneva Convention.¹² Additionally, the President’s original position was that Common Article 3 of the Geneva Conventions¹³ did not apply to these detainees. This position was guided in part by the advice of the White House Legal Counsel, Alberto Gonzales. With the support of the Department of Justice Office of Legal Counsel, Mr. Gonzales formally advised the President that in this “new kind of war”¹⁴ the Geneva Conventions did not apply. Notably, this was contrary to Secretary of State Colin Powell’s advice.¹⁵

In 2006, the Supreme Court significantly altered this landscape in *Hamdan v. Rumsfeld*.¹⁶ The Court decided that Common Article 3 did apply to the U.S. and its treatment of detainees – specifically Al Qaeda – captured in its global war on terrorism.¹⁷ In order to comply with the holding in this case,

¹⁰ President George W. Bush, Address at the White House: President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/09/print/20060906-3.html> [hereinafter President Discusses Commissions].

¹¹ President George W. Bush, Address at the White House: Remarks by the President in Address to the Nation (June 6, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/06/20020606-8.html>.

¹² See Exec. Order No. 13,440, 72 Fed. Reg. 40,707 (July 24, 2007).

¹³ See *supra* note 8.

¹⁴ Memorandum from Alberto R. Gonzales, White House Legal Counsel, to President George W. Bush (Jan. 25, 2002) [hereinafter Gonzales Memo]. See Dick Jackson & Lieutenant Colonel Eric T. Jensen, *The Law of War after the DTA, Hamdan and the MCA*, ARMY LAW., Sept. 2007, at 19.

¹⁵ See Gonzales Memo, *supra* note 14.

¹⁶ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006).

¹⁷ See *id.*

President Bush asked Congress to pass legislation authorizing military commissions for global war on terrorism detainees. Congress agreed, passing the Military Commissions Act.¹⁸ The main thrust of the Military Commissions Act relates to the creation of military commissions to try detainees. Additionally, it amended the War Crimes Act¹⁹ by defining which violations of Common Article 3 constitute prosecutable war crimes, labeling these “grave breaches.”²⁰ Among these “grave breaches” are “torture,” “cruel treatment,” and “intentionally causing serious bodily injury.”²¹ The Military Commissions Act also directed that the President further clarify Common Article 3 with regard to the CIA’s interrogation program.²² The President did so by issuing Executive Order 13440.

B. Interrogation Techniques

Not surprisingly, the CIA does not publicly advertise the interrogation techniques that it employs, especially what President Bush refers to as its “alternative set of procedures.”²³ One obvious reason for keeping them classified is to prevent the enemy from knowing what to expect and how to prepare counter resistance techniques.²⁴ Another benefit, perhaps incidental, is that it minimizes public scrutiny. It is difficult to criticize an interrogation program if you do not know exactly what it consists of. Nobody is reasonably claiming that the CIA’s undisclosed interrogation techniques rise to the level of torture practiced by Antiochus IV Epiphanes (the Mad), King of Syria from 175 to 164 B.C.²⁵ But it is widely believed that the CIA’s “alternative set of

¹⁸ Military Commissions Act, 10 U.S.C. § 948a (2006).

¹⁹ War Crimes Act, 18 U.S.C. § 2441 (2006) [hereinafter WCA].

²⁰ *Id.*; See MICHAEL J. GARCIA, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, THE WAR CRIMES ACT: CURRENT ISSUES 6 (2007); Jackson & Jensen, *supra* note 14, at 19, 24.

²¹ WCA, *supra* note 19.

²² See Statement of Robert Turner, *supra* note 9.

²³ President Discusses Commissions, *supra* note 10.

²⁴ See *id.*; Charlie Savage, *Bush Issues Orders on Interrogations: Tells CIA Which Techniques OK in Terror Cases*, BOSTON GLOBE, July 21, 2007 (discussing EO 13440 and “the accompanying set of classified instructions”), available at

http://www.boston.com/news/nation/washington/articles/2007/07/21/bush_issue_s_orders_on_interrogations/.

²⁵ See DANIEL P. MANNIX, THE HISTORY OF TORTURE 5-8 (Dorset Press 1986) (1964) (describing the horrendous torture and deaths of a Jewish mother and her seven sons). See generally Encyclopedia Britannica, Antiochus IV Epiphanes, <http://www.britannica.com/eb/article-9007863/Antiochus-IV-Epiphanes>

procedures,”²⁶ also commonly referred to as “enhanced interrogation techniques”²⁷ or “special methods of questioning,”²⁸ may include the following: “The Attention Grab, The Attention Slap, The Belly Slap, Long Time Standing, The Cold Cell, and Water Boarding.”²⁹ Other common techniques may include: prolonged stress positions;³⁰ extreme sensory deprivation or overload, such as prolonged blaring of extremely loud music;³¹ extended periods of isolation;³²

(providing history of Antiochus IV Epiphanes) (last visited Dec. 30, 2008); AMNESTY INTERNATIONAL REPORT ON TORTURE (1st American ed. 1975) (1973) (providing excellent history of torture and various techniques).

²⁶ President Discusses Commissions, *supra* note 10.

²⁷ Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866>.

²⁸ Bill Gertz, *Inside the Ring, CIA Interrogations*, WASH. TIMES, Nov. 2, 2007, available at <http://ebird.afis.mil/ebfiles/e20071102557962.html> (quoting CIA Director Gen. Hayden).

²⁹ Ross & Esposito, *supra* note 27 (“Attention Grab: The interrogator forcefully grabs the shirt front of the prisoner and shakes him. Attention Slap: An open-handed slap aimed at causing pain and triggering fear. The Belly Slap: A hard open-handed slap to the stomach. The aim is to cause pain, but not internal injury. Doctors consulted advised against using a punch, which could cause lasting internal damage. Long Time Standing: This technique is described as among the most effective. Prisoners are forced to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours. Exhaustion and sleep deprivation are effective in yielding confessions. The Cold Cell: The prisoner is left to stand naked in a cell kept near 50 degrees. Throughout the time in the cell the prisoner is doused with cold water. Water Boarding: The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt.”)

³⁰ See ASS'N OF THE CITY OF THE BAR OF NEW YORK ET AL., REPORT TO THE ABA HOUSE OF DELEGATES 5 (2007), available at <http://www.abanet.org/adminlaw/annual2007/CIA-Report-Full-HOD.pdf> [hereinafter ABA REPORT]; William Douglas & Jonathan S. Landay, *Bush Bars CIA from Using Torture, But Details Remain Cloudy*, MCCLATCHY NEWSPAPERS, July 20, 2007, available at <http://www.mcclatchydc.com/home/page/story/18244.html>; Savage, *supra* note 24.

³¹ See Douglas & Landay, *supra* note 30; Mayer, *supra* note 1.

³² See Douglas & Landay, *supra* note 30.

exposure to extreme heat and cold;³³ long-term sleep disruption;³⁴ sexual humiliation;³⁵ forcible stripping;³⁶ and prolonged nudity.³⁷

With regard to waterboarding, sources say that CIA interrogators, practicing the technique themselves, last around 14 seconds before giving up.³⁸ Khalid Sheikh Mohammed, self-proclaimed 9/11 mastermind and one of the highest profile Al Qaeda detainees to date,³⁹ allegedly did a little better, suffering the waterboard for about two-and-a-half minutes before breaking and agreeing to talk.⁴⁰ Many consider waterboarding to be a form of mock execution since the victims really believe they are dying.⁴¹ Master instructors at U.S. military Survival, Evasion, Resistance and Escape (SERE) schools are about as familiar with waterboarding as one can get. One purpose of SERE school is to expose students to some of the more common torture techniques they may encounter if captured in combat.⁴² One former master instructor at the U.S. Navy SERE school in San Diego, who served not only as a waterboarding

³³ See Mark Mazzetti & William Glaberson, *White House Approves Resumption of Severe Interrogation of Terrorism Suspects*, INTERNATIONAL HERALD TRIBUNE, July 22, 2007, available at <http://www.iht.com/articles/2007/07/22/news/gitmo.php>.

³⁴ See Douglas & Landay, *supra* note 30; Mayer, *supra* note 1.

³⁵ See Bill Morlin & Karen Steele, *Psychologists' CIA Work Called 'Voodoo Science'*, SPOKESMAN REVIEW, July 18, 2007, available at <http://www.spokesmanreview.com/breaking/story.asp?ID=10742>; Alfred W. McCoy, *Torture at Abu Ghraib Followed CIA's Manual*, BOSTON GLOBE, May 14, 2004, available at http://www.boston.com/news/globe/editorial_opinion/oped/articles/2004/05/14/torture_at_abu_ghraib_followed_cias_manual/.

³⁶ See Mayer, *supra* note 1.

³⁷ See Scott Horton, *General Hayden Flunks an Interrogation Test*, HARPER'S MAGAZINE, Sept. 9, 2007, available at <http://www.harpers.org/archive/2007/09/hbc-90001148>.

³⁸ See Ross & Esposito, *supra* note 27.

³⁹ See Mike Mount, *Khalid Sheikh Mohammed: I beheaded American reporter*, CNN, Mar. 15, 2007, available at <http://www.cnn.com/2007/US/03/15/guantanamo.mohammed/index.html>.

⁴⁰ See Ross & Esposito, *supra* note 27.

⁴¹ See *id.*

⁴² See Malcolm Nance, *I Know Waterboarding Is Torture – Because I Did It Myself*, N.Y. DAILY NEWS, Oct. 31, 2007, available at http://www.nydailynews.com/opinions/2007/10/31/2007-10-31_i_know_waterboarding_is_torture__because.html.

trainer but as a trainee as well, has absolutely no doubt that waterboarding is “torture.”⁴³

C. Ends Justifying Means

In defending his agency’s interrogation techniques, CIA Director General Michael Hayden clearly focuses on the end result, stating that over seventy percent of the intelligence the CIA has used came from interrogating detainees.⁴⁴ In addition to quantity, he touts the quality of this intelligence base, stating that there is no better source of information on the terrorists and their plans than the terrorists themselves.⁴⁵ He espouses the “irreplaceable”⁴⁶ value of interrogation-based intelligence. He stresses the relatively low number of occasions in which enhanced interrogation techniques have been needed, saying they are reserved just for the most stubborn terrorists who refuse to cooperate.⁴⁷ He highlights that these interrogations have “produced thousands of intelligence reports, revealed priceless insights on Al Qaeda’s operations and organization, foiled plots and saved innocent lives.”⁴⁸ He reminds us of the danger that we are still living with, warning of the continuing high risk of another “spectacular attack that would cause mass casualties, massive destruction and economic harm.”⁴⁹

Vice President Cheney is another strong proponent of keeping the focus on the threat, and is quick to chastise anyone who strays by looking too closely at the means. To those who underestimate the threat or think 9/11 probably will not happen again, he gladly reminds them that next time, it could be much worse: “[T]he ultimate threat is a group of terrorists in one of our cities with a nuclear weapon, and that would cause more casualties than we lost in all the

⁴³ *Id.* (“There is no way to sugarcoat it. In the media, waterboarding is called ‘simulated drowning,’ but that’s a misnomer. It does not simulate drowning, as the lungs are actually filling with water. There is no way to simulate that. The victim *is* drowning. Unless you have been strapped down to the board, have endured the agonizing feeling of the water overpowering your gag reflex, and then feel your throat open and allow pint after pint of water to involuntarily fill your lungs, you will not know the meaning of the word.”)

⁴⁴ *See* Gertz, *supra* note 28.

⁴⁵ *See id.*

⁴⁶ *Id.*

⁴⁷ *See id.*

⁴⁸ Douglas & Landay, *supra* note 30 (quoting Michael V. Hayden).

⁴⁹ Gertz, *supra* note 28.

wars we've fought in the 230-year history of the Republic."⁵⁰ He calls the CIA's interrogation program one of the three vital programs that we need to defend our country, alongside the Patriot Act and the Terrorist Surveillance Program.⁵¹ In advocating the need to continue the interrogation program, he stresses how much we have learned from such high value detainees as Khalid Sheikh Mohammed.⁵² He praises the program as critical to the security of the nation.⁵³ Clearly referring to waterboarding, he has unabashedly opined that "a dunk in water is a no brainer if it can save lives."⁵⁴ During the Detainee Treatment Act⁵⁵ debates, he met with Senators John Warner, Lindsey Graham, and John McCain. These three Republicans, while strong supporters of the military as well as the war on terrorism, have also been instrumental in combating detainee abuse. The Vice President tried, unsuccessfully, to derail the Senators' efforts and sway them to focus on the end result, complaining that their proposed legislation would hinder the President's ability to properly combat terrorism.⁵⁶

President Bush certainly focuses on the end result, praising the CIA interrogation program for preventing attacks and saving lives.⁵⁷ Not surprisingly, the White House Legal Counsel favored the end result over the Geneva Conventions as well. In his advice to the President, Alberto Gonzales proposed that the global war on terrorism is a unique, novel type of warfare which the framers of the Geneva Conventions did not contemplate.⁵⁸ He argued that this new type of warfare "places a high premium on other factors."⁵⁹ One factor he considered more important than any contained in the Geneva Conventions was "the ability to quickly obtain information from captured

⁵⁰ Interview by Scott Hennen with Vice President Dick Cheney, at the White House (Oct. 24, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/10/20061024-7.html> [hereinafter Cheney Interview].

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *Id.*

⁵⁵ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680 [hereinafter DTA].

⁵⁶ *See* Bob Herbert, *Who We Are*, NY TIMES, Aug. 1, 2005, *available at* http://www.nytimes.com/2005/08/01/opinion/01herbert.html?_r=1&oref=slogin.

⁵⁷ *See* Mayer, *supra* note 1.

⁵⁸ *See* Gonzales Memo, *supra* note 14.

⁵⁹ *Id.*

terrorists and their sponsors in order to avoid further atrocities against American civilians.”⁶⁰

With regard to Common Article 3, General Hayden repeatedly dismisses it for being too vague and open to interpretation to be meaningful.⁶¹ Vice President Cheney apparently thinks that as long as an act is not torture it is permissible, without regard to the rest of the Common Article 3 prohibitions.⁶² President Bush also appears to brush Common Article 3 aside for being too vague, lacking a clear definition, and subject to multiple interpretations.⁶³ One law school professor offered his explanation of this “common-sense policy”⁶⁴ approach that the Bush administration takes with regard to Common Article 3: “Given the ambiguity of Common Article 3, it is hard to fault the Bush administration’s strategy. States always interpret treaties narrowly when broad interpretations do not serve their interests, and the Bush administration’s interpretation of the ambiguous substantive language . . . is at least reasonable.”⁶⁵ The candid statement of one CIA agent depicts the “ends justify the means” camp perfectly: “I can respect people who oppose aggressive interrogations, but they should admit that their principles may be putting American lives at risk.”⁶⁶

D. The Reaction

The reaction that Executive Order 13440 sparked was near instantaneous, akin to swatting a bee hive. Professor Robert F. Turner of the University of Virginia School of Law is known as “a rare and outspoken defender of the Bush administration in . . . controversies related to presidential power and the war on terrorism.”⁶⁷ Professor Turner, co-founder of the Center

⁶⁰ *Id.*

⁶¹ See General Michael V. Hayden, Director, CIA, Statement to Employees on the Executive Order on Detentions and Interrogations (July 20, 2007), *available at* <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/statement-on-executive-order.html>.

⁶² See Cheney Interview, *supra* note 50.

⁶³ See President Discusses Commissions, *supra* note 10.

⁶⁴ Eric Posner, *Apply the Golden Rule to al Qaeda?*, WALL ST. J., July 15, 2006, *available at* <http://www.law.uchicago.edu/posner-golden-rule.html>.

⁶⁵ *Id.*

⁶⁶ Mayer, *supra* note 1.

⁶⁷ Charlie Savage, *Military Cites Risk of Abuse by CIA: New Bush Rules on Detainees Stir Concern*, BOSTON GLOBE, Aug. 25, 2007, *available at* http://www.boston.com/news/nation/washington/articles/2007/08/25/military_cites_risk_of_abuse_by_cia/.

for National Security Law and former three-term chairman of the American Bar Association's Standing Committee on Law and National Security,⁶⁸ was invited by the Senate Select Intelligence Committee to give his expert opinion on Executive Order 13440. The Senate Intelligence Committee was in search of the true meaning and effect of the Executive Order.⁶⁹

Professor Turner testified that he had first learned about the Executive Order on the day it was released. The Department of Justice had invited him to give his thoughts on it during a conference call. He testified that "upon reading it I was absolutely outraged . . . [A]ll of my alarms from years of working in government went off . . . I can't remember being so angry since the immediate aftermath of 9/11."⁷⁰ Given his regular support of presidents and the executive branch over the decades, with a conservative slant if any, Professor Turner's reaction must have come as quite a shock. This was not a good beginning for the fledgling Executive Order, and it would only get worse.

Six days after President Bush signed the Executive Order, the Washington Post published a scathing letter, written jointly by Professor Turner and former Commandant of the Marine Corps, General P. X. Kelley (Retired), as their lead op-ed.⁷¹ To boost its credibility, the letter began by highlighting the authors' impressive credentials. While General Kelley's title speaks for itself, Professor Turner reminds us how he "has vigorously defended the constitutionality of warrantless National Security Agency wiretaps, presidential signing statements and many other controversial aspects of the war on

⁶⁸ See JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW xxii (2d ed. 2005) (Turner is a former Army Captain who served twice in Vietnam. His extensive federal government service includes five years as national security advisor to Senator Robert P. Griffin, a Foreign Relations Committee member, and assignments as Special Assistant to the Under Secretary of Defense for Policy, as Counsel to the President's Intelligence Oversight Board at the White House, and as Principal Deputy and acting Assistant Secretary of State for Legislative and Intergovernmental Affairs. He was the first President of the Congressionally established U.S. Institute of Peace. He has testified as a national security expert before more than a dozen committees of Congress.)

⁶⁹ See Douglas & Landay, *supra* note 30.

⁷⁰ Statement of Robert Turner, *supra* note 9.

⁷¹ See P. X. Kelley & Robert F. Turner, *War Crimes and the White House: The Dishonor in a Tortured New 'Interpretation' of the Geneva Conventions*, WASH. POST, July 26, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/25/AR2007072501881.html>.

terrorism.”⁷² Both two-tour Vietnam veterans, these were powerful and unexpected sources of attack.

Their assessment of Executive Order 13440’s egregious effect is somber. They emphatically warn that it “has compromised our national honor and . . . may well promote the commission of war crimes by Americans and place at risk the welfare of captured American military forces for generations to come.”⁷³ They specifically hone in on the “for the purpose of” language, pointing out the problem:

[A]s long as the intent of the abuse is to gather intelligence or to prevent future attacks, and the abuse is not “done for the purpose of humiliating or degrading the individual”—even if that is an inevitable consequence—the president has given the CIA carte blanche to engage in “willful and outrageous acts of personal abuse.”⁷⁴

Citing the universally accepted principle of international law that a treaty must be interpreted in good faith, in accordance with the plain meaning of its words as well as its intent and purpose,⁷⁵ they argue that the Executive Order does not even come close to upholding the United States’ obligation under Common Article 3 to treat all detainees humanely, which includes refraining from any acts of violence against their person.⁷⁶

Turner told the Senate Committee that clearly “someone . . . had inserted an escape clause designed to authorize serious physical abuse of detainees . . . on the theory that the purpose of the abusive treatment was intelligence gathering and not a desire to humiliate or degrade the individual.”⁷⁷ Turner’s aversion to the Executive Order went beyond the mere fact that it authorized international law violations. Perhaps equally repugnant was the blatantly deceptive nature of the ruse. As he told the Committee, “any bright high school graduate who read the order would likely . . . conclude that the President was trying to deceive the country into believing America was going to

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *See id.*; Statement of Robert Turner, *supra* note 9; Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 (signed but not ratified by the U.S., but most of this treaty is considered customary international law, including art. 31, General Rule of Interpretation).

⁷⁶ *See* Kelley & Turner, *supra* note 71.

⁷⁷ Statement of Robert Turner, *supra* note 9.

comply with its Common Article 3 obligations while actually reserving [the] option of serious physical and mental abuse.”⁷⁸

The Judge Advocates General (TJAGs) for each branch of service were quick to circle the wagons and distance the military’s newly refurbished interrogation program⁷⁹ from any taint of the controversy. Shortly after the Executive Order was issued they met with Senators Warner and Graham, and an aide filling in for Senator McCain.⁸⁰ The four TJAGs unanimously voiced the same concern as Professor Turner with regard to the purpose exception for humiliating or degrading interrogation techniques.

Additionally, they emphatically clarified that this Executive Order only applied to the CIA. Concerned about the high chance of confusion, the Army TJAG, Major General Scott C. Black, reminded all Army lawyers that the Executive Order did not change or affect the rules for the Army in any way.⁸¹ Major General Black’s office followed up with a more detailed article in the Army Lawyer, emphasizing that the Executive Order did not apply to anyone in the Department of Defense (DoD).⁸²

The American Bar Association (ABA) quickly pounced as well. It issued a report in which it attacks the Executive Order for deceptively claiming that the CIA’s interrogation program satisfies Common Article 3, while in reality establishing “just the opposite . . . [granting] the CIA authority to engage in cruel and abusive practices.”⁸³ In the report, the ABA fervently urges Congress to supersede the Executive Order by making the military’s detention and interrogation rules applicable to all U.S. actors.⁸⁴

The Washington Director of Human Rights First was also invited by the Senate Select Intelligence Committee to give her opinion on Executive Order 13440. In the hearing she also pointed out the problem with the “purpose” exception. She testified that the Executive Order “appear[s] to permit, rather than prohibit, ‘willful and outrageous acts of personal abuse’ so

⁷⁸ *Id.*

⁷⁹ See discussion *infra* part IV (U.S. military interrogation rules).

⁸⁰ See Savage, *supra* note 67.

⁸¹ See Major General Scott C. Black, *TJAG Sends, A Message from The Judge Advocate General*, vol. 37-15, Aug. 2007, available at [https://144.59.243.25/laawsxxi/jagcprofile.nsf/\(JAGCNetDocID\)/Announcements](https://144.59.243.25/laawsxxi/jagcprofile.nsf/(JAGCNetDocID)/Announcements).

⁸² See Jackson & Jensen, *supra* note 9, at 69.

⁸³ ABA REPORT, *supra* note 30, at 1.

⁸⁴ See *id.*

long as the purpose of such acts was to gain intelligence rather than to humiliate or degrade the prisoner.”⁸⁵ Human Rights First also advocates making the military’s detention and interrogation rules the sole, required standard for all U.S. agencies, including the CIA.

Not long after the Executive Order was issued, General Hayden gave a speech which was dissected by a Human Rights First attorney in a derisive critique. The attorney wrote that General Hayden has apparently never been through SERE school since he “collapsed into a flustered mass of contradictions as soon as he faced critical questioning.”⁸⁶ He decried General Hayden for sticking his head in the sand and intentionally failing to understand the meaning of Common Article 3.⁸⁷ Countering General Hayden’s dismissal of Common Article 3 for being vague, the attorney accused General Hayden of creating ambiguities himself by trying to sneak the enhanced interrogation techniques into the intentionally ambiguous Executive Order.⁸⁸ He bluntly charged that General Hayden really does understand what Common Article 3 means, he just calls it vague because he knows that it prohibits his beloved enhanced interrogation techniques.⁸⁹ He called General Hayden’s “evasive and false answers . . . evidence of an intention to *subvert* the law.”⁹⁰ He discounted General Hayden and other supporters of Executive Order 13440 as “operating in the twilight world”⁹¹ in which the law is just a game of words: “[T]weak a word here or there—give it some audacious and secret meaning—and you can call *anything* legal. Even torture.”⁹²

Many others blasted the President and CIA Director for playing “legalistic games”⁹³ in the Executive Order. Picking apart the “artful (but

⁸⁵ *Pending Intelligence Matters: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. (Sept. 25, 2007) (statement of Elisa Massimino, Washington Director, Human Rights First) [hereinafter Statement of Elisa Massimino].

⁸⁶ Horton, *supra* note 37.

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *Id.*

⁹¹ Horton, *supra* note 37.

⁹² *Id.*

⁹³ Benjamin Davis, *Gutting the Geneva Conventions in the ‘War on Terror,’* JURIST, July 25, 2007, available at <http://jurist.law.pitt.edu/forumy/2007/07/gutting-geneva-conventions-in-war-on.php>.

ultimately transparent) phrases,”⁹⁴ such as “done for the purpose,” one law school professor cautioned that you have to really read between the lines in this Executive Order in order to understand what it is really saying.⁹⁵

Certainly there have been the expected defenses to these critiques from the “ends justifies the means” camp. Some have responded that these critics are simply overreacting, reading too much into the Executive Order.⁹⁶ Others, of course, are actually in favor of torturing war on terror detainees and are not afraid to admit it. After all, “[h]owever we treat them, they will torture and behead our soldiers.”⁹⁷ While he was running for President, Rudolph Giuliani stated that, if elected, he would authorize interrogators to employ “every method they could think of.”⁹⁸ But by far, public response, including countless prominent voices from all points of the political spectrum, has been consistently and overwhelmingly against the Executive Order.⁹⁹

⁹⁴ *Id.*

⁹⁵ *See id.*

⁹⁶ *See Savage, supra* note 67.

⁹⁷ Posner, *supra* note 64.

⁹⁸ Editorial, *A Question of Torture – Excepting John McCain, Republican Candidates for President Seem to Favor It*, WASH. POST, May 17, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/16/AR2007051602412.html> [hereinafter *A Question of Torture*].

⁹⁹ *See* discussion *infra* part V (regarding negative international reaction to Bush Administration’s policy on detainee treatment).

III. APPLYING COMMON ARTICLE 3 TO THE CIA'S INTERROGATION TECHNIQUES

The United States' position remains that Common Article 2¹⁰⁰ and the full protections provided to "prisoners of war" under the Third Geneva Convention do not apply to Al Qaeda and other, stateless, war on terrorism detainees. No one has seriously challenged this position, as those full protections only apply in armed conflicts between two Geneva Convention signatory states.¹⁰¹ But many have argued that Common Article 3 should apply, and as discussed, the U.S. is now officially in agreement.

Common Article 3, known as a mini-convention, or a "convention within a convention,"¹⁰² provides rules for the minimum, basic treatment of detainees. It states that "[p]ersons . . . shall *in all circumstances* be treated humanely."¹⁰³ It prohibits "at any time and in any place whatsoever . . . violence to life and person, . . . cruel treatment and torture, [and] . . . [o]utrages upon personal dignity, *in particular, humiliating and degrading treatment.*"¹⁰⁴

While President Bush, General Hayden and others have complained about Common Article 3 being too vague to understand, one aspect of it is clear enough: unlike Executive Order 13440, Common Article 3 does not contain any loopholes or exceptions to its prohibitions. It does not state that the prohibited acts are permissible as long as conducted for purposes other than humiliation or degradation, or for otherwise good purposes. The prohibited acts are prohibited under all circumstances, period.

¹⁰⁰ This provision is referred to as "Common Article 2" since it is present in all four Geneva Conventions. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

¹⁰¹ *See supra* note 100.

¹⁰² JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTIONS OF WAR VICTIMS 32 (1975).

¹⁰³ *See supra* note 8 (emphasis added).

¹⁰⁴ *Id* (emphasis added).

Exact, specific definitions of the prohibited terms in Common Article 3 are for the most part lacking. This was not an oversight on the part of the Geneva Convention drafters, but quite intentional.¹⁰⁵ It was considered better to let the plain meaning of the terms speak for themselves rather than attempt to define the terms further, since exact definitions would open the doors to narrow exceptions and clever arguments as to why the terms did not apply.¹⁰⁶ The language and underlying intent of Common Article 3 was considered clear enough: “Treat people like humans and not animals or objects.”¹⁰⁷

The one prohibited term that has been defined is torture. The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which has over 140 signatories, defines torture as “the intentional infliction of severe physical or mental pain or suffering.”¹⁰⁸ The U.S. ratified the CAT with certain declarations, reservations, and understandings, including further definition of mental torture, but the implementing statute has essentially the same definition of torture as the CAT.¹⁰⁹

Lesser forms of mistreatment, such as humiliating or degrading treatment, are not further defined like torture, but are obviously considered to be less severe abuse. When applying the definition of torture as well as the plain meaning and intent of the other Common Article 3 prohibitions to the enhanced interrogation techniques, the problems become evident. The CIA’s own Inspector General apparently agreed that the techniques violated Common Article 3, saying they “appeared to constitute cruel and degrading treatment under the [Geneva] convention.”¹¹⁰ Countless others agree. During the Military Commissions Act debates, Congress invited several medical experts, including the heads of the American Psychiatric Association and the American

¹⁰⁵ See R. Jeffrey Smith, *War Crimes Act Changes Would Reduce Threat Of Prosecution*, WASH. POST, Aug. 9, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/08/08/AR20060808_01276.html.

¹⁰⁶ See *id.*

¹⁰⁷ *Id.* (quoting Lieutenant Colonel Geoffrey S. Corn, U.S. Army (Retired), former chief, law of war branch, Office of the Judge Advocate General).

¹⁰⁸ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1 (1984), 1465 U.N.T.S. 85; MICHAEL J. GARCIA, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES 1 (2004), available at <http://www.fas.org/irp/crs/RL32438.pdf> [hereinafter CRS CAT Overview].

¹⁰⁹ See 18 U.S.C. § 2340; CRS CAT Overview, *supra* note 108, at 5.

¹¹⁰ Ross & Esposito, *supra* note 27 (quoting John Helgerwon).

Psychological Association, to cast their opinion on these techniques. Calling the techniques brutal, the joint medical opinion was that these techniques “can have a devastating impact on the victim’s physical and mental health. They cannot be characterized as anything but torture and cruel, inhuman, and degrading treatment.”¹¹¹ Senator McCain, a five and a half year veteran of North Vietnam’s POW camps, knows first hand what torture is. One would certainly surmise that he would not use that term lightly, and he calls the enhanced interrogation techniques “torture.”¹¹²

Looking at specific techniques, shaking a person can cause not only serious physical injury, but even death.¹¹³ Slapping or striking a person, especially when he is bound and unable to move or otherwise defend himself, can cause not only serious and permanent physical injury, such as detached retinas and spinal injuries,¹¹⁴ but serious and permanent psychological damage as well.¹¹⁵ Forced, prolonged standing can be not only very painful, but can even cause death from swelling and blood clots that can form in the legs.¹¹⁶ This simple technique has widely been considered torture for ages.¹¹⁷

¹¹¹ Statement of Elisa Massimino, *supra* note 85. See Sarah Jordan, *APA President & Past President Join in Call for a Prohibition Against Abusive Interrogation Tactics*, AM. PSYCHOL. ASS’N EXPERIMENTAL PSYCHOL. BULL., Sept. 2006, available at <http://www.apa.org/divisions/div3/Newsletter2006-10-2/Newsletter2006-10-2f.htm>; Mark Benjamin, *Psychologists to CIA: We Condemn Torture*, SALON, Aug. 15, 2007, available at http://www.salon.com/news/feature/2007/08/15/apa_torture/.

¹¹² *A Question of Torture*, *supra* note 98.

¹¹³ See Statement of Elisa Massimino, *supra* note 85; Letter from Open Soc’y Pol’y Ctr. et al., to Condoleezza Rice, Sec’y of State (June 11, 2007), available at http://www.americanprogress.org/issues/2007/06/rice_letter.html (letter on interrogation standards sent to Secretary Rice from: Open Society Policy Center, Human Rights Watch, Human Rights First, Physicians for Human Rights, Center for National Security Studies, National Institute of Military Justice, and the Center for American Progress) [hereinafter Letter to Secretary Rice].

¹¹⁴ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹¹⁵ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹¹⁶ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹¹⁷ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

Comparing historical examples and interpretations by the U.S., its allies, as well as notorious, totalitarian regimes, these techniques do not fare well. The United Kingdom used to employ what it referred to as “the five techniques”¹¹⁸ in Northern Ireland. These techniques included a stress position called “wall standing,”¹¹⁹ hooding, continuous loud noise, food and drink deprivation, and sleep deprivation combined with disorientation and sensory deprivation.¹²⁰ The U.K. stopped using these techniques in 1972, and in 1977 declared them to be illegal.¹²¹ They are all part of the CIA program.

In 1999, Israel banned the use of identical and similar techniques, including stress positions involving handcuffing the detainee to a chair in an uncomfortable position, or forcing the detainee to crouch on his toes for a prolonged period; shaking the detainee; over-tightening a detainee’s handcuffs; and sleep deprivation.¹²² The Israeli Supreme Court stated that shaking a detainee, which killed one Israeli prisoner, or forcing a prisoner to stand in a stress position on his toes for even a short period of time not only harmed the person physically, but degraded him and violated his dignity as well.¹²³ Israel does not allow exceptions for these techniques for any purpose.

After World War II, the U.S. prosecuted Japanese soldiers for using the same techniques against Americans. The U.S. called these techniques war crimes. A Japanese corporal was convicted of forcing American prisoners to endure prolonged standing by having to stand at the position of attention for up to seven hours.¹²⁴ A Japanese seaman was convicted of forcing an American prisoner to remain in a partial squat position with arms raised above his head for

¹¹⁸ Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹¹⁹ Statement of Elisa Massimino, *supra* note 85. See Letter to Secretary Rice, *supra* note 113.

¹²⁰ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113; Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811, 845 (2005); CRS CAT Overview, *supra* note 108, at 12-13.

¹²¹ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹²² See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113; CRS CAT Overview, *supra* note 108, at 13-15.

¹²³ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹²⁴ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

periods of five to fifteen minutes.¹²⁵ The U.S. military commission called this stress technique torture.¹²⁶

The North Korean technique of making prisoners stand still for hours has been labeled torture, as has their technique of making prisoners repeatedly sit down and stand up until they collapse.¹²⁷ In 2002 the U.S. Supreme Court ruled that tying a prisoner to a post and forcing him to stand in a stress position in the sun was “obvious cruelty . . . antithetical to human dignity . . . degrading . . . [and] dangerous.”¹²⁸ While that case involved a domestic prisoner, this same technique has reportedly been used by such states as Iran and Libya.¹²⁹ Recently, other U.S. federal courts have found mistreatment involving stress positions, and exposure to extreme temperatures, to constitute torture.¹³⁰

In 1957 the CIA funded a study of Soviet KGB interrogation techniques at Cornell University.¹³¹ With regard to forced prolonged standing, the study found that:

After 18 to 24 hours of continuous standing, there is an accumulation of fluid in the tissues of the legs . . . The ankles and feet . . . swell to twice their normal circumference. The edema may rise up the legs . . . The skin becomes tense and intensely painful. Large blisters develop, which break and exude watery serum . . . The heart rate increases, and fainting

¹²⁵ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹²⁶ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹²⁷ See Benjamin Hu, *Nightmares From the North: Korean Son Recounts Life in Dictatorship*, WASH. TIMES, Apr. 30, 2004, available at http://findarticles.com/p/articles/mi_hb5244/is_200404/ai_n19582988; Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹²⁸ *Hope v. Pelzer*, 536 U.S. 730, 745 (2002).

¹²⁹ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹³⁰ See *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 69 (D.D.C. 1998); *Hilao v. Marcos*, 103 F.3d 789, 795 (9th Cir. 1996); *Lhazom v. Gonzales*, 430 F.3d 833, 848 (7th Cir. 2005); Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹³¹ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

may occur. Eventually, there is a renal shutdown, and urine production ceases.¹³²

How this technique cannot be considered, at a minimum, violence to person, an outrage upon personal dignity, humiliating, or degrading, if not outright torture, is difficult to fathom.

Known as “tormentum insomniae” in the Middle Ages, sleep deprivation, which is often used in conjunction with other techniques, such as prolonged standing, has long been considered torture.¹³³ Sixty years ago the U.S. Supreme Court cited as authority an ABA report that stated that sleep deprivation has been considered “the most effective torture”¹³⁴ since at least 1500. Sleep deprivation was another favorite tool of the Soviets, considered their usual method for breaking a prisoner.¹³⁵ A study of the Soviet practice found that after two or three days of forced sleep deprivation, the victim experiences immense suffering, equal to any other form of torture.¹³⁶ Not surprisingly, it was also a basic tool in the Nazi Gestapo interrogation kit.¹³⁷ The U.S. State Department has even called it torture, criticizing such states as Iran, Saudi Arabia, and Tunisia for using it.¹³⁸ The U.K. and Israel have both banned its use as an interrogation technique.¹³⁹

Making prisoners stand naked in freezing cold temperatures and soaking them with cold water was also prosecuted by the U.S. as a war crime after World War II.¹⁴⁰ How this technique cannot be considered violence to

¹³² See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹³³ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹³⁴ *Ashcraft v. Tennessee*, 322 U.S. 143, 149 (1944). See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹³⁵ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹³⁶ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹³⁷ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹³⁸ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹³⁹ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹⁴⁰ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

person, an outrage upon personal dignity, humiliating, or degrading, if not torture, also evades comprehension.

Waterboarding was used as an interrogation technique in the Middle Ages by the Spanish Inquisition,¹⁴¹ infamous for its mastery of extremely vicious torture techniques. It has been a common technique among the most notorious regimes in the world, including Cambodia's Khmer Rouge¹⁴² and Argentina's military junta.¹⁴³ It was yet another interrogation technique prosecuted by the U.S. as a war crime after World War II.¹⁴⁴

So in looking closely at the basic acts and effects involved with these enhanced interrogation techniques, no one can reasonably argue that they are not, at a minimum, humiliating or degrading to the detainee. Hence, supporters of the CIA program can only argue that these effects on the detainee are just not the desired end state of the interrogator. They are merely unfortunate, unavoidable consequences of the techniques—acceptable collateral damage. The sole desired end state of the interrogator is valuable intelligence. Common Article 3, though, *is* aimed at the effects experienced by the detainee. The good intentions behind causing those effects are simply irrelevant.

IV. COMPARISON TO U.S. MILITARY INTERROGATION RULES

The interrogation rules that apply to DoD personnel differ substantially from those that govern the CIA. In “stark contrast”¹⁴⁵ to Executive Order

¹⁴¹ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹⁴² See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113; Cambodian Cultural Museum and Killing Fields Memorial, <http://www.killingfieldsmuseum.com/genocide/genocide.html> (last visited Dec. 30, 2008) (between 1975-1979, this regime killed an estimated 2 million of its own people—30% of the country's population—by starvation, torture, and murder).

¹⁴³ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113; Luis Clemens, *Argentina's "Dirty War": An Ugly Episode That Won't Die*, CNN, Mar. 2, 1998, available at <http://www.cnn.com/WORLD/9803/02/argentina.dirty.war/> (from 1976-1983, this regime tortured and murdered an estimated 30,000 of its own people).

¹⁴⁴ See Statement of Elisa Massimino, *supra* note 85; Letter to Secretary Rice, *supra* note 113.

¹⁴⁵ ABA REPORT, *supra* note 30, at 5.

13440, the DoD Detainee Program¹⁴⁶ expressly incorporates all of the provisions of Common Article 3 into its rules on the treatment of all detainees. Significantly, it applies Common Article 3 as the minimum required standard of treatment without taking into account an individual's official legal status.¹⁴⁷ Another major difference between the DoD and CIA interrogation programs is that the DoD techniques are completely unclassified and subject to public scrutiny.¹⁴⁸

With regard to specific interrogation techniques, pursuant to the Detainee Treatment Act of 2005,¹⁴⁹ DoD is bound by the U.S. Army Field Manual on Human Intelligence Collector Operations (FM 2-22.3).¹⁵⁰ Recently overhauled, this manual has been lauded as textbook guidance for interrogations and detainee treatment complying with the law of war, especially Common Article 3. The Detainee Treatment Act, originally known as the McCain Amendment, prohibits DoD personnel from using any interrogation technique that is not specifically listed in FM 2-22.3.¹⁵¹ Further, per the Detainee Treatment Act and DoD instruction, non-DoD personnel, such as the CIA, may only use FM 2-22.3 techniques in DoD facilities.¹⁵² DoD cannot make any changes to FM 2-22.3 without Congressional approval.¹⁵³

The timing of the revised DoD detainee and interrogation rules was not arbitrary. Criticism of DoD detainee treatment had been increasing for over a year, following the disastrous Abu Ghraib scandal and complaints coming out of Guantanamo Bay. Twelve major DoD investigations were conducted on

¹⁴⁶ U.S. DEP'T OF DEFENSE, DIR. 2310.01E, DEP'T OF DEF. DETAINEE PROGRAM (5 Sept. 2006).

¹⁴⁷ See Jackson & Jensen, *supra* note 9, at 69.

¹⁴⁸ See Lieutenant General John Kimmons, Deputy Chief of Staff for Intelligence, U.S. Army, Address at the Foreign Press Center: Department of Defense Directive on Detainee Operations, the Release of the Army Field Manual for Human Intelligence Collection and an Update on Military Commissions (Sept. 7, 2006), available at <http://fpc.state.gov/fpc/71958.htm>.

¹⁴⁹ DTA, *supra* note 55.

¹⁵⁰ U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (Sept. 2006) [hereinafter FM 2-22.3].

¹⁵¹ See DTA, *supra* note 55, at 2741; Jackson & Jensen, *supra* note 9, at 69, 70.

¹⁵² See DTA, *supra* note 55, at 2741; U.S. DEP'T OF DEFENSE, DIR. 3115.09, DEP'T OF DEFENSE INTELLIGENCE INTERROGATIONS, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING para. 3.4.4.3 (w/Ch. 1) (5 Oct. 2006); Jackson & Jensen, *supra* note 9, at 69, 70.

¹⁵³ See Jackson & Jensen, *supra* note 9, at 69, 70.

detainee abuse.¹⁵⁴ As the Deputy Assistant Secretary of Defense for Detainee Affairs explained upon its public release, the revision represented “over a year of discussion and debate . . . It reaffirms our commitment to treat people humanely . . . It was important to get it right.”¹⁵⁵

The Army Deputy Chief of Staff for Intelligence also spoke on the release of the current DoD rules, and the desired end state of the war on terrorism was not lost on him. He praised the approximately five hundred deployed DoD interrogators for performing a tough job under tough conditions, trying their best to collect critical intelligence which saves lives and hurts the enemy.¹⁵⁶ But he did not disregard the means, saying that these interrogators accomplish their mission without violating Common Article 3.¹⁵⁷

Field Manual 2-22.3 expressly adopts the Common Article 3 prohibitions, and includes a non-exclusive list of specific, prohibited acts which DoD considers clear Common Article 3 violations. This list includes hooding, forced nakedness, and other techniques directly attributed to Abu Ghraib, as well as exposure to extreme temperatures and waterboarding.¹⁵⁸ Unlike Executive Order 13440, FM 2-22.3 does not contain any loopholes or exceptions to its prohibitions. It does not state that the prohibited acts are permissible as long as conducted for purposes other than humiliation or degradation, or for otherwise good purposes. The prohibited acts are prohibited under all circumstances.

When comparing the specific techniques authorized by FM 2-22.3 and the purported CIA techniques, the differences become readily apparent. Of the nineteen interrogation techniques listed in FM 2-22.3, sixteen were contained in the old DoD manual,¹⁵⁹ which had last been updated in 1992. While there may not have been anything wrong in the old manual, it was thought to be in need of clarification, in addition to adding the three new techniques.¹⁶⁰ The three new

¹⁵⁴ See Cully Stimson, Deputy Assistant Sec’y of Def. for Detainee Affairs, Address at the Foreign Press Center: Department of Defense Directive on Detainee Operations, the Release of the Army Field Manual for Human Intelligence Collection and an Update on Military Commissions (Sept. 7, 2006), available at <http://fpc.state.gov/fpc/71958.htm>.

¹⁵⁵ *Id.*

¹⁵⁶ See Kimmons, *supra* note 148.

¹⁵⁷ See *id.*

¹⁵⁸ See FM 2-22.3, *supra* note 150, at para. 5-75.

¹⁵⁹ FM 34-52.

¹⁶⁰ See Kimmons, *supra* note 148.

approved techniques are: the Mutt and Jeff, or good cop/bad cop, routine;¹⁶¹ the False Flag technique, in which the interrogator pretends to be non-American;¹⁶² and Separation, which involves physically separating detainees from other detainees in order to prevent them from corroborating stories or assisting each other in interrogation resistance.¹⁶³ All three of these newly authorized techniques require special approval.¹⁶⁴ The first two require approval from the first colonel in the interrogator's chain of command.¹⁶⁵ Separation, which has its own "Restricted Interrogation Technique" Appendix, requires the approval of the combatant commander, a four-star general.¹⁶⁶ Not only is violence against a detainee strictly prohibited in all nineteen techniques, but the threat of violence is prohibited as well.¹⁶⁷

General Hayden was asked why the CIA's rules differ from the military's. He essentially pointed out that the CIA's mission was different than the military's, hence it should not be surprising that its interrogation rules differed too.¹⁶⁸ He believes that FM 2-22.3 was specifically designed for the military, allowing it to train large numbers of young service members to be able to conduct quick interrogations, on combat zone detainees, for relatively simple, tactical purposes.¹⁶⁹ Contrast the CIA's mission, which is to interrogate high value detainees for big picture, strategic purposes. He argued that FM 2-22.3 did not corner the market on all possible interrogation techniques that comply with Common Article 3.¹⁷⁰ Just because an interrogation technique is not listed in FM 2-22.3, that does not mean it necessarily violates Common Article 3. That argument seems reasonable, but it loses some validity when issued by one who openly claims to not understand what Common Article 3 means.

General Hayden also made the point that, unlike the military, the CIA only interrogates a relatively small number of detainees.¹⁷¹ Additionally, he

¹⁶¹ See *id.*; FM 2-22.3, *supra* note 150, at para. 8-65.

¹⁶² See Kimmons, *supra* note 148; FM 2-22.3, *supra* note 150, at para. 8-69.

¹⁶³ See Kimmons, *supra* note 148; FM 2-22.3, *supra* note 150, at para. 8-71.

¹⁶⁴ See Kimmons, *supra* note 148; FM 2-22.3, *supra* note 150, at para. 8-3.

¹⁶⁵ See Kimmons, *supra* note 148; FM 2-22.3, *supra* note 150, at para. 8-3.

¹⁶⁶ See Kimmons, *supra* note 148; FM 2-22.3, *supra* note 150, at para. 8-3.

¹⁶⁷ See FM 2-22.3, *supra* note 150, at para.8-68.

¹⁶⁸ See General Michael V. Hayden, Director, CIA, Remarks at the Council on Foreign Relations (Sept. 7, 2007), *available at* <https://www.cia.gov/news-information/speeches-testimony/2007/general-haydens-remarks-at-the-council-on-foreign-relations.html>.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

proclaimed that the average age of CIA interrogators is forty-three, and those who perform the enhanced interrogation techniques receive 240 hours of training.¹⁷² Perhaps he is implying that, given the relatively high level of experience and maturity of CIA interrogators, coupled with the low number of detainees they interrogate, Common Article 3 violations are less likely to occur. Hence, they do not need the same strict reigns as military interrogators, who are relatively younger, less experienced, and suffer from the high pressure of having to sift through a much larger volume of detainees.

The argument that less mature, less experienced, overworked interrogators are generally more likely to commit acts for the actual purpose of humiliating or degrading detainees has some merit. But the problem still remains. The older, more mature CIA interrogator committing the same acts as that immature military interrogator, but for the sole purpose of gathering intelligence, still violates Common Article 3. No doubt, committing the same act for the actual purpose of humiliating or degrading the detainee is worse in many respects. Gathering intelligence is unquestionably important, especially compared to satisfying one's sadistic desires, which of course has no objective value to our country. But the detainee experiences the same effect either way, which is why Common Article 3 does not take the purpose of the act into account.

V. POTENTIAL PROBLEMS WITH EXECUTIVE ORDER 13440

A. Damages U.S. Reputation and Standing in the International Community

One cost of Executive Order 13440 is it damages the United States' international reputation and standing, thereby harming its international relations and interests. Violations of the law of war, specifically Common Article 3, depict the U.S. as an "arrogant nation, above the law."¹⁷³ Many believe that U.S. standing in much of the world has been "all but destroyed"¹⁷⁴ by the Bush Administration's policy on detainee treatment. Some believe that the United States' "reputation has been trashed around the world [and] [w]e are now despised and distrusted by populations which only a few years ago were close allies."¹⁷⁵ Expert witnesses have testified vehemently to Congress that the CIA

¹⁷² *See id.*

¹⁷³ ABA REPORT, *supra* note 30, at 9.

¹⁷⁴ *A Question of Torture*, *supra* note 98.

¹⁷⁵ Horton, *supra* note 37. *See generally* *World Polls: U.S. Reputation Falls: In 8 of 10 Countries, Majority Said View of America Had Worsened*, CBS NEWS, Oct. 15, 2004, available at <http://www.cbsnews.com/stories/2004>

interrogation program has “inflicted enormous damage on the honor and reputation of the United States.”¹⁷⁶

Executive Order 13440 further cements this destruction of the United States’ reputation and standing. Not only does it authorize violations of Common Article 3, but it does so in a deceptive manner, attempting to hide its true intent. So in addition to the problems caused by authorizing humiliating and degrading treatment of detainees, the Order also creates mistrust of the United States.

Just a month before the release of Executive Order 13440, a U.S. State Department official gave a speech at the Hague “about the United States and international law.”¹⁷⁷ The sole purpose of the speech was to patch up the “reproach and recrimination regarding international law”¹⁷⁸ that the U.S. had been receiving around the world. The U.S. representative began the speech by good naturedly admitting: “Some of you may think it rather bold of me to come to a city renowned for its institutions of international peace, justice, and security and talk about the United States’ commitment to international law.”¹⁷⁹ One can imagine the silence at this point as he nervously chuckled. He then laid the problem out on the table:

/10/15/world/main649513.shtml (showing the United States’ declining reputation in many ally countries, including: Canada, France, Great Britain, Spain, Japan, South Korea, Australia, and Mexico); World Public Opinion.org, *Publics in Europe and India See US as Violating International Law at Guantanamo*, July 17, 2006, http://www.worldpublicopinion.org/pipa/articles/home_page/229.php?nid=&id=&pnt=229&lb=hmpg2 (showing deteriorating U.S. reputation in Germany, Great Britain, Poland, and India regarding detainee treatment and the use of torture in interrogations); Dan Eggen, *White House Pushes Waterboarding Rationale: Administration May Be Trying to Shore Up Prosecution of Terrorism Suspects*, WASH. POST, at A03, Feb. 13, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/story/2008/02/12/ST2008021203098.html> (showing the negative reaction that the U.N. Special Rapporteur on Torture had to the U.S. admission that they used waterboarding).

¹⁷⁶ Statement of Elisa Massimino, *supra* note 85.

¹⁷⁷ John B. Bellinger III, Legal Advisor, U.S. Dep’t of State, Remarks at The Hague, Netherlands: The United States and International Law (June 6, 2007), available at <http://www.state.gov/s/l/rls/86123.htm>.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

[T]he United States has taken a battering in Europe . . . for its commitment to international law—or, rather, what is criticized as its lack of commitment . . . [O]ur critics sometimes paint the United States as . . . willing to duck or shrug off international obligations when they prove constraining or inconvenient. That picture is wrong. The United States *does* believe that international law matters . . . Tonight I will show . . . our commitment to international law.¹⁸⁰

The U.S. representative assured the audience that when the U.S. assumes “international obligations, we take them seriously and seek to meet them, even when doing so is painful.”¹⁸¹ He concluded by openly and warmly reaffirming the United States’ commitment to building “international cooperation and the rule of law.”¹⁸²

Then, with the applause from this speech and all its right words practically still reverberating, President Bush launched Executive Order 13440. The message? While the U.S. can whip up a really nice speech at the Hague, do not believe a word of it. The U.S. does not take Common Article 3 seriously when it comes to the CIA interrogation program—that would be too painful. As Professor Turner told the Senate Select Intelligence Committee, the Executive Order “was but the latest of many examples where it appeared this administration simply didn’t care about domestic or international public opinion.”¹⁸³ Critics are bracing for the expected “devastating consequences”¹⁸⁴ of the Executive Order.

During the Detainee Treatment Act debates, Senator McCain received a joint letter signed by more than a dozen retired generals, admirals, and former prisoners of war who supported the effort to establish standards of detainee treatment that outlawed abuse.¹⁸⁵ The signatories of this letter declared that detainee abuse “hurts America’s cause in the war on terror, endangers U.S. service members who might be captured by the enemy, and is anathema to the values Americans have held dear for generations.”¹⁸⁶ One of the signatories was a former Judge Advocate General of the Navy. He later explained his grave concern that if the U.S. cannot fully commit to non-abusive treatment of

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Bellinger, *supra* note 177.

¹⁸³ Statement of Robert Turner, *supra* note 9.

¹⁸⁴ Davis, *supra* note 93.

¹⁸⁵ See Herbert, *supra* note 56.

¹⁸⁶ *Id.*

detainees, we will “have changed the DNA of what it means to be an American.”¹⁸⁷

A scenario was posed to the ten Republican presidential candidates during a recent debate. The scenario involved the interrogation of captured terrorists in the aftermath of suicide attacks in several U.S. cities. The candidates were asked, if they were President, how aggressively would they want the detainees interrogated, especially if it was believed that the detainees knew about future similar attacks. In response to whether they would authorize torture, Senator McCain was the only candidate who clearly said “no,” saying “we could never gain as much from that torture as we lose in world opinion.”¹⁸⁸

Following this debate, former Commandant of the Marine Corps General Charles C. Krulak (Retired) and Marine Corps General Joseph P. Hoar (Retired), a former Central Command commander, wrote an op-ed in the Washington Post. They talked about the danger of fear. Fear can be an extremely powerful motivator, they wrote, causing leaders to overreact in the wrong ways.¹⁸⁹ They cite President Franklin D. Roosevelt interning tens of thousands of innocent Japanese Americans during World War II, and Senator Joseph McCarthy’s communist “witch hunt” during the 1940s and 1950s, which devastated hundreds, if not thousands, of innocent Americans.¹⁹⁰ And they equally compare the current Bush administration’s fear-driven policy which authorizes torture of detainees.¹⁹¹ The Generals have no problem calling such interrogation techniques as waterboarding, sensory deprivation, sleep deprivation and stress positions torture and war crimes.¹⁹² With regard to combating fear, they offered their expert opinion.

We have served in combat; we understand the reality of fear and the havoc it can wreak if left unchecked or fostered. Fear breeds panic, and it can lead people and nations to act in ways inconsistent with their character. The American people are understandably fearful about another attack like the one we

¹⁸⁷ Herbert, *supra* note 56 (quoting Rear Admiral John Hutson (Retired)).

¹⁸⁸ *A Question of Torture*, *supra* note 98.

¹⁸⁹ See Charles C. Krulak & Joseph P. Hoar, *It's Our Cage, Too – Torture Betrays Us and Breeds New Enemies*, WASH. POST, at A-17, May 17, 2007, available at

http://www.washingtonpost.com/wp-dyn/content/article/2007/05/16/AR2007051602395_pf.html.

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

¹⁹² See *id.*

sustained on Sept. 11, 2001. But it is the duty of the commander in chief to lead the country away from the grip of fear, not into its grasp.¹⁹³

The two generals criticized all but one of the Republican candidates for demonstrating their “stunning failure to understand this most basic obligation . . . [O]nly John McCain demonstrated that he understands the close connection between our security and our values as a nation.”¹⁹⁴ To those who believe that such tactics as the CIA interrogation program are necessary to win the war on terror, they offered an alternative: “It is time for us to remember who we are and approach this enemy with energy, judgment and confidence that we will prevail. That is the path to security, and back to ourselves.”¹⁹⁵

B. Reciprocity

Another cost of Executive Order 13440 is the risk of reciprocity. One of many reasons we abide by the law of war is to avoid giving the enemy the desire to reciprocate the same law of war violations against U.S. personnel. Understandably, many are skeptical of this benefit, as this concept has debatable concrete merit when applied on a case by case basis. Al Qaeda, for instance, may treat captured U.S. personnel the same way whether we uphold the law of war or not. Hence, there is no incentive to apply Common Article 3 against Al Qaeda. Following this quid pro quo perspective, “[s]tates comply with the Geneva Conventions, when they do, because in return for their humane treatment of enemy soldiers and civilians, the enemy responds in kind. When reciprocity is absent, states often break the rules.”¹⁹⁶

But the concept of reciprocity cannot be applied case by case. For one, it does not only apply in any given current conflict, but all future conflicts as well. So even if upholding the law of war has little or no effect on Al Qaeda, it certainly can have an effect on a future enemy, who will remember how the U.S. treated its detainees in the current conflict. Future enemies can “point to our efforts . . . to gut the Geneva Convention protections to rationalize their barbarity towards our captured soldiers.”¹⁹⁷ When the U.S. announces that, in its interpretation of Common Article 3, certain interrogation techniques are permissible, it establishes legal precedent for future enemies to cite when they

¹⁹³ *Id.*

¹⁹⁴ Krulak & Hoar, *supra* note 189.

¹⁹⁵ *Id.*

¹⁹⁶ Posner, *supra* note 64.

¹⁹⁷ Davis, *supra* note 93.

decide to use the same techniques on Americans.¹⁹⁸ Indeed, John McConnell, the Director of National Intelligence and supporter of the CIA program, admitted that he would not want the same techniques used against Americans.¹⁹⁹

Additionally, even if Al Qaeda is going to torture captured U.S. service members whether we mistreat detainees or not, they still may treat U.S. prisoners worse if we mistreat detainees. The less fuel we unnecessarily give them to hate us the better. The U.S. refraining from mistreating detainees, therefore, may not stop the enemy from doing it completely, but it very well could make some difference on an individual, case by case basis.

During the Congressional debates on the Military Commissions Act, forty-nine retired military officers sent a joint letter to Senators Warner and Levin. The group included former Chairman of the Joint Chiefs of Staff, General John Shalikashvili, U.S. Army (Retired), General Hoar, and Douglas Peterson, a former Air Force pilot who spent six and a half years as a prisoner of war in North Vietnam.²⁰⁰ Peterson was also the first U.S. ambassador to Vietnam after the conclusion of the war.²⁰¹ The authors of this letter stressed the importance to the military of properly upholding Common Article 3, as it protects American service members. As they point out, if the CIA violates Common Article 3, or if the U.S. adopts an unrealistically narrow interpretation of what it means, it will be equally unrealistic if we complain later when our enemies perform the same “barbaric practices”²⁰² on captured Americans troops. The group of retired generals, admirals, and former prisoners of war who wrote to Senator McCain during the Detainee Treatment Act debates urged the same warning, that “abuse of prisoners . . . endangers U.S. service members who might be captured by the enemy.”²⁰³

Supporters of the CIA program praise its effectiveness in disrupting terrorist plots and saving lives. It is difficult for anyone to argue against this claim of success, since supporting evidence, if any, is highly classified, known only to those making the claim and defending the program.²⁰⁴ But while the

¹⁹⁸ See Statement of Elisa Massimino, *supra* note 85.

¹⁹⁹ See *id.*

²⁰⁰ See *id.*; Letter to Secretary Rice, *supra* note 113.

²⁰¹ See Biography, Douglas Brian “Pete” Peterson, P.O.W. Network, <http://www.pownetwork.org/bios/p/p060.htm> (last visited Oct. 20, 2008).

²⁰² Statement of Elisa Massimino, *supra* note 85.

²⁰³ Herbert, *supra* note 56.

²⁰⁴ See Krulak & Hoar, *supra* note 189.

exact success of this “fear-driven program”²⁰⁵ is unknown, the consequences are not. The CIA program sets “the standard not only for the CIA but also for what kind of treatment captured American soldiers can expect from their captors, now and in future wars.”²⁰⁶ It is imperative that the President understand those long lasting consequences.²⁰⁷ In the words of the Senate Intelligence Committee Chairman, “[r]etaliatio[n] is the way of the world. What we do to others, they will do to us but worse.”²⁰⁸

C. Decreases the Likelihood of the Enemy Surrendering and Ceasing Hostilities, and Fuels Their Hatred of and Desire to Fight the U.S.

Another practical benefit in abiding by the law of war is that it increases the likelihood of the enemy surrendering. The better a soldier believes he will be treated in captivity, the more likely he will surrender in combat instead of resisting to the death. On the contrary, the worse that soldier believes he will be treated in captivity, the more likely he will fight to the death instead of surrendering. If a soldier believes that, if captured, the enemy is going to abuse and mistreat him during interrogations, the chance of him surrendering decreases. On a grander scale, the less incentive we give our enemy to hate and want to fight us, the higher the chance of him quitting the insurgency or war altogether. Abuse and mistreatment of detainees – as authorized by Executive Order 13440 – just fuels the enemy’s hatred of and desire to fight the U.S., prolonging the conflict.

After the detainee abuse at Abu Ghraib became known, but before the media published the bulk of the photographs and video tapes to the whole world, the military avidly opposed their release. While deeply condemning the abuse, calling it “illegal, immoral and contrary to American values and character,”²⁰⁹ military officials feared the expected increase in violence and insurgent attacks

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *See id.*

²⁰⁸ Pamela Hess & Laurie Kellman, *Senate Votes to Ban Waterboarding: Senate Votes Ban the CIA From Using Waterboarding and Other Harsh Interrogation Methods*, ABC NEWS, Feb. 14, 2008, available at <http://abcnews.go.com/Politics/wireStory?id=4286966> (quoting Sen. Jay Rockefeller).

²⁰⁹ Julia Preston, *Officials See Risk in the Release of Images of Iraq Prisoner Abuse*, NY TIMES, Aug. 12, 2005, available at <http://www.nytimes.com/2005/08/12/politics/12photos.html> (quoting Chairman, Joint Chiefs of Staff General Richard Myers).

that would result.²¹⁰ Violence and riots had just erupted in several Muslim countries after Newsweek published a story – later recanted – about a Koran being thrown in a toilet at Guantanamo Bay.²¹¹ The military is rightfully concerned that stories, and certainly images, of detainee abuse serve as unnecessary fuel for the insurgents’ “propaganda mill, which will result in, besides violent attacks, increased terrorist recruitment, continued financial support and exacerbation of tensions between Iraqi and Afghani populaces and U.S. and coalition forces.”²¹²

Stories of detainee abuse “feed . . . the ‘recuperative power’ of the terrorist enemy. Victory in this kind of war comes when the enemy loses legitimacy in the society from which it seeks recruits and thus loses its ‘recuperative power.’”²¹³ Counterinsurgency experts believe that this war will not be won “on the battlefield but in the minds of potential supporters who have not yet thrown in their lot with the enemy.”²¹⁴ When we abuse detainees, the enemy multiplies, as those on the fence are persuaded to join the fight. Detainee abuse just pushes victory further out of reach.²¹⁵

VI. CONCLUSION

The criticism and problems with Executive Order 13440 are clear. Common Article 3 applies to the U.S. in its treatment of war on terrorism detainees, and some or all of the CIA enhanced interrogation techniques violate Common Article 3. At the very least, these techniques humiliate or degrade the detainee. Worse, they may very well rise to the level of torture. If so, not only is the U.S. violating international law, but the CIA interrogators who perform these techniques violate domestic law and are risking prosecution for war crimes.

It is critical that the U.S. “make clear – to the American people and to the rest of the world – what it means when it says it will abide by its obligations under Common Article 3.”²¹⁶ But instead of the U.S. openly and genuinely agreeing to apply Common Article 3 to its interrogation techniques, it announces to the world that the ends are just too important at this time. Abiding by our law of war obligations would be just too painful. Instead of following the example

²¹⁰ *See id.*

²¹¹ *See id.*

²¹² *Id.*

²¹³ Krulak & Hoar, *supra* note 189.

²¹⁴ *Id.*

²¹⁵ *See id.*

²¹⁶ Statement of Elisa Massimino, *supra* note 85.

set by the military, the CIA is allowed to continue to drag the U.S. down the destructive path that detainee abuse leads.

After the Executive Order was issued, Senators Warner, Graham, and McCain issued a joint statement saying they did not “want to rush to judgment”²¹⁷ over the Order. They wanted to carefully examine the issue before deciding what action to take. Over the next half year Congress did closely examine the issue, holding many hearings.²¹⁸ Making the CIA adopt the military’s interrogation program has been the most commonly advocated solution. This solution has had some close calls in recent years. The CIA managed to duck out of the same requirement that the Detainee Treatment Act placed on the military. Then the Military Commissions Act was thought to have “reined in”²¹⁹ the CIA’s enhanced interrogation program. The leading proponents of the Act – Senators Warner, Graham, and McCain – apparently thought that it did just that.²²⁰ Alas, with a few choice words in the Executive Order, the program survived that attack as well.

In December 2007, the House of Representatives did its part to solve this problem, approving a bill which would restrict the CIA to the same interrogation techniques authorized for the military.²²¹ In February 2008, the Senate closed the loop in Congress, approving the bill by a 51-45 vote.²²² This decision is now with the President, who not surprisingly has promised to veto any such bill. With a Congressional override unlikely, the best hope for the bill will be with the next President.

Of course some, even in Congress, believe that we should not have any rules of conduct with regard to these detainees. During the Detainee Treatment Act debates, Senator Jeff Sessions, a Republican from Alabama, argued against the Act, since these detainees are simply terrorists who deserve whatever they

²¹⁷ Douglas & Landay, *supra* note 30.

²¹⁸ See Richard Esposito & Jason Ryan, *CIA Chief: We Waterboarded: Gen. Hayden Confirms the Agency Waterboarded Three ‘High-Value’ Detainees*, ABC NEWS, Feb. 5, 2008, available at <http://abcnews.go.com/Blotter/TheLaw/story?id=4244423&page=1>; Dan Froomkin, *We Tortured and We’d Do It Again*, WASH. POST, Feb. 6, 2008, available at http://www.washingtonpost.com/wp-dyn/content/blog/2008/02/06/BL2008020602244_pf.html.

²¹⁹ Statement of Elisa Massimino, *supra* note 85.

²²⁰ See *id.*

²²¹ See Hess & Kellman, *supra* note 208.

²²² See *id.*

get.²²³ This is certainly not an uncommon opinion. Some truly believe that the use of these interrogation techniques is “essential to defeating an international army of mass murderers bent on killing more Americans.”²²⁴ Many “good folks” have no qualms whatsoever about “dunking a terrorist in water . . . if it saves American lives.”²²⁵ Many people, including the highest members of the Bush administration, feel that this whole “debate seems a little silly given the threat we face.”²²⁶

But most Americans, from the founding fathers²²⁷ to today, agree with Senator McCain’s response to Senator Sessions: “It’s not about the terrorists, it’s about us. It’s about what kind of country we are.”²²⁸ As the ABA aptly summarized the problem with Executive Order 13440, detainee abuse in violation of Common Article 3

under any circumstances erodes one of the most basic principles of international law and human rights, places captured U.S. personnel at inordinate risk, and contradicts the basic values of a democratic state . . . [W]hen the rule of law is subjugated to a claim of “necessity,” all who claim its benefits are less secure.²²⁹

²²³ See Herbert, *supra* note 56.

²²⁴ Robert J. Caldwell, *Bush, McCain and ‘Torture’*, SAN DIEGO UNION-TRIBUNE, Sept. 24, 2006, available at http://www.signonsandiego.com/uniontrib/20060924/news_mz1e24caldwe.html.

²²⁵ Cheney Interview, *supra* note 50.

²²⁶ *Id.*

²²⁷ See ABA REPORT, *supra* note 30, at 2.

²²⁸ *A Question of Torture*, *supra* note 98.

²²⁹ ABA REPORT, *supra* note 30, at 9.

PLANNING FOR THE “STRATEGIC CASE”: A PROPOSAL TO ALIGN THE HANDLING OF MARINE CORPS WAR CRIMES PROSECUTIONS WITH COUNTERINSURGENCY DOCTRINE

Major John M. Hackel*

I remain irrevocably persuaded that if you and I do truly believe in the principles of justice and the equality of every man, however humble, before the law, that form the very backbone that this country is founded on, then we must press forward a widespread and public investigation of this matter with all our combined efforts. I think that it was Winston Churchill who once said, “A country without a conscience is a country without a soul, and a country without a soul is a country that cannot survive.” I feel that I must take some positive action on this matter.² This is like déjà vu all over again.³

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² Letter from Ron Ridenhour to Morris “Mo” Udall, U.S. Congressman (Mar. 29, 1969), available at

http://www.law.umkc.edu/faculty/projects/ftrials/mylai/ridenhour_ltr.html.

This letter began the investigation into the massacre of hundreds of civilians at My Lai by American Soldiers in Vietnam. MICHAEL R. BELKNAP, THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY 103–04 (2002).

³ Yogi Berra, cited in BrainyQuote,

<http://www.brainyquote.com/quotes/quotes/y/yogiberra135233.html> (last visited Dec. 8, 2008).

I. INTRODUCTION

In 2006, in the wake of the Army's Abu Ghraib detainee abuse scandal, the Marine Corps found itself in the unenviable position of simultaneously facing two spectacular war crimes investigations three years into Operation Iraqi Freedom. In March 2006, Time Magazine published an investigative article that detailed an alleged massacre of twenty-four Iraqis committed by several Marines in Haditha, Iraq, on November 19, 2005.⁴ In subsequent investigations, the Marine Corps charged several of the "shooters" for their actions during the incident and also charged several officers with dereliction of duty for failing to investigate the killings.⁵ Less than two months after the Haditha story broke, seven Marines and one Navy corpsman gunned down an unarmed Iraqi civilian in the remote village of Hamdaniyah while on patrol.⁶ Upon discovering the incident, the Marine Corps quickly removed those eight service members from Iraq, sending them back to the United States to await courts-martial for murder in pretrial confinement at Camp Pendleton.⁷ In both cases, the feeling was that seasoned combat veterans—members of highly-trained infantry units—had simply broken, ignored their training about the law of war, and murdered civilians.

For many Marine leaders, it was a time of shock and doubt. Many tacitly expressed feelings reminiscent of those expressed by General Lewis W. Walt, a former commanding general of III Marine Amphibious Force (III MAF), who dealt with similar allegations of murder by members of his command in

⁴ Tim McGirk, *Collateral Damage or Civilian Massacre in Haditha?*, TIME, Mar. 19, 2006, at 34. This article initially reported that fifteen Iraqi civilians had been killed, but later investigations proved that twenty-four civilians had been killed. See Michael Duffy, Tim McGirk, & Bobby Ghosh, *The Ghosts of Haditha*, TIME, June 4, 2006, at 26.

⁵ Mark Walker, *Charges Against Haditha Defendant Questioned*, N. COUNTY TIMES, Nov. 18, 2007, available at http://www.nctimes.com/articles/2007/11/18/news/top_stories/17_12_0611_17_07.prt.

⁶ Mark Walker, David Sterrett, and William Finn Benett, *Seven Marines, Navy Corpsman Charged With Murder*, N. COUNTY TIMES, Jun. 22, 2006, available at http://www.nctimes.com/articles/2006/06/22/news/top_stories/04_01_206_21_06.txt.

⁷ Tom Bowman, *Marines, Medic Charged with Murder in Iraq Case*, NAT'L PUB. RADIO, Jun. 21, 2006, <http://www.npr.org/templates/story/story.php?storyId=5501773&ft=1&f=1001>.

Vietnam.⁸ When discussing allegations of vicious war crimes by members of the “Potter Patrol”⁹ in September 1966 with his chief of staff, General Walt “couldn’t believe that a Marine, any Marine, would do something like this . . . This had to be someone other than Marines, because Marines just wouldn’t do something like this.”¹⁰ For the first time since the Vietnam War, the Marine Corps faced a protracted ground conflict, in both Iraq and Afghanistan, in which large units would experience lengthy deployments and Marines would be exposed to the tremendous physical and psychological rigors of executing a complex counterinsurgency battle. Moreover, even the best trained and most experienced Marines had proved themselves capable of committing serious criminal misconduct against civilian noncombatants.

The Marine Corps’ recent execution of military justice in a deployed environment raises important questions about how to properly investigate and prosecute war crimes allegations. Recent deployments have demonstrated that the Marine Corps possesses the ability to effectively execute deployment justice in Iraq,¹¹ at least for cases involving Marine-on-Marine conduct that could be resolved with a guilty plea at special or summary court-martial.¹² But since

⁸ III MAF was commanded by then-Major General Lewis W. Walt, a highly decorated combat veteran of World War II, Korea, and Vietnam. Lewis William Walt, General, United States Marine Corps, Arlington National Cemetery, <http://www.arlingtoncemetery.net/lwwalt.htm> (last visited Dec. 8, 2008).

⁹ On Sept. 23, 1966, four members of a Marine ambush patrol led by Private First Class John D. Potter entered a hamlet in Vietnam and raped the wife of a man they accused of being a Viet Cong. Then they shot him, his child, his sister, his sister’s child, and his wife, the rape victim (who survived to testify about the atrocity). GARY D. SOLIS, *MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE* 53 (1989) [hereinafter SOLIS, *TRIAL BY FIRE*]; see also Gary D. Solis, *The High Profile Court-Martial: Lessons Learned from Ribbon Creek to Vietnam*, Marine Corps Ctr. for Lessons Learned, May 22, 2007, at 5.

¹⁰ SOLIS, *TRIAL BY FIRE*, *supra* note 8, at 53, *quoting* Interview with Lieutenant General Leo J. Dulaki, 111–12 (Oct. 24, 1974) (on file with Oral History Collection, Marine Corps Historical Center). In 1966, then-Colonel Dulaki served as General Walt’s chief of staff at the time of the Potter Patrol incident. *Id.*

¹¹ For this article, the term “deployment justice” refers to the execution of military justice in a forward deployed environment, often in an area of combat operations like Iraq or Afghanistan.

¹² For example, during Operation Iraqi Freedom II (OIF II), the Marine Legal Services Support Team in Iraq conducted five general courts-martial, six Article 32 Investigations, forty-eight special courts-martial, and seventy summary courts-martial. LtCol Gregory L. Simmons, Legal Services Support Team-Iraq

none of those cases dealt with serious allegations of misconduct involving Marine-on-civilian crimes in Iraq or Afghanistan, there is very little precedent upon which to model an effective military justice system for handling war crimes. As it turns out, the seemingly simple question of *how* has proven far more complex and troublesome for the Marine Corps than one might expect of an institution that convicted twenty-seven Marines for the murder of Vietnamese noncombatants from 1965 to 1971.¹³ Complicated command relationships, relatively short deployments, and inconsistent decisions about handling these cases prove that the Marine Corps needs to reevaluate how it conducts deployment justice with regard to war crimes.

These problems clearly manifested themselves in the Marine Corps' handling of the Hamdaniyah case. There, the Marines and Sailor charged with murder had completed roughly three months of their unit's seven-month deployment to Iraq when their misconduct was discovered and investigated.¹⁴ At the time, three Marine Corps defense counsel were serving at a nearby base in Iraq from which they could have advised the accused service members about their legal rights, formed attorney-client relationships with some of the accused, and investigated the matter.¹⁵ Meanwhile, local Army units in Iraq had several judge advocates serving in Trial Defense Service (TDS) billets who could have

(LSST-Iraq) Statistics for Operation Iraqi Freedom II (OIF-II) (Mar. 2005) (unpublished PowerPoint Presentation, on file with author).

¹³ SOLIS, TRIAL BY FIRE, *supra* note 8, at 280–81.

¹⁴ Telephone Interview with LtCol K. Scott Woodard, Senior Def. Counsel, Camp Lejeune, N.C., at Charlottesville, Va. (Jan. 13, 2008) [hereinafter Woodard Interview]. As one of the most experienced active duty trial attorneys in the Marine Corps, Lieutenant Colonel Woodard has served in both trial and defense billets in which he tried capital cases. He has served as defense counsel for multiple cases involving Marine war crimes allegations, including the Hamdaniyah and Haditha cases from Iraq and the MARSOC court of inquiry from Afghanistan. In his representation of Marines charged with war crimes, LtCol Woodard has interviewed dozens of infantrymen with recent combat experience. He also draws from his own experiences from deployments to Iraq and Afghanistan. *Id.*

¹⁵ Telephone Interview with Maj Louis M. Schotemeyer, Military Justice Officer, Marine Corps Base Kaneohe Bay, Haw., in Charlottesville, Va. (Jan. 10, 2008) [hereinafter Schotemeyer Interview]. Major Schotemeyer served as the Marine Corps' Senior Defense Counsel in Iraq at the time of the Hamdaniyah incident, and later represented one of the accused in the case. Maj Schotemeyer served as the senior defense counsel for I Marine Expeditionary Force (I MEF) in Iraq when the Abu Ghraib case broke. *Id.*

provided additional defense assistance.¹⁶ Rather than make use of these counsel, however, the Marine Corps sent the entire case back to the United States. From Camp Pendleton, trial counsel and defense counsel started from scratch with a very complex case in which they lacked basic familiarity with the unit's mission, enemy activities in the area, or other important aspects of the environment in which the misconduct had taken place.¹⁷ The eight cases ultimately required more than fourteen months to prosecute, despite the fact that five of the eight defendants agreed to plead guilty and provide testimony against the three remaining, non-pleading defendants.¹⁸ Of the three Marines who took their cases to contested courts-martial, only one was found guilty of murder and sentenced to a lengthy sentence of confinement; the other two received sentences of time-served or no confinement.¹⁹ Similarly, the Haditha case still remains unresolved, more than two years since first being brought to light.²⁰

The Haditha and Hamdaniyah cases thus raise the issue of bringing effective and efficient deployment justice into sharp focus for the Marine Corps. In cases involving misconduct occurring in a deployed environment, the manner by which the Marine Corps currently approaches and executes military justice

¹⁶ Interview with Maj Robert T. Kincaid, Graduate Student, The Judge Advocate General's Legal Ctr. and Sch., in Charlottesville, Va. (Jan. 16, 2008) [hereinafter Kincaid Interview]. Major Kincaid is a former trial defense counsel and senior defense counsel who served two years in Iraq, including during the discovery of the Hamdaniyah incident. In total, Maj Kincaid spent more than four years in Trial Defense Services representing Soldiers accused of all types of misconduct, including during the two years he served in Iraq. He possesses extensive experience defending Soldiers at both courts-martial and administrative separation proceedings. *Id.*

¹⁷ Telephone Interview with LtCol Colby Vokey, Regional Defense Counsel, Western Region, Camp Pendleton, Cal., in Charlottesville, Va. (Jan. 14, 2008) [hereinafter Vokey Interview]. Lieutenant Colonel Vokey served as the senior supervisory defense attorney throughout the Hamdaniyah courts-martial and acted as the detailing authority for all of the Hamdaniyah defense counsel. He represents an accused in the Haditha court-martial. *Id.*

¹⁸ Teri Figueroa, *Marine Gets 15 Years for Hamdania Killing*, N. COUNTY TIMES, Aug. 4, 2007,

http://www.nctimes.com/articles/2007/08/04/news/top_stories/1_01_258_1_07.txt.

¹⁹ *Id.*

²⁰ U. S. Marine Corps, Haditha, Iraq Investigation: Charges and Specifications, <http://192.156.19.109/lapa/Iraq/Haditha/Haditha-Charges-Referred-To-GCM.htm> (last visited Jan. 6, 2009) (listing the charges and specifications referred to general courts-martial for the Marines implicated in the Haditha incident, one of whom has not yet been tried).

begs the ultimate question: has the Marine Corps missed the mark with deployment justice, particularly with war crimes? As the wars in Iraq and Afghanistan continue into the indefinite but foreseeable future, Marines continue to find themselves deployed worldwide fighting an elusive and intelligent enemy. Considering the unique pressures of the counterinsurgency battlefield, we may reasonably expect that deployment justice issues will continue to challenge the Marine Corps. Indeed, Hamdaniyah and Haditha were clearly not the last of their kind, as proven by the subsequent misconduct alleged of a Marine special operations unit in Afghanistan in March 2007, and of a Marine in Fallujah in 2004.²¹ Thus it is appropriate to scrutinize the Marine Corps' current handling of war crimes under the Uniform Code of Military Justice.²²

On occasion, certain military justice cases transcend the classic functions of military law. Under the Manual for Courts-Martial, "[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and to *strengthen the national security of the United States*."²³ Hence, in certain circumstances, a military justice case impacts not only the unit's mission, order, and effectiveness, but also the national military strategy and the overall war effort. Several military justice cases arising out of the conflicts in Iraq and Afghanistan have strongly impacted the war effort, affecting the coalition's ability to carry out its counterinsurgency mission and

²¹ See, e.g., Estes Thompson, *Marine Shooting Tribunal Delayed*, ASSOCIATED PRESS, Oct. 30, 2007, <http://ap.google.com/article/ALeqM5gZ7UnR4ZOkUzp5x5-n-U0gsrgb-AD8SJQ53G0> ("As many as 19 people were killed and 50 injured in March when members of the Marine special operations company opened fire in a crowded roadway after their convoy was rammed by a minivan full of explosives."); Estes Thompson, *Panel Investigating Marine Shooting in Afghanistan Completes Work*, INT'L HERALD TRIB., Mar. 8, 2008, <http://www.iht.com/articles/ap/2008/03/08/america/Afghan-Marine-Shooting.php>; Press Release, U. S. Marine Corps, Charges Preferred Against Marine in Fallujah, Iraq Investigation (Dec. 7, 2007) (on file with author) (Sergeant Jermaine A. Nelson, USMC, was charged with the murder of a detainee during Operation Phantom Fury in November 2004).

²² The alternative, of course, is to try certain offenses committed in a combat zone as "war crimes." See Major Mynda G. Ohnan, *Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice*, 57 A.F. L. REV. 1 (2005); see also Major Martin N. White, *Charging War Crimes: A Primer for the Practitioner*, ARMY LAW., Feb. 2006.

²³ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. I, ¶ 3 (2008) [hereinafter MCM] (emphasis added).

lending strength to the enemy's insurgency.²⁴ As such, commanders must stand prepared to efficiently, effectively, and fairly process these "strategic cases" to mitigate their damage to the overall war effort, as well as to accommodate the traditional purposes of military law.

Narrowing this premise, the Marine Corps needs to reassess its deployment justice model to proactively anticipate and address the "strategic cases" arising out of Iraq and Afghanistan. This article analyzes the Marine Corps' current deployment justice process, assessing its effectiveness in light of the overall purpose of having military law govern service member conduct, and recommending a change to better provide for the efficient administration of "strategic cases." From the outset, we will first ground ourselves in the overarching purpose of military law as it relates to deployment justice. Next, we will define those "strategic cases" having a particularly far-reaching impact on the war, identifying their common attributes as they have been experienced by practitioners with recent experience prosecuting and defending them. Third, "strategic cases" will be placed in the context of modern counterinsurgency doctrine to understand their role in the overall national military strategy. Fourth, we will address the key challenges faced in the deployment justice environment, addressing such issues as complicated command relationships, abnormal logistical and administrative issues, and manpower predicaments. Finally, this article will propose a model by which the Marine Corps may institutionally stand better prepared to handle "strategic cases" arising out of the current conflict.

II. MILITARY LAW: JURISDICTIONAL FRAMEWORK FOR DEPLOYMENT JUSTICE

Prior to the ratification of the Constitution, American military law provided commanders the power to punish soldiers and sailors for committing crimes while serving in the armed forces.²⁵ Providing for a disciplined and

²⁴ See Schotemeyer Interview, *supra* note 14 (Haditha incident forced deployed commanders to reevaluate rules of engagement training processes and retrain their Marines while forward deployed); *see also* Interview with MAJ Kirsten M. Dowdy, Student, 56th Graduate Course, The Judge Advocate General's Legal Ctr. and Sch., in Charlottesville, Va. (Jan. 8, 2008) [hereinafter Dowdy Interview]. Major Dowdy served as trial defense counsel for one of the accused in the Abu Ghraib detainee abuse case; the investigation of that case revealed that images from the Abu Ghraib case were used by insurgents to create recruitment media. *Id.*

²⁵ See, e.g., *O'Callahan v. Parker*, 395 U.S. 258, 268 (1969), *overruled by* *Solorio v. United States*, 483 U.S. 435 (1987) (describing historical record of

ordered military continues to be a primary purpose of military law. As such, military law is "the branch of public law governing military discipline and other rules regarding service in the armed forces."²⁶ More to the point, "military law, in its ordinary and more restricted sense, is the specific law governing the Army as a separate community," to include the procedural and substantive rules governing the conduct of members of the armed forces.²⁷ Military service demands that service members expose themselves to grave dangers, travel and survive in austere environments, and potentially battle hostile, intelligent, and deadly enemies. Despite technological advances in weaponry and logistics, the application of military force "requires *people*, trained personnel who can be counted upon to carry out their assigned combat or combat support mission. This requires discipline."²⁸ Unfortunately, people make mistakes and commit crimes. Rather than force commanders to ignore or condone misconduct, military law provides a basis for enforcing discipline over those service members charged with committing crimes in areas over which no United States courts would otherwise have jurisdiction.

Military law derives its authority directly from the Constitution, the statutes of Congress and regulations of the President, and the customs of the individual services.²⁹ The Constitution authorizes Congress "to make Rules for the Government and Regulation of the land and naval Forces,"³⁰ under which authority Congress passed the Uniform Code of Military Justice (UCMJ)³¹ and the President promulgated the Manual for Courts-Martial, which provides a procedural framework for the UCMJ.³² Under this rubric, courts-martial are "[empowered] to try servicemen for crimes proscribed by the UCMJ."³³ Supreme Court Chief Justice Vinson recognized the plenary nature of military

court-martial jurisdiction over civil offenses committed by service members since the seventeenth century); *see also* W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 15 (2d ed. 1920) ("Historically...our military law is very considerably older than our Constitution. With the Constitution, however, all our public law began either to exist or to operate anew, and this instrument therefore is in general referred to as the source of the military as well as the other law of the United States.")

²⁶ BLACK'S LAW DICTIONARY 991 (7th ed. 1999).

²⁷ WINTHROP, *supra* note 24, at 15.

²⁸ FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, *COURT-MARTIAL PROCEDURE* § 1-10.00 (3d ed. 2006).

²⁹ WINTHROP, *supra* note 24, at 15-16.

³⁰ U.S. CONST. art. I, § 8, cl. 14.

³¹ 10 U.S.C. §§ 801-946 (2008).

³² *See* MCM, *supra* note 22, pt. II, R.C.M.

³³ *Solorio v. United States*, 483 U.S. 435, 438 (1987).

law, writing that “military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.”³⁴ It applies to members of the military and naval services who are subject to its body of rules relating to organization, government, and discipline of the armed forces.³⁵ As such, military law strictly applies to service members subject to its jurisdiction, regardless of whether they are deployed overseas, serving on ships, or stationed at military bases within the territory of the United States.

The Uniform Code of Military Justice empowers a court-martial to try service members for crimes committed while forward deployed, so long as certain prerequisites are met.³⁶ First, personal jurisdiction exists at the time of a service member’s entry into the Armed Forces and terminates upon a valid discharge.³⁷ Second, to prove proper subject matter jurisdiction, there must be a showing of the accused’s *military status* at the time of the offense.³⁸ Finally, the court-martial must be properly convened and composed with properly referred charges.³⁹ For “strategic cases,”⁴⁰ the critical jurisdictional test is the status of the accused, “namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term ‘land and naval forces.’ *Without contradiction military jurisdiction is based on the ‘status’ of the accused, rather than on the nature of the offense.*”⁴¹ Thus, the fact that a service member is forward deployed, at sea, or stationed in the United States becomes irrelevant; all that matters is that the accused was a member of the Armed Forces at the time of the offense and at the time of trial.⁴² This provides convening

³⁴ *Burns v. Wilson*, 346 U.S. 137, 140 (1953).

³⁵ *See Johnson v. Jones*, 44 Ill. 142, 153 (1867) (in civil action for violation of a civilian’s habeas corpus rights during the Civil War, court distinguished military law in its application over service members from that over civilians during a period of martial law).

³⁶ 10 U.S.C. §§ 802–803 (2008).

³⁷ 10 U.S.C. § 802 (2008); MCM, *supra* note 22, R.C.M. 201(b)(4).

³⁸ MCM, *supra* note 22, R.C.M. 201(b)(5).

³⁹ *Id.* at R.C.M. 201(b)(1–3); *see also* CRIMINAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, 56TH GRADUATE COURSE CRIMINAL LAW DESKBOOK, vol. II., ch. A (Aug. 2007).

⁴⁰ *See infra* pp. 11–30.

⁴¹ *Solorio v. United States*, 483 U.S. 435, 439–40 (1987) (emphasis added).

⁴² *See, e.g., United States v. Murphy*, 50 M.J. 4, 7–8 (1998) (accused convicted of premeditated murder and sentenced to death while stationed in Germany challenged jurisdiction of court-martial over German courts which cannot impose death; court found claim meritless because *in personam* jurisdiction of

authorities the flexibility to accommodate other characteristics of military life, such as the transfer and deployment of personnel or the loss of personnel due to combat (including witnesses, counsel, court members, or military judges).⁴³ For misconduct committed by service members during deployment, commanders are thus empowered by the UCMJ to determine how, when, and where to execute the military justice process, provided that the jurisdictional elements of the court-martial are met. For Marine Corps war crimes, these decisions have universally been the same: bring the case home.

III. IDENTIFYING AND UNDERSTANDING THE "STRATEGIC CASE"

A. Military Offenses and Common Law Offenses: Not "Strategic Cases"

To the average practitioner, military justice cases frequently involve service members engaging in different kinds of misconduct that has little, if any, impact on the unit's ability to function during war.⁴⁴ For the most part, these routine cases highlight "the question of whether military justice is primarily a discipline tool or a means of dispensing justice, [a concept which] has long been debated."⁴⁵ These cases can loosely be described as "military offenses"⁴⁶ and "common law offenses."⁴⁷ The UCMJ recognizes such categories of military-specific crimes as absence offenses, disrespect offenses, disobedience offenses, drug offenses, and fraternization offenses.⁴⁸ For example, when a Marine tests positive for wrongfully using a controlled substance, a crime which has no civilian equivalent, he commits a crime against the Marine Corps as a whole. His commander may elect to send the Marine to court-martial as a means of enforcing discipline within the unit. However, the fact that the service itself has

court-martial was based solely on accused's military status, not on any international agreements that may have been violated).

⁴³ GILLIGAN & LEDERER, *supra* note 27, at § 1-20.00.

⁴⁴ Kincaid Interview, *supra* note 15.

⁴⁵ DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 1-1 (2007).

⁴⁶ *Id.* at § 2-1 ("The uniqueness of the military criminal system is clearly evident in its proscription of conduct, or lack thereof, that may not find a counterpart in the civilian sector. Supporting this proscription is a deeply rooted argument that unchecked behavior may undermine discipline—an indispensable ingredient in the military's mission . . . These [military] offenses are among those listed in the punitive articles of the U.C.M.J.")

⁴⁷ *MILITARY CRIMES AND DEFENSES* § 6.1 (2007).

⁴⁸ SCHLUETER, *supra* note 44, at § 2.syn.

been “victimized” by the member’s illicit act bears little impact on national military strategy or overall unit effectiveness: the unit’s leaders have the ability to limit the extent of the harm through leadership, punishment, and administrative action.

Similarly, military justice recognizes another category of misconduct, “common law” offenses.⁴⁹ These offenses typically reflect those crimes normally found in civilian penal codes, such as assault, larceny, murder, and rape. They reinforce the notion that military status, not location, is the key jurisdictional requirement of a court-martial.⁵⁰ In cases in which both civilian and military authorities may take jurisdiction of a case, “the military will probably have jurisdiction over the offense, assuming that there is not an agreement between civilian and military authorities that certain offenses by service members will be tried in the civilian courts.”⁵¹ As a result, these cases will frequently be tried by courts-martial or processed administratively under military regulations.⁵² Hence, with “common law” offenses, the crime itself causes the injury, not the service member’s relationship to the military.⁵³ In the deployed arena, these cases typically involve misconduct by service members against other service members, not war crimes committed against the host

⁴⁹ See *Solorio v. United States*, 483 U.S. 435 (1987) (determining that the jurisdiction of a court-martial to try a member of the Armed Forces depends solely on the military status of the member, not upon a service connection of the offense charged, and thus courts-martial possess statutory authority to try service members for criminal offenses within the territorial jurisdiction of the United States that could otherwise be tried in state or federal courts).

⁵⁰ *Id.* at 450–51.

⁵¹ MILITARY CRIMES AND DEFENSES, *supra* note 46, at § 6.1.

⁵² Kincaid Interview, *supra* note 15. See, e.g., U.S. DEP’T OF NAVY, JAG INSTR. 5800.7D, MANUAL OF THE JUDGE ADVOCATE GENERAL (June 20, 2007) (§§ 0102–0105 are devoted to “Nonpunitive Measures;” §§ 0106–0119 describe substantive and procedural aspects of “Nonjudicial Punishment;” § 0124 regulates the exercise of court-martial jurisdiction in cases tried in domestic and foreign courts).

⁵³ These common law offenses remain at the heart of criminal law jurisprudence, which defines a crime as “an offense against the sovereignty, a wrong which the government deems injurious not only to the victim but to the public at large, and which it punishes through a judicial proceeding in the government’s name.” 21 AM. JUR. 2D *Criminal Law* § 1 (2007) (citing *State v. Ziliak*, 464 N.E.2d 929 (Ind. Ct. App. 1st Dist. 1984); *State ex. Rel. Keefe v. Schmiede*, 28 N.W.2d 345 (Wis. 1947); *In re Dray*, 579 N.E.2d 788 (Ct. Cl. 1989); *State v. Camp*, 430 P.2d 187 (Wash. 1967); *Patterson v. Natural Premium Mut. Life Ins. Co.*, 75 N.W. 980 (Wis. 1898)).

nation's people.⁵⁴ While the offense itself may impact the unit by causing delays, personnel shortfalls, or expenses chargeable against the unit's operating budget,⁵⁵ and the case itself may cast the military service in a negative light because of bad publicity,⁵⁶ the case causes little, if any, impact on the nation's strategic-level war effort because it is localized to a particular accused, not representative of the nation's strategic mission.

Military offenses and "common law" offenses comprise the vast majority of all military justice cases. Because they do not involve war crimes by American service members, typically involve heavy media involvement, or impact on national military strategy, however, these are *not* "strategic cases." "Strategic cases" are thus very rare, occurring only during periods of extended armed conflict in such places as Iraq and Afghanistan. Nonetheless, these "strategic cases" have the potential to create long-term problems for the military, and thus require extraordinary planning and forethought.⁵⁷

B. Defining the "Strategic Case"

A "strategic case" broadens the purpose of military law beyond merely empowering commanders to enforce discipline or to punish wrongdoers for their "common law" crimes. Rather, these rare cases stem from military service members' misconduct on the battlefield. They are crimes by American Soldiers, Sailors, Airmen, and Marines against the enemy, detainees, or civilians in the area of combat. They attract tremendous publicity, which causes a noticeable impact on the military justice process and the mission. As such, these rare crimes represent violations of the UCMJ which have potentially far-reaching effects on the overall war strategy.

⁵⁴ See Kincaid Interview, *supra* note 15; Woodard Interview, *supra* note 13.

⁵⁵ Kincaid Interview, *supra* note 15.

⁵⁶ See, e.g., Tony Perry, *Ex-Marine Drill Instructor Convicted of Mistreating Recruits at Boot Camp; He Could Face Nearly 10 Years in Prison and a Dishonorable Discharge When He Is Sentenced*, L.A. TIMES, Nov. 15, 2007, at B1; Nation in Brief, *Arrest Issued in Dead Marine's Case*, WASH. POST, Jan. 13, 2008, at A14 (arrest warrant issued for Marine corporal wanted in death of pregnant colleague whose burnt remains were discovered in his back yard); Gidget Fuentes, *Not Above the Law: Civilian District Attorney Successfully Prosecutes Assault Case After Corps Took No Action*, MARINE CORPS TIMES, Oct. 17, 2006, at 14 (Marine pilot convicted and sentenced for sexual assault against fellow officer).

⁵⁷ See Kincaid Interview, *supra* note 15; see also Woodard Interview, *supra* note 13.

1. War crime

For a military justice case to have any impact on the war itself, it must first allege a violation of the law of war.⁵⁸ In each of the highest profile cases arising out of Iraq and Afghanistan, the alleged misconduct included offenses by American service members against Iraqi or Afghan citizens.⁵⁹ The Army defines “war crime” as a “technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.”⁶⁰ Nonetheless, not every violation of the law of war qualifies as a “strategic case:” for a military justice matter to be considered a “strategic case,” it must allege a serious war crime.⁶¹ Under the Geneva Conventions, the United States has obligated itself to “search for persons alleged to have committed, or to have ordered to be committed, such *grave breaches* [of the law of war], and shall bring such persons, regardless of their nationality, before its own courts.”⁶² These “grave breaches” include the willful killing, torture, or inhuman treatment of persons protected by the Geneva Convention.⁶³ For American service members alleged to have committed grave breaches of the law of war, the UCMJ serves as the enforcement tool required by the Geneva Convention.

In Iraq and Afghanistan, only crimes committed by American service members against non-Americans constitute the grave breaches of the law of war that should be recognized as “strategic cases.” These include allegations of murder, rape, kidnapping, assault, and mistreatment against detainees or

⁵⁸ Interview with MAJ Lawrence “Larry” Edell, Graduate Student, The Judge Advocate General’s Legal Ctr. and Sch., in Charlottesville, Va. (Jan. 8, 2008) [hereinafter Edell Interview]. Major Edell is a former Brigade Judge Advocate who prosecuted several Soldiers for war crimes while deployed in Baghdad, Iraq. *Id.*

⁵⁹ *Id.*; Woodard Interview, *supra* note 13.

⁶⁰ U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, at ¶ 499 (July 1956); *see also* U.S. MARINE CORPS, REFERENCE PUBLICATION 4-11.8B, WAR CRIMES 1 (Dec. 6, 2005).

⁶¹ For example, under the Geneva Convention for the Treatment of Prisoners of War, “prisoners of war must be allowed, in the middle of the day’s work, a rest of not less than one hour.” Geneva Convention Relative to the Treatment of Prisoners of War, art. 53, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. A warden violating this commits a “war crime,” per the Army’s definition, but his conduct hardly rises to the level of crimes of murder, torture, genocide, etc.

⁶² *Id.* at art. 129 (emphasis added).

⁶³ *Id.* at art. 130.

civilians.⁶⁴ American-versus-American (or coalition-versus-coalition) misconduct must not be included in the definition of "strategic case." While this type of misconduct certainly occurs during war and always carries the potential to devastate an operational unit, it bares minimal impact on the overall national military strategy. Thus, the term "strategic case" applies exclusively to serious war crimes committed by American service members against non-American civilians or detainees from Iraq and Afghanistan.

A comparison of two infamous cases from Iraq illustrates this distinction. First is the case of Army Sergeant Hasan Akbar, a Soldier who attacked his senior officers and noncommissioned officers of First Brigade, 101st Airborne Division, in their command tents in Kuwait shortly before their unit's maneuver into Iraq.⁶⁵ Using grenades and a rifle, he "fraggged" them in their tents, initially killing one officer and wounding fifteen other Soldiers, including the brigade commander.⁶⁶ Ultimately two officers were killed and Sergeant Akbar faced a general court-martial, at which he was sentenced to death.⁶⁷ Although Sergeant Akbar's actions had an immediate and immense impact on the unit's ability to perform its operational mission at a particularly critical moment, his case never generated public outcry suggesting that the American mission in Iraq was illegitimate or wrong. Moreover, it was technically not a

⁶⁴ See, e.g., Josh White, *No Murder Charges Filed in Haditha Case; Four Marines to Face Lesser Charges After Two-Year Inquiry Into Iraqi Killings*, WASH. POST, Jan. 4, 2008, at A5; Rick Rogers, *Pendleton Marine Convicted of Murder; Hamdaniyah Defendant Could Get Life in Prison*, SAN DIEGO UNION TRIB, Aug. 3, 2007, at A1; David Zucchino, *Marines Defend Actions in Afghan Deaths; Three Troops Accused of 'Excessive' Shooting Say They Were Fired Upon*, L.A. TIMES, Jan. 10, 2008, at A20; Drew Brown, *U.S. Identifies 5 Soldiers Charged in Murder Case; The U.S. Military Identified the Soldiers Charged in One of the Most Heinous Cases Against Iraqi Civilians—The Rape of a Teenager and the Killings of Her and Her Family*, MIAMI HERALD, July 11, 2006, at A19; *Latest Report on Abu Ghraib: Abuses of Iraqi Prisoners 'Are, Without Question, Criminal'*, N.Y. TIMES, Aug. 26, 2004, at A1.

⁶⁵ Peter T. Kilborn with Diana Jean Schemo, *A Nation at War: The Suspect; Army Offers A Few Details And a Theory of Motivation*, N.Y. TIMES, Mar. 24, 2003, at B1.

⁶⁶ David Zucchino, *War with Iraq: GI Held in Attack at Base Made Anti-U.S. Remarks*, L.A. TIMES, Mar. 24, 2003, at A1.

⁶⁷ Richard A. Serrano, *The Nation: GI Sentenced to Death for Fatal Attack; Army Sgt. Hasan Akbar Apologizes For Killing Two American Officers and Wounding 14 Other Soldiers In Kuwait on the Eve of War*, L.A. TIMES, Apr. 29, 2005, at A11.

war crime because it was an act of violence against fellow Soldiers, not against persons subject to the protections of the Geneva Conventions.

Conversely, when the comparatively minor misconduct involving detainees at the Abu Ghraib prison came to light, the world realized what could be considered the defining American war crime of the Iraq conflict.⁶⁸ One scholar described the impact of Abu Ghraib in the context of the military operations in Iraq in 2004:

The news out of Iraq didn't improve. In April, 134 American soldiers were killed in Iraq; it had been one of the bloodiest months yet. And there were the pictures from Abu Ghraib prison that showed Iraqi detainees being sexually humiliated, taunted, and mistreated by American military guards. The grotesque images, rebroadcast throughout the Arab world by the Al-jazeera satellite network, created a new crisis of legitimacy for the American mission in Iraq.⁶⁹

The impact of the Abu Ghraib scandal caused far greater damage to the war effort than the Akbar fragging primarily because it created a crisis of legitimacy: the American "liberators" of Iraq lost the moral high ground by permitting the grossly demeaning abuse of detainees, strengthening insurgent claims that the coalition troops were simply illegitimate invaders of their sovereign soil. As one defense counsel who participated in the case described seeing the images of the misconduct for the first time, she stated, "When I saw the photos at the beginning, [I thought] 'was this another My Lai type of case?'"⁷⁰ What struck this attorney particularly hard was "the idea that Americans are above that [type of conduct]."⁷¹

⁶⁸ See THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* 408 (2006) (In describing the administration's response to failures in implementing the war in Iraq, an administration official "cited the Abu Ghraib prison scandal, for which only a handful of soldiers were punished. 'The biggest stain on our soul I can imagine...and there's just no accountability.'")

⁶⁹ MICHAEL ISIKOFF & DAVID CORN, *HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR* 356 (2006).

⁷⁰ Interview with CPT Katherine "Kasia" Krul, Graduate Student, The Judge Advocate General's Legal Ctr. and Sch., in Charlottesville, Va. (Jan. 11, 2008) [hereinafter Krul Interview]. Captain Krul served as detailed defense counsel for one of the defendants in the Abu Ghraib detainee abuse case. *Id.*

⁷¹ *Id.*

Clearly, as with an incident like the Abu Ghraib detainee abuse scandal, the "strategic case" gains its importance not because it is a crime committed during war, but because it is a grave breach of the law of war by an American service member. Therefore, the first element of the "strategic case" lies in its roots as a serious war crime; without this component, it simply does not simultaneously capture high profile media interest and thereby impact national military strategy.⁷²

2. *High Media Interest and Involvement*

The "strategic case" demands media attention that is rarely experienced in traditional military justice cases. When asked to list factors present in these sorts of special cases, one experienced attorney who represented an accused in the Abu Ghraib detainee abuse case immediately responded, "The press! The media! ...I think that the press being so involved in [these] cases . . . [influenced the convictions]. I think that the only reason [my client was convicted] was that the press was so involved that the panel felt like [it] had to find him guilty of something."⁷³ This sentiment—that the media plays an influential and intrusive role in these cases—resonates strongly and universally among prosecutors and defense attorneys, regardless of service.

⁷² See Woodard Interview, *supra* note 13. In comparing his war crimes cases with typical military justice offenses, he states, "[My cases] are under the legal definition of war crimes. They're straight up war crimes." *Id.*

⁷³ Dowdy Interview, *supra* note 23. The prosecutor corroborates the premise that the media influenced the trial:

The cases had been preferred about a month and a half before all of the media coverage started, and we had assessed what the cases were worth. We went down in line about what we thought each case should get. The numbers went up substantially once the media coverage had started because we saw the impact that it had on operations in country.

Interview with MAJ Steven "Chuck" Neill, Graduate Student, The Judge Advocate General's Legal Ctr. and Sch., in Charlottesville, Va.(Jan. 10, 2008) [hereinafter Neill Interview]. Major Neill was a prosecutor for the Abu Ghraib detainee abuse cases. He deployed to Iraq in early 2004, arriving shortly after the initial Abu Ghraib investigation had commenced. Within weeks of his arrival, he received the first investigatory reports and was assigned to the case through its completion more than two years later. *Id.*

The media's role as a source of information for the international community impacts the "strategic case" not only in how it spreads information, but in how it selectively covers some cases but ignores others. For instance, when the Abu Ghraib scandal broke, the Army's First Cavalry Division simultaneously dealt with a war crime involving Soldiers murdering two Iraqi civilians in Baghdad.⁷⁴ In that case, the Soldiers took two bound detainees, cut their restraints, handed them inoperable assault rifles, and killed them, claiming that the detainees had attempted to flee.⁷⁵ The case received almost no media coverage whatsoever, despite the fact that its severity surpassed the Abu Ghraib abuse allegations.⁷⁶ As such, it resolved quickly and quietly before the unit's redeployment from Baghdad, and the case generated no public outcry against the American war effort.⁷⁷

In contrast, it is evident that the media played a major role in elevating the Abu Ghraib misconduct from an egregious war crime into a "strategic case." "[The Abu Ghraib cases] weren't difficult cases to try . . . Factually they were simple . . . pretty much 'slam dunks.'"⁷⁸ But several media-related factors made the Abu Ghraib cases far more complex: one, the instant prevalence of damning images released to the public; two, the impact of the media in shaping public opinion and maintaining public interest in the case; and three, the ability of

⁷⁴ Edell Interview, *supra* note 57. MAJ Edell prosecuted the cases against the Soldiers accused of killing the two Iraqis. *Id.*

⁷⁵ Jackie Spinner, *Two Soldiers Charged With Murdering 3 Iraqis*, WASH. POST, Sept. 23, 2004, at A19 (the sole news article reporting this incident: "Two U.S. soldiers have been charged with premeditated murder in the deaths of three Iraqis. The Army's 1st Cavalry Division on Wednesday identified the soldiers as Sgt. Michael P. Williams and Spc. Brent W. May, members of Company C, 1st Battalion, 41st Infantry Regiment, based at Ft. Riley, Kan. Williams was also charged with obstruction of justice and making a false official statement. The military gave no details about the case. It said the events that led to the charges could not be disclosed because the investigation was continuing."); Edell Interview, *supra* note 57; Kincaid Interview *supra* note 15 (Maj Kincaid served as the detailed defense counsel for Sergeant Williams, one of the two accused Soldiers in the case).

⁷⁶ Edell Interview, *supra* note 57; Kincaid Interview *supra* note 15.

⁷⁷ Edell Interview, *supra* note 57.

⁷⁸ *Id.*; see also Neill Interview, *supra* note 72. Discussing his initial estimate of the case, which included a witness for the prosecution who could authenticate the images of the charged offenses and testify about all of the misconduct charged, MAJ Neill stated, "I thought . . . these [were] going to be six easy guilty pleas." The final trial wrapped up nearly two years later. *Id.*

civilian defense counsel to appeal to the media to create issues at trial.⁷⁹ Arguably, the media wields the power to turn a factually simple case into a messy, protracted battle and open a new front in the case outside of the courtroom.⁸⁰

The combination of the media, the internet, and a high profile American war crime has the potential to wreak havoc on national military strategy. "An ordinary characteristic of small wars is the antagonistic propaganda against the campaign or operations in the United States press or legislature. One cannot afford to ignore the possibilities of propaganda."⁸¹ In Iraq, the interplay between the immediacy of news reports about war crimes, the ease by which insurgents could manipulate those reports, and the instantaneous access via the internet to propagate propaganda proved the media's significant link between the war crimes and national strategy.⁸²

⁷⁹ Edell Interview, *supra* note 57.

⁸⁰ Vokey Interview, *supra* note 16.

⁸¹ U.S. DEP'T OF NAVY, UNITED STATES MARINE CORPS SMALL WARS MANUAL para.I-15(h) (1940) [hereinafter SMALL WARS MANUAL]. For many Marines, this reference publication served as a major counterinsurgency doctrinal reference prior to the recent publication of FM 3-24. *See infra* pp. 22–23 and note 81.

⁸² Counterinsurgency (COIN) doctrine addresses the challenge of information operation:

Both counterinsurgents and the [Host Nation] government ensure that their deeds match their words. They also understand that any action has an information reaction. Counterinsurgents and the [Host Nation] government carefully consider that impact on the many audiences involved in the conflict and on the sidelines. They work actively to shape responses that further their ends. In particular, messages to different audiences must be consistent. *In the global information environment, people in the [Area of Operations] can access the Internet and satellite television to determine the messages counterinsurgents are sending to the international community and the U.S. public. Any perceived inconsistency reduces credibility and undermines COIN efforts.*

U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-140 (Dec. 2006) [hereinafter FM 3-24] (emphasis added).

Two Army “strategic cases” provide good examples of the manner in which these cases affect the information battlefield of the war effort. First, the Abu Ghraib case initially began as a relatively low-key investigation into detainee abuse during which investigators discovered that a handful of low-level Soldiers committed abuses of their Iraqi prisoners.⁸³ The most damning evidence of the abuse was hundreds of digital photographs and videos of the misconduct.⁸⁴ When the story broke, many of the worst images were released to the worldwide press and very quickly transformed into enemy propaganda.⁸⁵ In fact, the “pictures and videos that you [saw] all the time—they ended up in videos to recruit Iraqis to come and help with the insurgency.”⁸⁶ The impact of the images, and the ease of their dissemination, clearly contributed to the seriousness of the case. One Abu Ghraib prosecutor summed it up: “I believe if there had not been pictures, this would not have had media coverage at all, even if the press had full access to the CID reports.”⁸⁷

The Mahmoudiyah case provides another example of the impact of American war crimes in contributing to insurgent propaganda. In March 2006, five soldiers from the 502nd Regiment of the 101st Airborne Division participated in what has been described as “one of the most heinous [war crimes] involving U.S. troops in the last three years of the war in Iraq.”⁸⁸ The Soldiers noticed a fourteen-year old girl while on combat patrol and plotted to go to her home for a “crime of opportunity.”⁸⁹ They later went to her home, killed her parents and ten-year old sister, then raped her, killed her, and “set her body afire in an effort to conceal the crime and blame it on the insurgents.”⁹⁰ Shortly afterwards, insurgent groups swore to avenge the victims. They

⁸³ Neill Interview, *supra* note 72.

⁸⁴ *Id.*; Dowdy Interview, *supra* note 23; Krul Interview, *supra* note 69.

⁸⁵ Neill Interview, *supra* note 72; Krul Interview, *supra* note 69.

⁸⁶ Dowdy Interview, *supra* note 23; *see also* Neill Interview, *supra* note 72.

⁸⁷ Neill Interview, *supra* note 72.

⁸⁸ Drew Brown, *U.S. Identifies 5 Soldiers Charged in Murder Case; The U.S. Military Identified the Soldiers Charged in One of the Most Heinous Cases Against Iraqi Civilians—the Rape of a Teenager and the Killings of Her and Her Family*, MIAMI HERALD, July 11, 2006, at 19A.

⁸⁹ Richard Sisk, *G.I. Slaughter Probe: Accused of Killing, Rape*, DAILY NEWS, July 1, 2006, at 10.

⁹⁰ Brown, *supra* note 63, at A19; Richard Sisk, *G.I. Slaughter Probe: Accused of Killing, Rape*, DAILY NEWS, July 1, 2006, at 10; *Soldier Gets 100 Years for Iraq Rape, Murder*, CHI. TRIB., Feb. 23, 2007, at 6; Joshua Partlow, *The War in Iraq: Soldier Detailed Rape, Slaying, Investigator Says; He Graphically Recounted Alleged Crime in Interview, Sworn Statement, Official Testifies*, HOUSTON CHRON., Aug. 8, 2006, at A8.

abducted and beheaded two Army soldiers in June 2006, and “vowed to kidnap and kill another eight American troops to exact a ten-to-one revenge for the rape and murder of the girl.”⁹¹ Although hardly surprising that such an action would be planned in retaliation for such an egregious crime, it is important to recognize that the insurgents communicated their message of retaliation through an internet video.⁹² The video showed “the mutilated bodies of two American soldiers abducted in June and found murdered days later during a search by American and Iraqi forces south of Baghdad. A message with the video [said] the soldiers were killed out of revenge for the rape and murder of an Iraqi girl in March.”⁹³ Notably, the killings took place prior to any American soldiers being charged in relation to the Mahmoudiyah rape and killings.⁹⁴

The idea that American service members are capable of committing war crimes hardly surprises any who study the history of warfare, especially the behavior of individual soldiers fighting a counterinsurgency. Nonetheless, the fact that war crimes such as those at Abu Ghraib and Mahmoudiyah demand major international media attention must be recognized as a factor in these “strategic cases” because of the manner by which they affect the military justice process and influence enemy propaganda. The intense media attention clearly influences the cases themselves, affecting decisions made by the prosecutors and defense attorneys, military officials, and others involved in the process.⁹⁵ More significantly, they impact the overall national military strategy and the operational mission.

⁹¹ Akeel Hussein and Colin Freeman, *Two Dead Soldiers, Eight More to Go, Vow Avengers of Iraqi Girl's Rape*, SUNDAY TELEGRAPH, July 9, 2006, at 25. See also Julian E. Barnes, *U.S. Sees Possible Links Between Incidents in Iraq: The Slayings of Three Soldiers Near the Site of an Alleged Rape and Killing of a Family May Have Been an Act of Revenge, an Official Says*, L.A. TIMES, July 5, 2006, at A6.

⁹² Edward Wong, et al., *Insurgent Group Posts Video of 2 Mutilated U.S. Soldiers*, N.Y. TIMES, July 10, 2006, at A10.

⁹³ *Id.*

⁹⁴ Soldiers deployed in Iraq at the time dispute that the kidnappings and the Mahmoudiyah killings were related because the Soldiers' actions were not discovered until after the kidnappings had taken place. Interview with MAJ Joseph N. Orenstein, Student, 56th Graduate Course, The Judge Advocate General's Legal Ctr. and Sch., in Charlottesville, Va. (Mar. 13, 2008). Major Orenstein served as a Brigade Judge Advocate for 10th Mountain Division, the follow-on unit operating in the Mahmoudiyah area. He assisted the FBI with the collection of evidence for the case against one former Soldier involved in the incident who was released from the Army prior to being charged. *Id.*

⁹⁵ See Neill Interview, *supra* note 72; Dowdy Interview, *supra* note 23.

3. *Impact on the National War Effort*

The third and final element of the “strategic case” is that it has an identifiable impact on the overall warfighting mission. When a service member commits a grave breach of the law of war, and the media then broadcasts sordid details of the misconduct to the public, the military justice matter becomes a “strategic case” because military planners must subsequently change the manner in which they approach the war. The “strategic case” ultimately undermines the mission.

“Abu Ghraib is a good example of a case that can undermine the mission.”⁹⁶ When the scandal broke on “60 Minutes II” on April 28, 2004, the world was shocked to see images of Soldiers engaging in graphically dehumanizing mistreatment of Iraqi detainees at the infamous Saddam-era prison.⁹⁷ Details of the investigation topped the daily news in Iraq, and Soldiers and Marines felt the impact of the scandal immediately.⁹⁸ Commanders who were engaged in complex counterinsurgency missions all over Iraq were forced to retrain their units on the law of war while in the midst of their daily operational tasks.⁹⁹ To make matters worse, insurgents used the Abu Ghraib images as propaganda tools for recruitment so as to foment unrest within Iraq.¹⁰⁰ Unsurprisingly, this period was characterized by great turbulence throughout Iraq, as insurgents and terrorists fought major battles against the Army and

⁹⁶ Neill Interview, *supra* note 72.

⁹⁷ CBS, *Abuse of Iraqi POWs By GIs Probed* (Apr. 28, 2004), <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>; Seymour M. Hersh, *Torture at Abu Ghraib: How Far Up Does the Responsibility Go*, NEW YORKER, May 10, 2004, at 42; Seymour M. Hersh, *Chain of Command: How the Department of Defense Mishandled the Disaster at Abu Ghraib*, NEW YORKER, May 17, 2004, at 38.

⁹⁸ Neill Interview, *supra* note 72; Edell Interview, *supra* note 57; Interview with Maj Daniel P. Harvey, Graduate Student, The Judge Advocate General’s Legal Ctr. and Sch., in Charlottesville, Va. (Jan. 16, 2008) [hereinafter Harvey Interview]. Major Harvey served as a Marine battalion judge advocate in Iraq from February to August 2004, during which time the Abu Ghraib scandal broke. Maj Harvey served as the regimental judge advocate in Iraq from February to August 2006 for the regiment with oversight on the Hamdaniyah investigation and operational control of the unit implicated in the war crime. *Id.*

⁹⁹ Edell Interview, *supra* note 57; Harvey Interview, *supra* note 97.

¹⁰⁰ Neill Interview, *supra* note 72; Dowdy Interview, *supra* note 23.

Marines in Ramadi, Fallujah, Najaf, and elsewhere.¹⁰¹ In the mind of one battalion judge advocate stationed in Ramadi during this period, the problem was that the local sheiks engaged with the Marines could now point to Abu Ghraib as another source of contention with the Americans.¹⁰² "I remember it being said around the battalion that those [expletive deleted] guys in Abu Ghraib were going to get Marines killed in Ramadi."¹⁰³

Outside of Iraq, American and international public opinion of the coalition's efforts suffered from Abu Ghraib, which in turn hampered the overall national military effort. "An unfortunate side effect of [Abu Ghraib] was that it shadowed the courage shown by thousands of other U.S. soldiers. 'We [spent] ninety percent of our time talking about the Abu Ghraib stuff, and one percent talking about the valor of the troops.'"¹⁰⁴ The American press and Congress focused a great deal of attention on the Abu Ghraib scandal and the administration's handling of it.¹⁰⁵ "As U.S. senators profusely apologized to the world, the press was bombarding defense officials for explanations about their roles in the scandal."¹⁰⁶ Fueled by graphic images and a strong media interest, this "strategic case" thus shifted the national political focus from winning the counterinsurgency to damage control, investigation, and finger-pointing.

Operationally, Abu Ghraib's impact was still being felt in Iraq years later. Nonetheless, the "strategic cases" did not stop. The Marine Corps uncovered the Haditha and Hamdaniyah cases in March and May 2006, more than two years after the atrocities at Abu Ghraib took place. During this time, the Marines' mission in Anbar Province was affected by these cases. After news of the shootings came to light, and as the preliminary inquiries became full-scale criminal investigations, commanders were ordered to take immediate steps to retrain Marines about legal issues.¹⁰⁷ Units "completely changed the SOPs . . . We [trained] on ROEs; we changed who [taught] the classes. It was not just the lawyers any more—it was the commanders and the [operations officers] . . . so the troops were hearing it from their leaders."¹⁰⁸ These changes were part of a larger effort directed by Multinational Forces Iraq, which consisted of "the mother of all PowerPoints," a scenario-based training package addressing ethics,

¹⁰¹ See BING WEST, *NO TRUE GLORY* 61, 74–88, 93 (2005) (describing the rising swell of insurgency during this period).

¹⁰² Harvey Interview, *supra* note 97.

¹⁰³ *Id.*

¹⁰⁴ Ricks, *supra* note 67, at 379–80, *quoting* Bing West.

¹⁰⁵ WEST, *supra* note 100, at 224.

¹⁰⁶ *Id.* at 213.

¹⁰⁷ Schotemeyer Interview, *supra* note 14; Harvey Interview, *supra* note 97.

¹⁰⁸ Schotemeyer Interview, *supra* note 14.

rules of engagement, escalation of force, and other legal issues directly related to the Haditha and Hamdaniyah investigations.¹⁰⁹ The biggest change, however, was that battalion commanders personally had to make time for training law of war issues in the midst of conducting their operational missions.¹¹⁰

Skeptics' responses to these sorts of training measures indicate the extent to which a "strategic case" affects public opinion. In response to a report in which the Chairman of the Joint Chiefs of Staff had stated that the training described above would "provide comfort to those looking to see if we are a nation that stands on the values we hold dear,"¹¹¹ one critic wrote:

With all due respect to the general, does he really think that such training will appease those who believe the Americans at Haditha and Hamdaniyah, and our soldiers and agents elsewhere, are guilty of atrocities? Regardless of the results of official inquiries and courts-martial, the damage has been done. In the Muslim (and much of the non-Muslim) court of opinion, the verdict is already in.¹¹²

These "strategic cases" thus imply that American Soldiers and Marines do not always obey the law of war or act from the moral high ground.¹¹³ Using Hamdaniyah as an example, the bottom-line message appeared to be that "it [was] starting to sound like Saddam's era" under a different tyrant, where "a group of Marines [would] roll into a house, grab somebody, put him in a hole, and kill him."¹¹⁴ The "strategic case" thus harms the national strategic mission

¹⁰⁹ Harvey Interview, *supra* note 97.

¹¹⁰ *Id.*

¹¹¹ Alex Vernon, Editorial, *The Road From My Lai*, N.Y. TIMES, June 23, 2006, at A27.

¹¹² *Id.*

¹¹³ Under current Army and Marine Corps doctrine, a key element of the overall COIN strategy is to respect the local populace:

Another part of analyzing a COIN mission involves assuming responsibility for everyone in the AO. This means that leaders feel the pulse of the local populace, understand their motivations, and care about what they want and need. *Genuine compassion and empathy for the populace provide an effective weapon against insurgents.*

FM 3-24, *supra* note 81, para. 7-8 (emphasis added).

¹¹⁴ Schotemeyer Interview, *supra* note 14.

because it undermines the legitimacy of the entire war effort; if the perception is that American service members will go unpunished for crimes against the civilian population, or that commanders cannot (or will not) take effective measures to prevent such abuses, the occupation appears hypocritical, dehumanizing, and oppressive.

Finally, Marines and Soldiers at the tactical level also feel the impact of "strategic cases." One officer noticed that the troops executing the brunt of the counterinsurgency battle in Iraq and Afghanistan have developed a reluctance to act in combat:

There's a big impact on your average "snuffy" out there. He's reading what's going on in the news; he's listening to the media. *He doesn't want to be the guy investigated for the next shooting.* A lot of the witnesses I talk to, in all of these cases, all of them say at times [that] if they go back, they are a lot more reluctant to pull the trigger on anything. That—in and of itself—is an impact outside of the courtroom. It impacts not only the way Marines deal with [their mission] on the battlefield. They put themselves in greater danger by not engaging a target that they could lawfully engage just because they don't want somebody coming back to question them through a year-long investigation and another year later potentially finding themselves in the courtroom.¹¹⁵

The tactical dilemma of the "strategic case" is clear: young Soldiers and Marines may be forced to choose between acting to protect themselves and their comrades or taking an action that may be construed as a war crime.

In the end, "strategic cases" affect the overall national military strategy because they undermine the public's faith in the integrity of the armed forces. Similarly, these cases cause troops in the field to doubt their own actions, potentially creating a dangerous reluctance to act when faced with an ability to do so. In the middle, where military commanders plan and execute campaign plans, "strategic cases" cause large-scale refocusing and retraining in the midst of executing the mission, taking time and focus from defeating the enemy to discerning the legal implications of wrongful action. While none of these effects indicate a direct harm to the national military strategy, they highlight the fact that a "strategic case" influences matters beyond the courtroom. As such, a "strategic case" incorporates three critical elements: one, it is a "grave breach" of the law of war by an American service member against a non-American

¹¹⁵ Woodard Interview, *supra* note 13.

detainee or civilian; two, it generates and receives long-term national and international media interest that affects the conduct of the case itself; and three, its effects are felt on the battlefield and at the strategic level of war.

IV. COUNTERINSURGENCY DOCTRINE IN RELATION TO THE “STRATEGIC CASE”

The wars in Iraq and Afghanistan can best be described as counterinsurgency campaigns. They invoke a broad range of complex issues surrounding the role of the military in the counterinsurgency campaign, the use of force to achieve strategic success, and the impact of war crimes on the overall military strategy.¹¹⁶ The United States’ national strategy for victory in Iraq recognizes eight pillars upon which the American strategic effort will be focused, amongst which are “help Iraq strengthen the rule of law and promote civil rights,” “increase international support for Iraq,” and “strengthen public understanding of coalition efforts and isolation of the insurgents.”¹¹⁷ To best understand the interplay between these national goals and the prosecution “strategic cases,” it is necessary to identify principles of counterinsurgency warfare as they relate to military justice.

A. Insurgency and Counterinsurgency Defined

Insurgency and counterinsurgency (COIN) are complex subsets of warfare.¹¹⁸ Defining insurgency and counterinsurgency must serve as a starting point. “[A]n insurgency is an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government, occupying power, or other political authority while increasing insurgent control.”¹¹⁹ Put in the context of Iraq, the insurgency consists of those enemy

¹¹⁶ See, e.g., Jay Price, *A New Emphasis on Counterinsurgency*, SCRIPPS HOWARD NEWS SERVICE, Jan. 9, 2007, available at <http://www.scrippsnews.com/node/18398> (“Even before President Bush reveals his plan Wednesday for fighting the Iraq war, one thing is clear: the underlying theme is counterinsurgency.”); see also NAT’L SECURITY COUNCIL, NATIONAL STRATEGY FOR VICTORY IN IRAQ (Nov. 2005) [hereinafter NAT’L SECURITY COUNCIL].

¹¹⁷ NAT’L SECURITY COUNCIL, *supra* note 115, at 25–26.

¹¹⁸ FM 3-24, *supra* note 81, para. 1-1. In December 2006, the Army and Marine Corps published this new doctrinal publication in which they identified fundamental principles for military operations in a counterinsurgency environment. This publication serves as the key reference for the counterinsurgency doctrine.

¹¹⁹ *Id.* at para. 1-2.

forces seeking to “intimidate, coerce, or convince the Iraqi public not to support the transition to democracy by persuading them that the nascent Iraqi government is not competent and will be abandoned by a Coalition that lacks the stomach for this fight.”¹²⁰

On the other side of the conflict are the counterinsurgents. “Counterinsurgency is military, paramilitary, political, economic, psychological, and civic actions taken by a government to defeat insurgency.”¹²¹ In Iraq the American counterinsurgent mission is to “help the Iraqi people build a new Iraq with a constitutional, representative government that respects civil rights and has security forces sufficient to maintain domestic order and keep Iraq from becoming a safe haven for terrorists.”¹²² Taken together, these two sides of the same coin represent a phenomenon that is unique in each circumstance, but each of which possesses at least one critical characteristic: the battle for legitimacy.¹²³

B. Legitimacy Is Paramount

The notion of legitimacy lies at the very core of counterinsurgency warfare. “The primary objective of any COIN operation is to foster development of effective governance by a legitimate government.”¹²⁴ At the highest level, this concept applies to the legitimacy of the government; similarly, legitimacy remains the counterinsurgent’s chief objective at all levels of the conflict, and it ultimately impacts an individual Marine’s tactical decisions.¹²⁵ This premise is ultimately rooted in the idea that a legitimate government will have the support of its people:

Counterinsurgents achieve [legitimacy] by the balanced application of both military and nonmilitary means. All governments rule through a combination of consent and coercion. Governments described as “legitimate” rule

¹²⁰ NAT’L SECURITY COUNCIL, *supra* note 115, at 7.

¹²¹ FM 3-24, *supra* note 81, para. 1-2 (emphasis removed).

¹²² NAT’L SECURITY COUNCIL, *supra* note 115, at 7–8.

¹²³ “Long-term success in COIN depends on the people taking charge of their own affairs and consenting to the government’s rule.” FM 3-24, *supra* note 81, para. 1-4.

¹²⁴ *Id.* at para. 1-113.

¹²⁵ *See id.* at para. 1-157 (“Successful COIN operations require competence and judgment by Soldiers and Marines at all levels. Indeed, young leaders—so-called “strategic corporals”—often make decisions at the tactical level that have strategic consequences”).

primarily with the consent of the governed; those described as “illegitimate” tend to rely mainly or entirely on coercion. Citizens of the latter obey the state for fear of the consequences of doing otherwise, rather than because they voluntarily accept its rule. A government that derives its powers from the governed tends to be accepted by its citizens as legitimate. It still uses coercion—for example, against criminals—but most of its citizens voluntarily accept its governance.¹²⁶

Although military action can deal effectively with a number of issues caused by a loss of legitimacy by destroying large numbers of insurgents and shutting down avenues of communication, a “[counterinsurgency] effort cannot achieve lasting success without the [host nation] government achieving legitimacy.”¹²⁷ For Iraq, President Bush set the benchmark for success of the national military strategy: “The United States has no intention of determining the precise form of Iraq’s new government . . . [but] all Iraqis must have a voice in the new government, and all citizens must have their rights protected.”¹²⁸

Conversely, actions contrary to legitimate governance cause severe harm in counterinsurgency campaigns. “Illegitimate actions are those involving the use of power without authority—whether committed by government officials, security forces, or counterinsurgents. Such actions include unjustified or excessive use of force, unlawful detention, torture, and punishment without trial. Efforts to build a legitimate government through illegitimate actions are self-defeating.”¹²⁹ Recognizing this, military forces seeking to defeat an insurgency must encourage and enforce strict obedience to the law of war, domestic laws and treaties, and Host Nation laws.¹³⁰ The failure to do this sows the seeds of the “strategic case.” Indeed, “any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world. *Illegitimate actions undermine both long- and short-term counterinsurgency efforts.*”¹³¹

Counterinsurgency doctrine recognizes the prejudicial impact of American misconduct in the COIN environment. “The aim is not to develop a

¹²⁶ *Id.* at para. 1-113.

¹²⁷ *Id.* at para. 1-120.

¹²⁸ NAT’L SECURITY COUNCIL, *supra* note 115, at 1 (quoting a speech by President George W. Bush on Feb. 26, 2003).

¹²⁹ FM 3-24, *supra* note 81, para. 1-132.

¹³⁰ *Id.*

¹³¹ *Id.* (emphasis added).

belligerent spirit in our men but rather one of caution and steadiness. Instead of employing force, one strives to accomplish the purpose with diplomacy.”¹³² Leaders bear the brunt of preventing the “strategic case”:

Senior leaders set the proper direction and climate with thorough training and clear guidance; then they trust their subordinates to do the right thing. Preparation for tactical-level leaders requires more than just mastering Service doctrine; they must also be trained and educated to adapt to their local situations, *understand the legal and ethical implications of their actions*, and exercise initiative and sound judgment in accordance with their senior commanders’ intent.¹³³

In performing their tactical missions, Marines and Soldiers are reminded of their obligations under the Constitution, the Uniform Code of Military Justice, and service regulations.¹³⁴ Nonetheless, “complex counterinsurgency operations place the toughest of ethical demands on Soldiers, Marines, and their leaders,” and understandably may result in “illegitimate actions” by them.¹³⁵ When this happens, discipline must be effective and transparent to limit the harm to the overall COIN effort.

C. Enforcing Discipline

The insurgent seeks to achieve dramatic, strategic gains by targeting the will of the domestic and international opposition. He does this by provoking individual Soldiers and Marines into taking retaliatory tactical action contrary to their own strategic goals.¹³⁶ “These attacks work especially well when insurgents can portray their opposition as unethical by the opposition’s own standards . . . In COIN, preserving noncombatant lives and dignity is central to mission accomplishment. This imperative creates a complex ethical environment.”¹³⁷ This means that commanders must anticipate that misconduct will occur; an efficient and transparent judicial process contributes both to the maintenance of good order and discipline and the overall counterinsurgency strategy because it reinforces legitimacy.

¹³² SMALL WARS MANUAL, *supra* note 80, para I-10(d).

¹³³ FM 3-24, *supra* note 81, at para. 1-157 (emphasis added).

¹³⁴ *See id.* at para. 7-21.

¹³⁵ *Id.*

¹³⁶ *Id.* at para. 7-25.

¹³⁷ *Id.*

Since the Abu Ghraib and Haditha cases have come to light, American counterinsurgency doctrine has recognized the need to enforce discipline of its troops in combat not only because military good order and discipline require it, but to win the battle for legitimacy. Field Manual 3-24, Counterinsurgency, incorporates an entire appendix devoted to the legal considerations of counterinsurgency.¹³⁸ “Despite rigorous selection and training, some personnel require discipline. The Uniform Code of Military Justice is the criminal code of military justice applicable to all military members. Commanders and general officers are responsible for their subordinates and their behavior. Commanders must give clear guidance and ensure compliance.”¹³⁹ Military justice clearly plays a strategic purpose in counterinsurgency operations:

[H]istory records that [U.S. military personnel] commit crimes amidst the decentralized command and control, the strains of opposing a treacherous and hidden enemy, and the often complex ROE that characterize the COIN environment. Uniformed personnel remain subject at all times to the Uniform Code of Military Justice and must be investigated and prosecuted, as appropriate, for violations of orders, maltreatment of detainees, assaults, thefts, sexual offenses, destruction of property, and other crimes, including homicides, that they may commit during COIN.¹⁴⁰

The fact that recent operational doctrine (as opposed to combat service support doctrine) emphasizes military justice considerations as part of the overall strategy represents a respect for the significance of the “strategic case.”¹⁴¹ Indeed, senior military leaders now recognize that “there are national strategic implications when we have incidents like [Abu Ghraib] occur, [particularly for] any law of armed conflict violation.”¹⁴² Thus, national military strategy requires

¹³⁸ FM 3-24, *supra* note 81, at app. D.

¹³⁹ *Id.* at para. D-22.

¹⁴⁰ *Id.* at para. D-23.

¹⁴¹ *See, e.g., id.* at para. I-10(d). Until the publication of FM 3-24, the Small Wars Manual was regarded as the key treatise on counterinsurgency, or “small wars.” The Small Wars Manual contains no mention of the criticality of prosecuting Marines for alleged violations of the law of war as a means of accomplishing strategic goals.

¹⁴² Telephone Interview with LtCol G. William “Bill” Riggs, Staff Judge Advocate, Marine Forces Central Command (MARCENT), Tampa, Fla., at Charlottesville, Va. (Jan. 18, 2008) [hereinafter Riggs Interview]. Lieutenant Colonel Riggs served as the senior Marine staff judge advocate (SJA) to the consolidated disposition authority (CDA), handling all Marine “strategic cases”

effective, efficient, and transparent prosecutions of "strategic cases" occurring in Iraq and Afghanistan.

V. THE CHALLENGES OF PROSECUTING AND DEFENDING "STRATEGIC CASES"

"Strategic cases" demand that attorneys devote far more of their energy to handling non-legal issues than would normally be required with typical military justice cases. By definition, "strategic cases" begin as war crimes and thus frequently commence their military justice journeys amidst ad hoc command relationships. Moreover, their complexity requires that counsel possess considerable time, experience, and skills rarely found in first-tour judge advocates. As such, in addition to the standard concerns dealt with in a complex court-martial, the major challenge of "strategic cases" involves resolving confusing command relationships, logistical and procedural problems, and personnel shortages. As one attorney involved with the Abu Ghraib case remarked, "When you're in the courtroom, you try the case just like you would any other case, and you put all that other garbage—the media, everybody else—behind you and out of your mind . . . *But it's the out of courtroom stuff that makes it more than a case.*"¹⁴³

A. Unscrambling Confusing Command Relationships

One of the initial issues confronted by those seeking to process a strategic case is deciding who will act as the convening authority. A "convening authority" is a commissioned officer in command with the power to convene a court-martial who, in addition to making decisions about pretrial confinement or the production of witnesses, holds the power to refer charges to courts-martial, to detail members, to enter into pretrial agreements, to act upon sentences and grant clemency, and, in some cases, to grant immunity.¹⁴⁴ As such, the convening authority exercises critical powers in the military justice system, especially for general courts-martial, in which the ultimate penalty may include

coming out of Central Command, including the Haditha, Hamdaniyah, and MARSOC (Afghanistan) cases. *Id.*

¹⁴³ Krul Interview, *supra* note 69 (emphasis added). *See also* Dowdy Interview, *supra* note 23.

¹⁴⁴ MCM, *supra* note 22, R.C.M. 103(6) (definition of convening authority), R.C.M. 504 (authority to convene courts-martial), R.C.M. 304(b) (pretrial confinement), R.C.M. 503(a) (member selection), R.C.M. 601 (referral), R.C.M. 703 (witness production), R.C.M. 704(c) (immunity), and R.C.M. 705(a) (pretrial agreement).

a sentence of death or confinement for life.¹⁴⁵ Because these decisions often require considerable thought and involvement in the process, many convening authorities prefer to handle most of their military justice issues before turning command over to a successor; for “strategic cases” and other deployment justice cases, some units set strict policies that they will not redeploy with unfinished military justice issues, whenever possible.¹⁴⁶

Because they originate in combat environments, “strategic cases” typically take place in the midst of complex command layers. In Iraq and Afghanistan, Army and Marine battalion- and brigade-sized combat units are frequently attached to units other than their original parent units.¹⁴⁷ Byzantine command relationships thus arise from the need to task combat units to meet specific combat missions. One former brigade judge advocate described one command puzzle that he experienced:

This is a little confusing. The murder cases that I worked on were from one particular unit, Charlie Company, 141 Infantry, which was part of Third Infantry Brigade, First Armored Division out of Fort Riley, Kansas. [This brigade was] attached to Second Brigade, Tenth Mountain Division, which was then attached to First Cavalry Division in Iraq.¹⁴⁸

In this example, the Soldiers from Charlie Company were potentially subject to two different special court-martial convening authorities (SPCMCA) and three different general court-martial convening authorities (GCMCA), depending on how the command relationships had been sorted out.¹⁴⁹

When “strategic cases” occur, Marine staff judge advocates scramble to determine an appropriate GCMCA to take cognizance over the case from

¹⁴⁵ *Id.*, Maximum Punishment Chart, at A12.

¹⁴⁶ Edell Interview, *supra* note 57.

¹⁴⁷ For a thorough analysis of jurisdictional concerns of deployment justice, *see* MAJ Nick Lancaster, Graduate Course: Deployment Justice (n.d.) (unpublished PowerPoint Presentation, on file with author) (Maj Lancaster taught the subject to the 56th Graduate Course, The Judge Advocate General’s Legal Ctr. and Sch., in Charlottesville, Va., on Dec. 4, 2007).

¹⁴⁸ Edell Interview, *supra* note 57 (emphasis added).

¹⁴⁹ Notably, the Army provides guidance for sorting out jurisdictional convening authority issues. *See* U.S. DEP’T OF ARMY, ARMY REGULATION 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 5-2(a)(2) (16 Dec. 2005) (“Commanders exercising GCM authority may establish deployment contingency plans that, when ordered into execution, designate provisional units under AR 220-5.”)

inception through convening authority's action.¹⁵⁰ While the UCMJ provides that "each armed force has court-martial jurisdiction over all persons subject to the code,"¹⁵¹ this power is limited in part by the breadth of the convening authority's command and by the Rules for Court-Martial.¹⁵² When a "strategic case" takes place, the parent command thus seeks an appropriate GCMCA to handle the entire thorny military justice process, thereby ensuring consistent handling of cases and administratively streamlining the case.¹⁵³ In the Abu Ghraib case, for instance, the decision-makers contemplated who would serve as the GCMCA, weighing the accused Soldiers' original operational commander in Iraq, their administrative home station commanders, or some new consolidated disposition authority in the United States.¹⁵⁴ Ultimately, two different GCMCAs handled the case, with seven of the trials falling under the original Corps commander from Iraq and the remaining cases being tried by an administrative GCMCA from the Military District of Washington.¹⁵⁵

The Marine Corps experienced this phenomenon with its "strategic cases." In the Hamdaniyah case, the misconduct occurred while the unit was roughly halfway through its seven-month deployment.¹⁵⁶ Rather than start the court-martial process in Iraq where there were too few Marine defense counsel to handle the eight cases and there was too little time to complete the cases prior to redeployment, the Commanding General of I Marine Expeditionary Force (I

¹⁵⁰ See Riggs Interview, *supra* note 141; Edell Interview, *supra* note 57; Neill Interview, *supra* note 72; Telephone Interview with LtCol John Baker, USMC, Staff Judge Advocate, Marine Corps Base Quantico, Va., in Charlottesville, Va. (Jan. 14, 2008) [hereinafter Baker Interview] (Lieutenant Colonel Baker was the lead prosecutor for the Hamdaniyah cases).

¹⁵¹ MCM, *supra* note 22, R.C.M. 201(e). The UCMJ specifies who may convene general courts-martial, including "the commanding officer of . . . an Army Corps, a division, a separate brigade, or a corresponding unit in the Army or Marine Corps..." 10 U.S.C. § 822(a)(5) (2008).

¹⁵² See MCM, *supra* note 22, R.C.M. 103(6) ("convening authority" includes a commissioned officer in command for the time being and successors in command") and R.C.M. 201(e)(3)(A) and (B) (delimits when a member of one armed force may be tried by a court-martial convened by a member of another armed force).

¹⁵³ See Riggs Interview, *supra* note 141.

¹⁵⁴ Dowdy Interview, *supra* note 23; Krul Interview, *supra* note 69; Neill Interview, *supra* note 72.

¹⁵⁵ Neill Interview, *supra* note 72; see also Dowdy Interview, *supra* note 23; Krul Interview, *supra* note 69.

¹⁵⁶ Woodard Interview, *supra* note 13; see also Baker Interview, *supra* note 149; Riggs Interview, *supra* note 141.

MEF), the senior Marine Corps commander in Iraq at the time, elected to send the entire case back to the United States for disposition at Camp Pendleton, California, the I MEF home station.¹⁵⁷ Around this same time, the Haditha investigation also indicated alleged misconduct by other Camp Pendleton Marines punishable under the UCMJ; to resolve the issue of which GCMCA should have cognizance over the two cases, the Commandant of the Marine Corps appointed the Commanding General of Marine Corps Forces Central Command (MARCENT) to serve as the “Consolidated Disposition Authority” (CDA) for both cases.¹⁵⁸ The benefit of this decision, as reflected in the Commandant’s memorandum, was that it would “ensure consistent handling of similar allegations, provide centralization of the administrative and disciplinary processing of cases, and provide visibility of these matters to the Commander, U.S. Central Command.”¹⁵⁹

Thus, because typical command relationships could not appropriately manage these “strategic cases,” it was necessary to create ad hoc jurisdictional schemes. Likewise, practitioners working on future “strategic cases” should anticipate having to establish unusual command relationships to provide for the consistent handling of “strategic cases.”

B. Navigating the Logistical and Administrative Quagmire

Logistical and administrative considerations are never far from the minds of military attorneys trying courts-martial. A great deal of effort is put into making sure witnesses and members are where they need to be, when they need to be there.¹⁶⁰ High profile cases often increase this burden, requiring enhanced security and public affairs involvement.¹⁶¹ But for the most part, military attorneys practicing outside of the deployment justice arena have relatively unfettered access to witnesses, clients, and military judges throughout

¹⁵⁷ Woodard Interview, *supra* note 13; Baker Interview, *supra* note 149; Riggs Interview, *supra* note 141; Schotemeyer Interview, *supra* note 14.

¹⁵⁸ Baker Interview, *supra* note 149; Riggs Interview, *supra* note 141; Memorandum, Commandant of Marine Corps to Commander, U.S. Marine Forces, Central Command, subject: Designation As Consolidated Disposition Authority For Any Necessary Administrative Or Disciplinary Actions Relative To The Investigation Of The Incident That Occurred In Hamdaniyah, Iraq On Or About 26 April 2006 (6 June 2006) [hereinafter Hamdaniyah Memo].

¹⁵⁹ Hamdaniyah Memo, *supra* note 157.

¹⁶⁰ See Woodard Interview, *supra* note 13; Krul Interview, *supra* note 69; Dowdy Interview, *supra* note 23.

¹⁶¹ See Woodard Interview, *supra* note 13; Baker Interview, *supra* note 149.

the process. Deployment justice magnifies all of these logistical and administrative headaches, especially for "strategic cases."

In Iraq and Afghanistan, merely meeting and speaking with an accused, a witness, or an investigator can be a major burden.¹⁶² Traveling from a military base to inspect the scene of the crime, interview witnesses, or otherwise investigate a case requires an attorney to arrange for security, likely in the form of an infantry unit with tactical responsibility over the area, and demands coordination of transportation to and from the area, either in the form of an air tasking order or a surface convoy.¹⁶³ Additionally, since many witnesses in "strategic cases" do not speak English, interpreters must accompany the attorneys to conduct interviews of local witnesses.¹⁶⁴ Considering that the sole purpose for military forces to be in the combat zone is to accomplish a specific military mission *completely unrelated to the investigation and preparation of a court-martial*, it is obvious why military attorneys attempting to conduct deployment justice find their jobs so problematic: it is *never* more important for an attorney to meet with a witness, visit a crime scene, etc., when the alternative is for a commander to accomplish his tactical combat mission. When commanders agree to provide resources for attorneys to accomplish these tasks, they do so acknowledging that they are placing their troops in danger for a legal matter, not an operational task.¹⁶⁵

To complicate matters, American, Coalition, and host nation witnesses are under constant threat of death or harm while in the combat zone. For example, in one tragic event, an Army company commander testified at an Article 32 investigation in Baghdad and was killed only a few hours later.¹⁶⁶ Similarly, the Naval Criminal Investigative Service (NCIS) personnel investigating the Hamdaniyah incident came under attack while visiting the scene of the crime.¹⁶⁷ Indeed, security concerns forced the lead prosecutor of

¹⁶² See Kincaid Interview, *supra* note 15.

¹⁶³ Kincaid Interview, *supra* note 15; Schotemeyer Interview, *supra* note 14. This phenomenon is hardly unique to Iraq; during Vietnam attorneys struggled with identical concerns. "Travel between commands remained haphazard and dependent on the persistence and ingenuity of the lawyers involved. Only rarely were vehicles assigned to legal offices and lawyers often took to the road, usually hitchhiking. Inadvertent trips down enemy controlled roads and helicopters forced down by mechanical failure remained unremarkable occurrences." SOLIS, TRIAL BY FIRE, *supra* note 8, at 104.

¹⁶⁴ Woodard Interview, *supra* note 13.

¹⁶⁵ See Schotemeyer Interview, *supra* note 14.

¹⁶⁶ Edell Interview, *supra* note 57.

¹⁶⁷ Woodard Interview, *supra* note 13; Baker Interview, *supra* note 149.

the Hamdaniyah case to spend only a few minutes in the middle of the night at the crime scene; his only personal look at the site of the shooting was through night vision goggles because of the threat of insurgent fire.¹⁶⁸ Unfortunately, these problems are not unique to the “strategic cases” of Iraq and Afghanistan; during courts-martial of the Vietnam War, investigators and attorneys constantly struggled with American combat-related casualties and dead, lost, or missing Vietnamese witnesses.¹⁶⁹

Legal offices, courtrooms, confinement facilities, and other elements of infrastructure necessary for military justice to take place simply did not exist when some of the recent “strategic cases” came to light. Emphasizing the stark nature of the deployment justice environment, there was no working courtroom at Camp Victory in Baghdad available in which to try courts-martial when the Abu Ghraib scandal broke. “The facilities were so bad, the judge had refused to come and have the cases tried there. . . It was just a mess.”¹⁷⁰ On the surface, the Marine Corps takes a different approach to the problem of infrastructure. Proud of its ability to thrive in the most austere conditions, even when conducting military justice, Marines claim to be proud of their ability to conduct “business as usual” in any environment. However, all of the Marine Corps’ “strategic cases” have been tried in the comparatively antiseptic courtrooms of Camp Pendleton and Camp Lejeune; not one of these cases even went to an Article 32 investigation in the forward deployed environment.¹⁷¹

When “strategic cases” are removed from the forward-deployed area to a home station in the United States, trial preparation becomes even more logistically complicated for the attorneys attempting to try the cases. In the Hamdaniyah and Haditha cases, for example, nearly all of the defense counsel and prosecutors were assigned to the cases while stationed at Marine Corps installations in California.¹⁷² Many of these attorneys recognized the need to travel to Iraq to fully investigate their cases, but most of them had no prior

¹⁶⁸ Baker Interview, *supra* note 149.

¹⁶⁹ See GARY D. SOLIS, SON THANG: AN AMERICAN WAR CRIME 137 (1997) [hereinafter SOLIS, SON THANG].

¹⁷⁰ Neill Interview, *supra* note 72. When the cases broke, MAJ Neill had been in Iraq for only a few weeks and had very little time to prepare the facilities for such a major case. The existing courtroom had been converted into a barracks for V Corps. They moved the cots, shower curtains, and card tables out of the room and contracted to build a real courtroom. Later, a courtroom was built, and the first few Abu Ghraib trials were able to proceed relatively unhindered by facility problems. *Id.*

¹⁷¹ Vokey Interview, *supra* note 16; Woodard Interview, *supra* note 13.

¹⁷² Vokey Interview, *supra* note 16.

deployment experience.¹⁷³ As a result, in addition to preparing for an extremely challenging case, they had to devote considerable time and energy arranging for transportation and participating in pre-deployment training, gear issue, and medical screening.¹⁷⁴ In the end, being able to deploy proved invaluable to these attorneys; it gave "an entirely different perspective . . . [and] was absolutely necessary."¹⁷⁵ They discovered that "what was more important than actually being at the crime scene was actually being in Iraq and knowing what it's like to have to gear up and . . . go outside the wire on a regular basis."¹⁷⁶ Since "strategic cases" directly relate to a service member's conduct while forward deployed, attorneys must have the ability to experience that environment firsthand, thereby making the additional logistical and administrative burdens necessary.

Finally, dealing with classified information remains a persistent administrative thorn common to "strategic cases."¹⁷⁷ Classified evidence complicates matters by invoking unfamiliar, rarely-used evidentiary rules with which few practitioners are familiar.¹⁷⁸ It also requires that additional measures be taken in the handling and storing of the evidence.¹⁷⁹ At Camp Pendleton, for example, to prepare for the Hamdaniyah and Haditha courts-martial, the legal support section built a classified material vault to assist the attorneys in handling the classified evidence without permitting it to inadvertently commingle with the thousands of pages of unclassified evidence.¹⁸⁰ All of this requires additional time, effort, and expertise, far beyond that typically required in standard military justice cases.¹⁸¹

¹⁷³ Vokey Interview, *supra* note 16; Woodard Interview, *supra* note 13.

¹⁷⁴ Vokey Interview, *supra* note 16; Woodard Interview, *supra* note 13; Krul Interview, *supra* note 69.

¹⁷⁵ Krul Interview, *supra* note 69. Although not involved with the Haditha or Hamdaniyah cases, CPT Krul served as defense counsel in the Abu Ghraib trial and based her remarks on the importance of having her co-counsel visit Iraq and the Abu Ghraib prison during their trial preparation. *Id.*

¹⁷⁶ Baker Interview, *supra* note 149.

¹⁷⁷ See Dowdy Interview, *supra* note 23. Maj Dowdy's Abu Ghraib court-martial was a classified trial. The classified evidence in the trial caused significant discovery issues for counsel. *Id.*

¹⁷⁸ See MCM, *supra* note 22, MIL. R. EVID. 505.

¹⁷⁹ See MCM, *supra* note 21, MIL. R. EVID. 505; see also Schotemeyer Interview, *supra* note 14; Dowdy Interview, *supra* note 23; Woodard Interview, *supra* note 13; Vokey Interview, *supra* note 16.

¹⁸⁰ Vokey Interview, *supra* note 16; Woodard Interview, *supra* note 13.

¹⁸¹ Classified evidence becomes even more problematic when civilian counsel are involved in the court-martial, delaying the case and affecting tactical

C. Dealing with Personnel Shortfalls

For the Marine Corps, the dearth of experienced, competent trial and defense counsel routinely gets highlighted when complex cases demand sensitive and knowledgeable handling. This problem only increases when “strategic cases” hit the docket. With a legal community easily described as “overcommitted,” the Marine Corps struggles to adequately staff its military justice sections, especially for “strategic cases” which require greater numbers of experienced counsel to handle the requisite trial and defense billets.

The Marine Corps simply does not have many trial or defense attorneys, and those it does have lack considerable trial experience.¹⁸² In recent years, the judge advocate community has honored its commitment to provide judge advocates serving as operational law advisors to every forward-deployed battalion- and regimental-sized ground combat unit.¹⁸³ Meanwhile, home station legal centers have maintained the volume and breadth of their complete legal services since operational Marine units typically do not deploy in units larger than battalion- or squadron-size.¹⁸⁴ For a relatively small judge advocate community already tasked with providing undiminished legal service support at the home stations, the new operational law mission constituted a major strain. To fill the deployment billets, trial and defense counsel were forced to rotate out of their positions much more quickly and frequently than in years past, thereby limiting their courtroom experience and denying them exposure to more challenging and complex cases typically handled by those counsel with greater trial experience.¹⁸⁵

decisions within the case itself. This assertion is based on the author’s recent professional experience as a defense counsel in the Hamdaniyah case, during which he spent months working to help his civilian counterpart receive an interim security clearance.

¹⁸² Riggs Interview, *supra* note 149.

¹⁸³ *Id.*

¹⁸⁴ Woodard Interview, *supra* note 13. For example, when I Marine Expeditionary Force (I MEF) deploys, it takes a small, permanent forward command element from First Marine Division and then fills its ranks from smaller battalion-sized units from the entire Marine Corps. Thus, during its year in Iraq, I MEF may have battalion-sized units from Okinawa, Hawaii, California, and North Carolina. Meanwhile, at I MEF’s home station, Camp Pendleton, the total remain-behind troop levels see little overall reduction. This, in turn, requires that the home station legal service providers continue to provide full, undiminished military justice and legal assistance services. *Id.*

¹⁸⁵ See Woodard Interview, *supra* note 13; Vokey Interview, *supra* note 16.

The Marine Corps defense community in particular felt the impact of this mission change. As a relatively small community, employing less than sixty judge advocates worldwide, the Marine Corps defense bar splits its counsel among three regions—Pacific, Western, and Eastern—serving the major installations of the respective geographical areas.¹⁸⁶ When a new defense counsel has finally spent enough time in the billet to have proven himself competent to try courts-martial with minimal supervision, he is also deemed competent for the battalion judge advocate mission and soon thereafter deployed in an operational law billet.¹⁸⁷ The overall effect has been to deplete the community of those personnel who should be challenged with larger and more complex defense cases. One experienced senior defense counsel summed up the central issue:

I'm a firm believer that we need to have judge advocates out with the battalions. I'm a firm believer we need to have judge advocates with the regiments. I'm a firm believer we need to have them with the MEF at every level. But because our end strength and structure is so limited, *we don't have the experience we need in order to focus on both the operational mission the way we need to and on traditional military justice.*¹⁸⁸

Since this practice has been going on for several years in support of the wars in Iraq and Afghanistan, it has caused significant experience shortages in defense (and trial) shops throughout the Marine Corps. Unfortunately, there is no plan to address this problem.¹⁸⁹

¹⁸⁶ Woodard Interview, *supra* note 13. For a complete breakdown of each individual judge advocate billet in the Marine Corps, see Memorandum, Deputy Staff Judge Advocate to the Commandant of the Marine Corps (DSJA to CMC) to SJA to CMC, subject: Judge Advocate Division Review of the Structure for Delivery of Legal Services in the Marine Corps (n.d.) [hereinafter DSJA Memo]; see also U.S. MARINE CORPS, ORDER P5800.16A W/ CH. 5, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION, ch. 2 (28 Nov. 2005) [hereinafter MCO P5800.16A].

¹⁸⁷ Woodard Interview, *supra* note 13. During his eighteen-month tenure as the Senior Defense Counsel at Camp Lejeune from July 2006 until January 2008, LtCol Woodard had five capable defense counsel deployed in support of the battalion mission, and he currently has two more being prepared for the mission. *Id.*

¹⁸⁸ *Id.* (emphasis added).

¹⁸⁹ Riggs Interview, *supra* note 141; Vokey Interview, *supra* note 16.

These shortfalls had a major impact on the Marine Corps' "strategic cases." When the Haditha and Hamdaniyah cases appeared in mid-2006, just as the annual summer personnel transfers had begun, Camp Pendleton was critically short of defense and trial attorneys, to the point that the Marine Corps' largest legal support section was incapable of handling these two strategic cases without significant outside help.¹⁹⁰ On the defense side,

[b]ecause of the sheer volume and number of cases and how serious they were, we didn't have enough defense counsel on the books to cover the cases and be able to perform military justice in the region. So we had to use additional people—anybody who fell within I MEF.¹⁹¹

With authorization from the CDA, the regional defense counsel detailed judge advocates from Marine Corps Air Station Miramar (one hour away), Marine Corps Recruit Depot San Diego (one hour away), and Marine Corps Air Ground Combat Center, Twentynine Palms, California (three hours away), to represent the Hamdaniyah and Haditha defendants.¹⁹² This, in turn, placed greater strains on those defense shops because they were still required to maintain their home stations' unabated, full-time defense missions while simultaneously preparing to try Camp Pendleton's "strategic cases."

After scrambling to expediently detail defense counsel to those cases (eight clients from the Hamdaniyah case were in pretrial confinement), the regional defense counsel realized that the most experienced attorney assigned to those "strategic cases" possessed less than two years of experience as a judge advocate and less than nine months doing defense work, with only one contested special court-martial behind him.¹⁹³ Thus attorney competence *in regard to "strategic cases"* became a major issue: understanding that the cases would require a great deal more out of the counsel than typical military justice cases, the supervising regional defense counsel co-detailed additional judge advocates to the cases.¹⁹⁴ But because of personnel shortfalls, he was forced to seek attorneys from the reserve component, the Navy, and Marine bases far from California, such as Camp Lejeune, North Carolina, and Okinawa, Japan.¹⁹⁵

¹⁹⁰ Vokey Interview, *supra* note 16; Riggs Interview, *supra* note 141.

¹⁹¹ Vokey Interview, *supra* note 16.

¹⁹² *Id.*

¹⁹³ This assertion is based on the author's recent professional experience as the Senior Defense Counsel, Marine Corps Air Station Miramar, from August 2005 until July 2007. *See also* Vokey Interview, *supra* note 16.

¹⁹⁴ Vokey Interview, *supra* note 16.

¹⁹⁵ Vokey Interview, *supra* note 16; Woodard Interview, *supra* note 13.

Similarly, the government recognized the need to assemble a trial team to handle the Haditha and Hamdaniyah cases in 2006. Rather than detail counsel piecemeal from within Camp Pendleton or other local bases, the Officer in Charge (OIC) of the Camp Pendleton Legal Services Support Section and the Staff Judge Advocate for Marine Forces Central Command chose to create "Legal Services Support Team Charlie" (LSST-C), to serve as the prosecution team over these two "strategic cases."¹⁹⁶ To staff LSST-C, the Marine Corps assigned experienced judge advocates from the entire Marine Corps to the team, including a former military judge stationed in Quantico, a criminal law professor at the Army Judge Advocate General's Legal Center and School, a reservist with extensive experience as a federal public defender, and at least five judge advocates from Marine bases in California.¹⁹⁷ In the end, LSST-C possessed considerable experience and manpower to effectively focus its attentions on prosecuting the Haditha and Hamdaniyah "strategic cases."¹⁹⁸

The experience and competence of attorneys involved with "strategic cases" deserves special consideration because of the complexity and sensitivity of these cases. As discussed, they typically involve massive investigations completed over months, often incorporating classified evidence, hundreds of exhibits and enclosures, and witness statements translated in different languages from interviews done by investigators stationed thousands of miles away.¹⁹⁹ And in many respects, the evidentiary piece of the trial is the least complicated: the war crime aspect of the cases and the media's role in how the cases are

¹⁹⁶ E-mail from LtCol Gregory L. Simmons, Branch Head, Military Law Branch, Judge Advocate Division, Staff Judge Advocate to the Commandant of the Marine Corps, to Maj John M. Hackel, Student, 56th Graduate Course, The Judge Advocate General's Legal Ctr. and Sch. (12 Jan. 2008, 1446 EST) (on file with author). LtCol Simmons served as the OIC for the Camp Pendleton LSSS at the time and played an integral role in the creation of LSST-C. *Id.*

¹⁹⁷ Riggs Interview, *supra* note 141; Baker Interview, *supra* note 149; Vokey Interview, *supra* note 16; Woodard Interview, *supra* note 13.

¹⁹⁸ The fact that LSST-C possessed so much manpower to deal solely with these two cases caused endless consternation from the defense side. Defense counsel continued to maintain full case loads from their respective home stations and could not achieve the focus of the prosecution team. At one point, the supervising regional defense counsel declared that all counsel representing clients in the Hamdaniyah case were "ineffective" to accept additional work because of the disparities he perceived between the two sides. Vokey Interview, *supra* note 16; *see* Woodard Interview, *supra* note 13.

¹⁹⁹ *See* Krul Interview, *supra* note 69; Dowdy Interview, *supra* note 23.

prepared, negotiated, and tried often predominate the cases.²⁰⁰ Taken together, some consider “strategic cases” to merit the same significance as capital litigation, and thus seek comparable support for and supervision of counsel assigned to them.²⁰¹ Unfortunately, the Marine Corps lacks a feasible, sustainable plan to provide consistent supervision over “strategic cases.”²⁰² Each year, the Eastern Regional Defense Counsel (RDC) and Western RDC assume responsibility as the “Theater Defense Counsel,” performing “duties consistent with those of a [RDC]” in addition to their regular duties.²⁰³ While this plan recognizes the need for a senior supervisor in “strategic cases,” history has proven that these attorneys lack the focus and time to effectively accomplish the task.²⁰⁴ In the end, personnel shortfalls—in terms of both numbers and competence—remain a critical vulnerability for the Marine Corps judge advocate community in trying “strategic cases.”

VI. PLANNING FOR THE NEXT “STRATEGIC CASE”

To address the challenges posed by “strategic cases,” especially with regard to logistical and administrative problems and manpower shortfalls, and to demonstrate a greater adherence to modern counterinsurgency doctrine, the Marine Corps should implement a new plan to deal with future strategic cases. This plan, creating a Marine Corps war crimes section, addresses these concerns by providing two senior, experienced judge advocates at the headquarters level to study, anticipate, investigate, and supervise the Marine Corps’ future “strategic cases.”

To begin, the Marine Corps should create a war crimes section under the Military Law Branch of Judge Advocate Division, Headquarters, Marine Corps. The section should be dedicated to preparing for and executing the prosecution and defense supervisory functions of “strategic cases” from Iraq, Afghanistan, and elsewhere. Because the Marine judge advocate community constantly wrestles with manpower, the section should be small: one lieutenant

²⁰⁰ See Krul Interview, *supra* note 69; Dowdy Interview, *supra* note 23; Neill Interview, *supra* note 72.

²⁰¹ See, e.g., Woodard Interview, *supra* note 13; Vokey Interview, *supra* note 16; Krul Interview, *supra* note 69; Schotemeyer Interview, *supra* note 14.

²⁰² Vokey Interview, *supra* note 16.

²⁰³ Vokey Interview, *supra* note 16; LtCol S. C. Newman, *Structure of Marine Corps Trial Defense Service, Iraq* 1 (n.d.) (unpublished proposal for II MEF trial defense services organization in Iraq) (on file with author); Schotemeyer Interview, *supra* note 14.

²⁰⁴ Vokey Interview, *supra* note 16; see also MCO P5800.16A, *supra* note 185, at para. 2002 (duties and responsibilities of Regional Defense Counsel).

colonel billet created to represent the government's interests, similar to a military justice officer at a Legal Services Support Section; and one regional defense counsel billet, focused solely on facilitating the competent defense of these challenging cases. Ultimately, the section's mission will be to provide two highly experienced trial attorneys with sufficient focus on the complexities of "strategic cases" in order to provide timely, nuanced, and well-considered advice and supervision.

More importantly, the two officers of this war crimes section will serve as resident experts capable of applying lessons learned from previous cases and setting a tone of consistency and transparency in the process. Consistent handling of "strategic cases" helps the Marine Corps because it "provide[s] centralization of the administrative and disciplinary processing of cases, and provide[s] visibility of these matters" to the senior military leadership with responsibility for the wars in Iraq and Afghanistan.²⁰⁵ More importantly, however, placing subject matter experts in positions to influence and streamline the court-martial process for "strategic cases" indicates an acknowledgement that the Marine Corps takes these cases seriously and seeks an efficient means to resolve them. Thus, consistency directly addresses the overall strategic goal of promoting legitimacy.²⁰⁶

As discussed above, ensuring competent counsel is a critical issue with "strategic cases," especially from the defense side.²⁰⁷ In this model, the supervisors of the case will be the Marine Corps' experts, possessing extensive trial experience and fully capable of focusing on the nuanced complexities of strategic cases. They will know the areas of combat operations intimately and be capable of instructing junior trial and defense attorneys on the logistical, operational, and administrative issues not obvious in the investigation materials read thousands of miles away. These attorneys will possess expertise on media relations and public affairs, and they will be thoroughly informed about handling classified evidence in a trial. And, most importantly, these counsel will not be bound to serve as regional supervisory attorneys, advising junior counsel on the

²⁰⁵ Hamdaniyah Memo, *supra* note 157.

²⁰⁶ The Marine Corps already learned and applied this lesson in its appointment of a consolidated disposition authority over the "strategic cases." *See supra* pp. 41–42 and note 157.

²⁰⁷ In the Hamdaniyah cases, the Regional Defense Counsel with supervisory responsibility over the defense counsel determined that the counsel for the eight defendants were unable to focus sufficiently on their case work in comparison to their trial counsel counterparts. As a result, he issued a memorandum stating that his counsel were deemed ineffective to accept any new defense cases until the completion of their Hamdaniyah cases. Vokey Interview, *supra* note 16.

myriad of other routine military justice issues common to the standard practice of military law; with full focus on the relationship between “strategic cases” and military justice, they will be fully able to instruct, mentor, and supervise the lesser-experienced counsel detailed to the “strategic cases,” thereby becoming true subject matter experts.

The war crimes section should be located at Judge Advocate Division as a subsection of the Military Justice Branch because there it will be best situated to monitor “strategic cases” worldwide. Although the current “strategic cases” are tied to Iraq and Afghanistan, history has proven that these cases will probably occur elsewhere, as demonstrated during the Vietnam War.²⁰⁸ Since the adoption of the UCMJ in 1950, these types of cases have arisen out of Marine operations in counterinsurgency battles typified by long-term Marine contact with a hostile civilian population. Since it is impossible to foresee the United States’ next war, it is best for these billets to remain at Headquarters, Marine Corps, to serve the Marine Corps as a whole rather than working solely for the Staff Judge Advocate of MARCENT, the senior staff judge advocate advising the CDA for the current Marine Corps “strategic cases.” Nonetheless, for the immediate future, the connection with MARCENT is crucial to having an effect on these cases. To best understand the counterinsurgency environment out of which the current “strategic cases” are arising, the two officers would need to have intimate knowledge of the commanders and operations in Iraq and Afghanistan. Additionally, to best provide incoming trial and defense counsel with effective logistical and administrative assistance, these officers would need to develop strong relationships with those personnel providing combat service support in Iraq and Afghanistan. As such, despite being located at Headquarters, Marine Corps, this section’s present need for a strong connection to MARCENT must be clearly understood.

Due to personnel shortages, the Marine Corps cannot afford to have a large team of prosecutors and defense attorneys standing by full time waiting for “strategic cases” to take place.²⁰⁹ Nowadays, when “strategic cases” arise, the local staff judge advocate serving the convening authority with jurisdiction over the case must work with the Staff Judge Advocate to the Commandant of the Marine Corps to locate attorneys from around the Marine Corps to fill the trial and defense billets.²¹⁰ Unfortunately, without executing a massive overhaul of

²⁰⁸ See, e.g., SOLIS, SON THANG, *supra* note 168, at 29–56.

²⁰⁹ Riggs Interview, *supra* note 141; Baker Interview, *supra* note 149.

²¹⁰ Riggs Interview, *supra* note 141; Baker Interview, *supra* note 149; Vokey Interview, *supra* note 16.

the Marine Corps legal community, a topic far beyond the scope of this article, this sort of ad hoc horse-trading cannot be avoided.²¹¹

What can be changed, however, is the legal community's recognition of the importance of these "strategic cases." When judge advocates are freed up to participate in "strategic cases," regardless of their role as trial or defense counsel, these attorneys must receive the same treatment as counsel trying capital cases. Ultimately, this requires that the Marine Corps give them reduced case loads to focus exclusively, if possible, on the "strategic case." As the Hamdaniyah defense cases proved, activating reservists and enlisting the assistance of the Navy can help ease case loads, but not to the degree necessary to permit attorneys to focus exclusively on the "strategic case" in the same manner enjoyed by the prosecutors of LSST-C.²¹² Thus, the war crimes section needs authority commensurate with its strategic importance; when Marine Corps attorneys serving outside of courtroom billets possess the requisite knowledge and experience to competently handle a "strategic case," the war crimes section should have the full support of the Commandant to effect those judge advocates' temporary reassignment to perform on the case absent a compelling reason not to do so—something greater than a commander or local staff judge advocate not wanting to do without his "go to guy."²¹³ The key is recognizing that these cases are extremely rare but also extremely meaningful, so when they take place, the entire Marine Corps legal community must adjust to handle them.

For a change like this to be implemented against the bureaucratic inertia of the Marine Corps legal community, it must achieve important benefits that outweigh the inefficiencies that it creates. In this model, the most experienced and knowledgeable supervisors are fully engaged with "strategic cases" at the earliest possible times. This guarantees that steps can be taken from the outset to protect the process. Rather than have a "strategic case" crop

²¹¹ See, e.g., DSJA Memo, *supra* note 185 (analyzes the entire structure of the Marine judge advocate community and proposes a course of action to improve the provision of legal services Marine Corps-wide, concluding that the judge advocate community requires an additional 71 billets to be added to the current authorized strength requirement). See also Vokey Interview, *supra* note 16. LtCol Vokey advocates for the Marine Corps to adopt a system similar to the Army's Trial Defense Services in which Army defense counsel receive far greater autonomy than their Marine brothers and sisters. *Id.*

²¹² Vokey Interview, *supra* note 16.

²¹³ This is a major weakness of the personnel assignment process for these cases. When seeking qualified trial and defense counsel who are not presently performing in these billets, "practically speaking, it's very difficult to try to get any personnel that are not already [] counsel." Vokey Interview, *supra* note 16.

up in Iraq, for example, and then attempting to release experienced judge advocates from their duties to handle the supervisory aspects of the case, there will already be two full time, informed, and competent Marine judge advocates already on hand. Besides enabling each side to establish a framework for dealing with the case, this early connection to the case permits these experts to create logistical plans by which they can immediately incorporate trial and defense counsel into the deployment justice process. Taken together, these are important gains that relate to the strategic goal of legitimacy. In the end, with such a tiny manpower footprint, creating a war crimes section imposes very little negative effects on the judge advocate community, especially when compared to the potential gains it offers the national war effort.

VII. CONCLUSION

The conflicts in Iraq and Afghanistan have proven once again the sad truth that American military personnel are capable of committing war crimes when facing the intense pressures of fighting a counterinsurgency.²¹⁴ When these crimes take place, the resulting courts-martial become “strategic cases,” very high profile judicial proceedings involving American war crimes with the potential to affect the overall national military strategy. Since the invasion of Iraq in 2003, several of these cases have already been tried by our military courts, the most infamous of which involved the Abu Ghraib detainee abuse scandal. The Marine Corps, unfortunately, can be an institution with a short memory: it forgot about its own problems with war crimes in Vietnam and the need to handle these cases effectively to satisfy both the need to seek justice and the ultimate strategic goal of promoting legitimacy.²¹⁵

²¹⁴ Less than thirty years before, the United States fought a similar war in Vietnam, where some of the most notorious war crimes in American history occurred, including the My Lai (4) massacre of hundreds of Vietnamese. On Mar. 16, 1968, Lieutenant Calley’s infantry platoon inserted into My Lai (4) to secure a landing zone for their company. “They hit the ground firing, and during the four hours that followed, Charlie Company proceeded to perpetrate one of the worst massacres in the annals of American warfare. Lieutenant Calley himself allegedly slaughtered over 100 Vietnamese civilians.” BELKNAP, *supra* note 1, at 59–60.

²¹⁵ See, e.g., SOLIS, SON THANG, *supra* note 168, at 297 (“The Son Thang trials, representative of many similar [general courts-martial] (GCMs), [of the Vietnam War] make a case for the establishment of multi-service war crime teams staffed by judge advocates with special law-of-war training.”). The Son Thang case involved the murder of sixteen Vietnamese civilians by five Marines in the tiny village of Son Thang (4). In the aftermath of the courts-martial, at which only two of the five shooters were found guilty of murder and for which the

Sir Winston Churchill once declared, "However beautiful the strategy, you should occasionally look at the results."²¹⁶ The incidents in Haditha and Hamdaniyah caught the Marine Corps flat-footed in the military justice arena, and the resulting steps taken to assign counsel, build a prosecution team, and try the cases demonstrated the need for better planning for future "strategic cases." Creating a war crimes section will cost the Marine Corps very little in terms of manpower while providing significant gains in expertise, supervision, logistics, efficiency, and, most importantly, legitimacy. "We need to say that these kinds of cases are so important to us—as defense, as the prosecution, as the [military]—to show that justice is done. [We need to] give them the credibility that they deserve."²¹⁷ Seen in light of the overall goal of supporting the national military strategies in Iraq and Afghanistan, this small step will enhance the efforts already being made to prosecute and defend Marine "strategic cases." This, in turn, will help demonstrate to the American public and the international community that an efficient, fair, and transparent process exists to hold accountable those Marines who have committed war crimes.

maximum sentence served was only one year of confinement, there were strong calls for reform to the Marine Corps military justice system to better handle war crimes cases. *Id.* at 293–99.

²¹⁶ Sir Winston Churchill, *cited in* BrainyQuote, http://www.brainyquote.com/quotes/authors/w/winston_churchill.html (last visited Dec. 8, 2008).

²¹⁷ Krul Interview, *supra* note 69.

REMOTE TESTIMONY AND EXECUTIVE ORDER 13430: A MISSED OPPORTUNITY

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I. INTRODUCTION

We live in the digital age. Children carry cellular phones. Hours of music can be stored and listened to via a device not much bigger than a driver's license. Cars talk to their drivers and tell them when to take the next turn, helping them reach their destination. Access to the World Wide Web provides any user with instant unlimited information, from directions on how to build an aerodynamic paper airplane to satellite photos of their neighborhoods. Technology is changing the world, and in fact has changed it significantly in the three centuries since the writing of our Constitution, which raises the issue whether application of the Confrontation Clause should change as well.¹

In 1789, our founding fathers guaranteed all criminal defendants the right to confront the witnesses against them.² For the majority of our history, that has meant that witnesses against an accused will be physically present when

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¹ U.S. CONST. amend. VI (“[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”).

² U.S. CONST. amend. VI.

testifying.³ But in 1789, when the Sixth Amendment was drafted, our colonial ancestors did not have video conferencing capability.

Utilizing a real time two-way simultaneous transmission of the audio and video of a witness's voice and face who is testifying outside of the courtroom could hardly have been foreseen by men who did not even have the benefit of electric light bulbs.⁴ Despite the realities of technology today, there are many arguments both for and against utilizing video conferencing for witness testimony in criminal trials. The debate rages between proponents and opponents of video conferencing. The proponents seek to affect the efficiency of the trial process and to lessen the re-victimization of fragile victim witnesses, whereas the opponents fear that the defendant will not receive the fair trial that the founding fathers envisioned if technology is permitted to alter the face-to-face confrontation of accuser to accused.⁵ As the debate continues, courts and legislatures continue to massage the implementation of video conferencing in the courtroom. Although use of remote testimony is slowly becoming more permissible, it continues to be limited by the constraints of the Confrontation Clause.

Recent changes to the Manual for Courts-Martial which were promulgated by Executive Order⁶ in 2007 took unique steps to incorporate the limited use of remote testimony into military courts-martial. Despite taking steps in the right direction to incorporate modern day technology into modern day courtrooms, the Executive Order fell short in two ways: (1) by closing the door to the use of video conferencing on the merits, and (2) by failing to provide procedures for using video conferenced testimony when it is permitted.

³ *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (“[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact”).

⁴ Indeed, the incandescent light bulb was not invented by Thomas Edison until nearly a century later in 1879.

⁵ See generally Anthony Garofano, *Avoiding Virtual Justice: Video-Teleconference Testimony In Federal Criminal Trials*, 56 CATH. U.L. REV. 683, 685 (2007); Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1108 (2004); Patricia Raburn-Remfry, *Due Process Concerns in Video Production of Defendants*, 23 STETSON L. REV. 805, 811 (1994); Shannon P. Duffy, *Judge's Tele-Pleas' Overcome Logistical Hitches to Justice*, The Legal Intelligencer, Sept. 16, 1998.

⁶ Exec. Order No. 13,430, 72 Fed. Reg. 20,213 (2007).

This paper will address the jurisprudence surrounding the Confrontation Clause as it has applied to remote testimony. It will also analyze the impact the new Executive Order has regarding the implementation of remote testimony in courts-martial, offering insight into judicial and policy support for the changes. In the final section of the paper, the shortcomings of the new Executive Order will be discussed.

II. CONFRONTATION CLAUSE JURISPRUDENCE AS IT APPLIES TO VIDEO TELECONFERENCING

In order to address the proper utilization of evidence procedures that do not involve the face-to-face confrontation of a witness against the accused, it is important to first understand the jurisprudence interpreting the requirements set out by the Confrontation Clause. There are generally three goals of the Confrontation Clause: (1) to have the witness give his statement under oath; (2) to have the finders of fact evaluate the witness' demeanor while testifying in order to assist with assessing his or her credibility; and (3) to submit the witness to cross-examination,⁷ "the greatest legal engine ever invented for the discovery of truth."⁸ Normally, the Confrontation Clause also requires the witness to testify in the presence of the accused.⁹ These rules revolve around the Supreme Court's main concern of ensuring reliable evidence is submitted before the trier of fact.¹⁰

What is surprising is that the Supreme Court has declared that the Confrontation Clause does not guarantee the accused an absolute right of face-to-face confrontation with the witnesses against him or her.¹¹ The Supreme Court instead placed emphasis on the particular method used to gather the evidence in order to judge its reliability when dealing with Confrontation Clause issues.¹² Though face-to-face confrontation is the preferred method of conducting a criminal trial, there may be procedures where the reliability of the evidence is effectively preserved without face-to-face confrontation.¹³

⁷ *United States v. Anderson*, 51 M.J. 145, 149 (1999).

⁸ *California v. Green*, 399 U.S. 149, 158 (1970) (citing 3 J. Wigmore, *Evidence* § 1367 (3d ed. 1940)).

⁹ *United States v. Anderson*, 51 M.J. 145, 149 (1999).

¹⁰ *See Maryland v. Craig*, 497 U.S. 836 (1990).

¹¹ *Id.*; *see also* *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (per curiam); *Ohio v. Roberts*, 448 U.S. 56, 69 (1980); *Kentucky v. Stincer*, 482 U.S. 730, 739–42 (1987); *Davis v. Alaska*, 415 U.S. 308, 315–16 (1974); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

¹² *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

¹³ *Craig*, 497 U.S. 836.

Evidence against an accused, subjected to rigorous testing in an adversarial proceeding, may overcome any questions of reliability, even if such evidence is provided in a format other than face-to-face confrontation.¹⁴ In addition to the importance of determining reliability for non-face-to-face confrontation evidence, such evidence must further an important public policy in order to overcome the preference for face-to-face confrontation.¹⁵

A. *Maryland v. Craig*¹⁶

In *Maryland v. Craig*, the accused was charged in state court with sexual offenses against a six-year-old girl who attended the kindergarten center he operated.¹⁷ The Maryland state statutes permitted child witnesses to testify via one-way closed-circuit television if the judge determined that the “testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.”¹⁸ Using this procedure, the counsel for both sides conduct their examinations of the child witness in a separate room from the judge, jury, and accused, who all remain in the courtroom.¹⁹ The examinations of the child witness are relayed real-time to the courtroom audibly and visibly on a television screen.²⁰ The defense counsel and accused remain in electronic communication and objections can be made and ruled on just as if the testimony were occurring in the courtroom.²¹ During this electronic testimony, the defendant can see the testifying witness, but the testifying witness cannot see the defendant.²²

In this case the state sought to utilize remote testimony. The State presented evidence to the judge in the form of expert testimony which stated that the child victim would suffer emotional distress resulting in an inability to communicate and thereby testify.²³ Over defense objection on Confrontation Clause grounds, the trial judge in this case permitted exercise of the Maryland

¹⁴ *Id.* at 845.

¹⁵ *Id.* at 847–48.

¹⁶ *Craig*, 497 U.S. 836.

¹⁷ *Id.* at 840.

¹⁸ *Id.* at 840–41 (quoting *Md. Cts. & Jud. Proc. Code Ann.* § 9-102(a)(1)(ii) (1989)).

¹⁹ *Id.* at 841.

²⁰ *Id.* at 842.

²¹ *Craig*, 497 U.S. at 842.

²² *Id.* at 841.

²³ *Id.* at 842.

statute and as such, the child witness testified via closed-circuit television.²⁴ The accused was convicted by the jury on all charges.²⁵

The Maryland Court of Appeals reversed and remanded for a new trial, declaring that the trial judge did not have sufficient evidence to determine that remote testimony was necessary.²⁶ Upon review, the United States Supreme Court provided a historical overview of the Confrontation Clause, stating that from the very beginning, the purpose of the Confrontation Clause:

[Was] to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.²⁷

²⁴ *Id.* at 844.

²⁵ *Id.*

²⁶ *Craig*, 497 U.S. at 843 (*quoting* *Craig v. State*, 560 A.2d 1120, 1127 (1989)).

[U]nder § 9-102(a)(1)(ii), the operative ‘serious emotional distress’ which renders a child victim unable to ‘reasonably communicate’ must be determined to arise, at least primarily, from face-to-face confrontation with the defendant. Thus, we construe the phrase ‘in the courtroom’ as meaning, for *sixth amendment* and [state constitution] confrontation purposes, ‘in the courtroom in the presence of the defendant.’ Unless prevention of ‘eyeball-to-eyeball’ confrontation is necessary to obtain the trial testimony of the child, the defendant cannot be denied that right.

Id.

²⁷ *Id.* at 846–48 (*quoting* *Mattox v. United States*, 156 U.S. 237, 242–243 (1895)).

The Confrontation Clause, then, is more than personal examination.²⁸ It also represents a requirement that the witness give statements under oath, submit to cross-examination and permit the jury to observe the witness's demeanor while making statements, so that they may assess his or her credibility.²⁹ The root of the Confrontation Clause is in ensuring *reliable* evidence is weighed by the fact finder in criminal proceedings with "rigorous *adversarial* testing."³⁰ It is because of this focus on reliability, and not merely physical confrontation, that exceptions to face-to-face confrontation have been chiseled out of the Confrontation Clause to form our hearsay rules.³¹

The Supreme Court reversed the Maryland Court of Appeals, holding that with both an adequate showing of necessity and the furtherance of an important public policy, the use of a special procedure for testimony other than a preferred face-to-face confrontation with the accused is justified.³² For years, the only public policy important enough to justify remote testimony was society's interest in sparing children from re-victimization in the courtroom. It was really not until *United States v. Gigante*³³ that a court considered the use of remote witness testimony for something other than the important public policy announced in *Maryland v. Craig*.³⁴

²⁸ *Id.* (citing *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987) ("The right to confrontation is a functional one for the purpose of promoting reliability in a criminal trial"); *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (plurality opinion) ("The mission of the *Confrontation Clause* is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony]'""); *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (confrontation guarantee serves "symbolic goals" and "promotes reliability"))).

²⁹ *Id.* (citing *California v. Green*, 399 U.S. 149, 158 (1970)).

³⁰ See *Craig*, 497 U.S. at 846 (emphasis added).

³¹ *Id.* at 850.

³² *Id.* at 855.

³³ *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir 1999) (cert. denied).

³⁴ *Craig*, 497 U.S. at 855.

B. *United States v. Gigante*³⁵

In *United States v. Gigante*,³⁶ the accused appealed his convictions based on a violation of his right to confrontation under the Sixth Amendment.³⁷ The witness testimony in question was taken from Peter Savino, a person in the Federal Witness Protection Program who was in the final stages of an inoperable, fatal cancer and was under medical supervision at an unknown location at the time of trial.³⁸ Savino's testimony was taken via a two-way, closed-circuit television.³⁹ Savino could see and hear the defense counsel and the other courtroom participants from his location and the courtroom participants could all see and hear Savino, as well.⁴⁰

The accused sought to have his conviction reversed because the government failed to articulate an important public policy that necessitated the use of remote testimony as required in *Maryland v. Craig*⁴¹ prior to utilizing the video teleconferenced testimony.⁴² However, the court did not apply the *Maryland v. Craig*⁴³ test, stating in that case, the court had based its decision on the use of one-way closed-circuit television and in this case, the court used a two-way system which did preserve a face-to-face confrontation.⁴⁴ As such, the court did not find it necessary to enforce the stricter *Craig* standard.⁴⁵

Instead, the court analyzed the use of remote testimony by comparing it to a deposition.⁴⁶ The Federal Rules of Criminal Procedure permit depositions "whenever due to *exceptional circumstances* of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and

³⁵ *Gigante*, 166 F.3d 75.

³⁶ *Id.*

³⁷ *Id.* at 78. The accused also appealed on other grounds: that the trial court improperly allowed testimony under the co-conspirator exception to the hearsay definition and that the district court erred in finding that he was competent to stand trial. *Id.*

³⁸ *Id.* at 79.

³⁹ *Gigante*, 166 F.3d at 79.

⁴⁰ *Id.*

⁴¹ *Craig*, 497 U.S. 836.

⁴² *Gigante*, 166 F.3d at 80–81.

⁴³ *Craig*, 497 U.S. 836.

⁴⁴ *Gigante*, 166 F.3d at 81.

⁴⁵ *Id.*

⁴⁶ *Id.*

preserved for use at trial.”⁴⁷ That deposition may be entered into evidence at trial if that witness is unavailable to appear at trial.⁴⁸ The court found that a deposition was not appropriate in this case due to the witness’ medical incapacity to travel, the secret location of the witness due to his involvement in the Federal Witness Protection Program, and the accused’s *own* ill health and inability to travel.⁴⁹

The court also found that two-way remote testimony of the witness would provide a greater protection of the accused’s confrontation rights than a deposition would have provided.⁵⁰ By permitting video teleconferencing testimony rather than deposition evidence, the accused gained the advantage of forcing the witness to testify in front of the jury; it allowed the jury to judge the witness’s credibility by observing his demeanor; and it also permitted the defense attorney to craft his cross-examination of the witness after viewing the impact his direct testimony had on the jury.⁵¹ Though remote testimony is not the preferred method of taking testimony, it does not violate the Confrontation Clause.⁵² Therefore, the court adopted the “exceptional circumstances” test from the Federal Rules of Criminal Procedure rule on depositions for its application on two-way closed-circuit testimony.⁵³

C. *United States v. Yates*⁵⁴

But most circuit courts disagreed with the *Gigante*⁵⁵ decision.⁵⁶ Most notably, the Eleventh Circuit disagreed with the *Gigante*⁵⁷ court’s distinction that two-way video testimony better protects the accused’s confrontation rights than the one-way video testimony mentioned in *Craig*.⁵⁸

⁴⁷ Fed. R. Crim. P. 15(a) (emphasis added).

⁴⁸ *Id.*

⁴⁹ *Gigante*, 166 F.3d at 81.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006)

⁵⁵ *Gigante*, 166 F.3d 75.

⁵⁶ *Yates*, 438 F.3d 1307; *United States v. Bordeaux*, 400 F.3d 548, 554-55 (8th Cir. 2005) (declining to follow *United States v. Gigante* and finding that “‘confrontation’ via a two-way closed circuit television is not constitutionally equivalent to a face-to-face confrontation.”)

⁵⁷ *Gigante*, 166 F.3d 75.

⁵⁸ *Craig*, 497 U.S. at 855.

In *Yates*, the government moved to take video teleconferenced testimony from two key witnesses who were Australian residents who refused to travel to the United States.⁵⁹ The government argued that video teleconferenced testimony for otherwise unavailable witnesses was necessary to further the “important public policy of providing the fact-finder with crucial evidence,”⁶⁰ and “interest in expeditiously and justly resolving the case.”⁶¹ The defendants, located in Montgomery, Alabama, objected to the use of video teleconferenced testimony as a violation of the Confrontation Clause.⁶² The trial court permitted the remote testimony, finding no violation of the defendants’ confrontation rights since the defendant could see the witness and the witness could see the defendant while testifying.⁶³ The defendants were ultimately convicted and appealed the use of the video teleconferenced testimony.⁶⁴

Refusing to apply any distinction between one-way or two-way closed circuit testimony, the *Yates*⁶⁵ court applied a strict *Craig*⁶⁶ standard, arguing that a deposition should have been taken in this case.⁶⁷ The Eleventh Circuit said that depositions offer superior Confrontation Clause protections over video testimony because it “guarantees the defendant’s right to physical face-to-face confrontation by specifically providing for his presence at the deposition.”⁶⁸ The Eleventh Circuit put special emphasis on the physical aspects of face-to-face confrontation.⁶⁹

The *Yates* court also disagreed with the government’s assertion that presenting the fact-finder with crucial evidence is an important enough policy to

⁵⁹ *Yates*, 438 F.3d at 1311.

⁶⁰ *Id.* at 1316 (quoting R.3-314 at 19).

⁶¹ *Id.* (quoting R.3-314 at 22).

⁶² *Id.* at 1310.

⁶³ *Id.*

⁶⁴ *Yates*, 438 F.3d at 1311 (the appellate court remanded the case based on the confrontation issue and did not address the defendants’ other grounds for appeal: that the district court erred by: (1) denying their motions for mistrial based on a *Jencks/Brady* violation; (2) barring *Yates* from cross-examining co-defendant about a relationship with another woman; (3) denying co-defendant’s motion for personal access to computer disks related to his defense; and the (4) imposition of their sentences).

⁶⁵ *Id.*

⁶⁶ *Craig*, 497 U.S. at 855.

⁶⁷ *Yates*, 438 F.3d at 1317.

⁶⁸ *Id.*

⁶⁹ *Id.*

outweigh the defendant's confrontation rights for face-to-face confrontation.⁷⁰ The court frowned upon any judicial efficiency saved by the government when utilizing video-teleconferenced testimony.⁷¹ The court emphasized the use of a deposition when available.⁷²

Citing a plethora of authority, however, the dissent said that it was "beyond reproach that there is an important public policy in providing the fact-finder with crucial, reliable testimony and instituting procedures that ensure the integrity of the judicial process."⁷³ The dissent rebuked the majority for not

⁷⁰ *Id.* at 1316.

⁷¹ *Id.*

⁷² *Yates*, 438 F.3d at 1316.

⁷³ *Id.* at 1321-23 (*citing* *Ohio v. Roberts*, 448 U.S. 56, 64, (1980) (overruled on other grounds by *Crawford v. Washington*, 541 U.S. 36 (2004)) ("Every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings"); *Martinez v. Court of Appeal*, 528 U.S. 152, 163 (2000) ("The overriding state interest in the fair and efficient administration of justice" is significant enough to "outweigh an invasion of the appellant's interest in self-representation"); *United States v. Scheffer*, 523 U.S. 303, 308 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. A defendant's interest in presenting such evidence may thus 'bow to accommodate other legitimate interests in the criminal trial process.' . . . [The interests here] include ensuring that only reliable evidence is introduced at trial [and] preserving the court members' role in determining credibility . . .") (footnote and citations omitted) (*quoting* *Rock v. Arkansas*, 483 U.S. 44, 55 (1987)); *id.* at 312-13 (1998) ("It is equally clear that [Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court-martial proceedings] serves a second legitimate governmental interest: Preserving the court members' core function of making credibility determinations in criminal trials. A fundamental premise of our criminal trial system is that 'the jury is the lie detector.'" (opinion of Thomas, J.) (*quoting* *United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973)) (emphasis omitted)); *United States v. Koblitz*, 803 F.2d 1523, 1528 (11th Cir. 1986) (holding that "the Government's interest in the efficient administration of justice" outweighed appellants' Sixth Amendment right to be represented at trial by their counsel of choice); *United States v. Gigante*, 971 F. Supp. 755, 756-57 (E.D.N.Y. 1997) ("American criminal procedure . . . is pragmatic. It recognizes that this ideal condition [a witness testifying in person, in court] can not be made available in every instance if there is to be an effective search for the truth in an atmosphere protecting the defendant's needs for fairness and due process and the public's right to protection against crime"); *Carlsen v. Morris*, 556 F. Supp. 320,

allowing a case-specific finding by the lower court that live, two-way video testimony by witnesses who were outside of the subpoena power of the court was a reliable form of testimony.⁷⁴

Some argue that the Eleventh Circuit took a strict view of the use of two-way remote testimony based on a letter Justice Scalia submitted to the Advisory Committee on the Criminal Rules regarding a possible revision to *Federal Rule of Criminal Procedure 26* that would have allowed testimony using two-way video teleconferencing.⁷⁵ In his letter, which has no legal authority other than his “legal musings,”⁷⁶ Justice Scalia suggested that the proposed amendment was of “dubious validity.”⁷⁷ Perhaps following suit, the Eleventh Circuit undercut the important public policy of providing the fact-finder with crucial reliable evidence and refused to find it necessary to take video teleconferenced testimony from two witnesses outside the subpoena power of the government.⁷⁸ The Eleventh Circuit made it clear that outside of protecting a child victim witness as was done in *Craig*,⁷⁹ it would be unlikely to find an important public policy that permitted remote testimony.⁸⁰

D. *United States v. Shabazz*⁸¹

At least one military court has danced with the idea of permitting remote witness testimony outside of the *Craig*⁸² child victim witness requirement. The Navy-Marine Corps Court of Criminal Appeals ruled on a case involving video teleconferencing of witness testimony of a non-child witness.⁸³ Ultimately, the remote testimony was not permitted, but the decision

322 (D.C.Utah 1982) (“The intent of the statute is to prevent interference with the fair administration of justice, an unquestionably compelling governmental interest”); *Harrell v. State*, 709 So. 2d 1364, 1370 (Fla. 1998) (“The [foreign] witnesses were absolutely essential to this case. . . There is an important state interest in resolving criminal matters in a manner which is both expeditious and just. In order to do that in this case, the testimony of these two witnesses was a necessity”).

⁷⁴ *Yates*, 438 F.3d at 1323–24.

⁷⁵ *Id.* at 1324.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 1315.

⁷⁹ *Craig*, 497 U.S. 836.

⁸⁰ *See Yates*, 438 F.3d 1307.

⁸¹ *United States v. Shabazz*, 52 M.J. 585 (N-M. Ct. Crim. App 1999).

⁸² *Craig*, 497 U.S. 836.

⁸³ *Shabazz*, 52 M.J. 585.

did not rest on the age of the victim.⁸⁴ Instead, the court's rejection was based on the failure of the trial judge to "ensure the reliability" of the witness's remote testimony.⁸⁵

What is remarkable about this case is that the court alludes that the remote testimony may have been permitted, over defense objection, due to exceptional circumstances if the judge had ensured the reliability of the video teleconferencing procedures. The alleged crime occurred in Okinawa and the testifying witness was a civilian who had since departed the island and returned to the United States.⁸⁶ The government lacked subpoena power, but had made sincere attempts to induce the witness to travel to Okinawa voluntarily.⁸⁷ Initially, she agreed and the trial dates were set.⁸⁸ On the scheduled day of travel for the witness, she notified the government that she would not fly to Okinawa, citing concerns for her safety there if she testified.⁸⁹ The government had already made arrangements for three other witnesses to travel from the United States for this trial, along with securing the presence of two Japanese civilians.⁹⁰ Not wanting to lose the testimony of this key witness, the government made a motion requesting to take her testimony via video teleconferencing.⁹¹ The trial judge entertained the idea of moving the situs of the trial to the States in order to gain subpoena power over the key witness, but found that too drastic of a measure.⁹² Due to these roadblocks and the gravamen of the expected testimony, the military judge found the use of remote testimony to be necessary.⁹³

In an attempt to ensure the reliability of the remote testimony, the military judge took evidence from two video teleconferencing technicians on the reliability and capability of the equipment.⁹⁴ The technicians also demonstrated the capability to show the real time reaction of the witness as she viewed

⁸⁴ *Id.* at 594.

⁸⁵ *Id.*

⁸⁶ *Id.* at 590.

⁸⁷ *Id.* at 591.

⁸⁸ *Shabazz*, 52 M.J. at 590.

⁸⁹ *Id.* at 590–591.

⁹⁰ *Id.* at 591.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Shabazz*, 52 M.J. at 591.

⁹⁴ *Id.*

documents while testifying.⁹⁵ The military judge ultimately permitted the use of the remote testimony over defense objection.⁹⁶

What the judge failed to do, and what the appellate court ultimately remanded the case for, was to adequately ensure the reliability of the remote testimony.⁹⁷ During the witness's remote testimony, a voice could be heard in the background talking to her.⁹⁸ The defense alleged that the person in the background was coaching the witness.⁹⁹ Due to lack of established controls at the witness's location, the government was unable to provide any evidence to counter the defense's claim.¹⁰⁰ The trial judge ruled that the communication between the witness and the third party was error, but it was harmless beyond a reasonable doubt since nothing substantive was discussed.¹⁰¹ The Navy-Marine Corps Court of Criminal Appeals disagreed.¹⁰²

The appeals court remanded the case because the trial judge did not establish control procedures on the distant end where the testimony was being

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 594.

⁹⁸ *Shabazz*, 52 M.J. at 592.

⁹⁹ *Id.*

¹⁰⁰ *See Id.*

¹⁰¹ *Id.* The defense admitted a stipulation of fact in support of their motion which included a transcript of the third party interjections in question:

Defense Counsel: Didn't you say yesterday he was not wearing a hat?

Witness: Yesterday I didn't recall because it's been so long but

Unidentified Voice: But after looking over. . .

Witness: But after looking over I started really thinking, going back, correctly, he was wearing a hat, he...had it turned around backwards.

Defense Counsel: When you talked to me on the phone last week . . . you said he was not wearing a hat?

Unidentified Voice: Because you couldn't recall . . .

Witness: Because I couldn't recall, it's been like two . . . years.

Id.

¹⁰² *Shabazz*, 52 M.J. at 594.

generated.¹⁰³ Just as it is his or her responsibility to do in the actual courtroom, the trial judge must ensure the environment of the location where a witness is testifying is secure and free from impediments to the reliability of the testimony being provided.¹⁰⁴ In addition to failing to *plan* for safeguards, the trial judge failed to timely *react* as it became apparent that the reliability was in doubt.¹⁰⁵ Upon indications that a third party was speaking to the witness during her testimony, the trial judge should have established control over the situation by identifying the third party and instructing them to cease discussions with the witness while she was testifying.¹⁰⁶

Though the video conferencing testimony was ultimately ruled a violation of the Confrontation Clause, the ruling was not based on the fact that the testimony was taken from someone other than a child witness or victim. The court's ruling leads one to believe that had the trial judge established adequate procedures to ensure the reliability of the testimony being given at the remote site, that such remote testimony would have been permissible under these circumstances. This is a break from the conservative limitation that remote witness testimony can only be for the Supreme Court-declared important public policy protecting child victim witnesses. Such a break has the potential ability to aid military prosecutors to use remote testimony for adult witnesses.¹⁰⁷

As demonstrated, modern day jurisprudence has made some minor adaptations for the technology that society benefits from today. First, the United States Supreme Court made an exception to the historical mandate that a testifying witness be physically present in the courtroom, but only when it was necessary to promote public policy.¹⁰⁸ The Eleventh Circuit then permitted the use of testimony by a witness via video conferencing against an accused in a criminal prosecution when exceptional circumstances were present.¹⁰⁹ To date, the necessity or, to a lesser extent, the exceptional circumstances tests have been the gatekeepers for any use of video conferencing witness testimony in criminal trials.¹¹⁰ The courts have been very conservative in their gate-keeping functions, primarily limiting the use of remote testimony to child victim witnesses.

¹⁰³ *Id.*.

¹⁰⁴ *See generally id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See id.*

¹⁰⁷ Giving more weight to the Second Circuit's test announced in *Gigante*, 166 F.3d at 81.

¹⁰⁸ *Craig*, 497 U.S. 836.

¹⁰⁹ *Gigante*, 166 F.3d at 78.

¹¹⁰ *Craig*, 497 U.S. 836; *Gigante*, 166 F.3d at 78.

III. THE ROAD TRAVELED WITH RESPECT TO IMPLEMENTATION OF VIDEO TELECONFERENCING

When Congress first embraced remote testimony, it was to codify the utilization of video conferencing exclusively for civil trials.¹¹¹ Then, after the Supreme Court permitted video conferencing for child victim witnesses in criminal trials,¹¹² Congress responded by codifying that limited use for criminal trials.¹¹³ For courts-martial, the use of video conferencing technology was not codified until 1999.¹¹⁴ It was then that the President promulgated an Executive Order revising Military Rule of Evidence 611(d).¹¹⁵ The new revision codified the Supreme Court's *Maryland v. Craig* necessity exception as it applied to child victim witnesses.¹¹⁶ So, although the President

¹¹¹ FED. R. CIV. P. 43(a) ("The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location").

¹¹² *Craig*, 497 U.S. 836.

¹¹³ 18 U.S.C. § 3509(b)(1)(A) (1994) ("In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, or a guardian *ad litem* appointed under subsection (h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television").

¹¹⁴ Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (1999) (implementing the use of and providing substantive guidance for utilizing video conferencing in a court-martial).

¹¹⁵ *Id.*

¹¹⁶ *Craig*, 497 U.S. 836; Exec. Order No. 13,140, 64 Fed. Reg. 55,115:

"Mil. R. Evid. 611 is amended by inserting the following new subsection at the end:

(d) Remote live testimony of a child.

(1) In a case involving abuse of a child or domestic violence, the military judge shall, subject to the requirements of subsection (3) of this rule, allow a child victim or witness to testify from an area outside the courtroom as prescribed in R.C.M. 914A.

(2) The term "child" means a person who is under the age of 16 at the time of his or her testimony. The term "abuse of a child" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child. The term "exploitation" means child pornography or child prostitution. The term "negligent treatment" means the failure to provide,

issued new rules for taking remote testimony, the new rules only addressed the use of remote testimony for child victims or witnesses.¹¹⁷

In April 2007, the President signed Executive Order 13430 amending the Manual for Courts-Martial once again.¹¹⁸ In addition to other areas of the Manual, the President specifically addressed the use of remote testimony.¹¹⁹ When addressing the procedures for implementing remote testimony in the new Rule for Courts-Martial 914B, the term “remote testimony” is by definition inclusive of not only video teleconferencing, but also telephonic testimony.¹²⁰

for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to endanger seriously the physical health of the child. The term “domestic violence” means an offense that has as an element the use, attempted use, or threatened use of physical force against a person and is committed by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian; or by a person similarly situated to a spouse, parent, or guardian of the victim.

(3) Remote live testimony will be used only where the military judge makes a finding on the record that a child is unable to testify in open court in the presence of the accused, for any of the following reasons:

(A) The child is unable to testify because of fear;

(B) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;

(C) The child suffers from a mental or other infirmity; or (D) Conduct by an accused or defense counsel causes the child to be unable to continue testifying.

(4) Remote live testimony of a child shall not be utilized where the accused elects to absent himself from the courtroom in accordance with R.C.M. 804(c).”

Exec. Order No. 13,140, 64 Fed. Reg. 55,115.

¹¹⁷ *Id.*

¹¹⁸ Exec. Order No. 13,430, 72 Fed. Reg. 20213 (2007) (reprinted in part in App. A).

¹¹⁹ *Id.* at 20214.

¹²⁰ *Id.* (“Remote live testimony” is defined as including, but not limited to, testimony by “videoteleconference, closed circuit television, telephone or

The new Executive Order addressed the use of remote testimony for four different situations.¹²¹ In the first instance, remote testimony may be used with the consent of both the accused and the Government, giving the military judge authority to authorize testimony by remote means at any stage of the trial.¹²² If, however, a party objects to the use of remote testimony, the military judge may still authorize its use on interlocutory questions if certain conditions exist.¹²³ The new rules also permit testimony by remote means during Article 39(a) sessions when authorized by the regulations of the Service Secretary.¹²⁴ Finally, the new rules include remote testimony as a valid alternative form of testimony during pre-sentencing proceedings. Unfortunately, the reasons behind the new changes in the Executive Order are not articulated anywhere for people to understand the intent behind their implementation. An overview of these changes, the supporting jurisprudence and how they may be implemented by the courts is addressed here.

A. With Consent of the Accused¹²⁵

It is true that the use of remote testimony provides the government with the obvious benefit of ensuring relevant and necessary witnesses are available worldwide for testimony without significant impact on essential missions. This minimizes a substantial burden for government counsel. It eliminates the need to make travel arrangements and avoids the battalion commanders' snarls, an inevitable byproduct of asking to take men and women under their command away, thus sacrificing the contributions they are making to the mission. Even so, government counsel still need to work the logistics involved in setting up

similar technology"). It is important to note that the new Executive order DID NOT include telephonic testimony as a part of the definition of "remote testimony" under R.C.M. 914A dealing with taking testimony from child victim witnesses. Although there was an amendment to R.C.M. 914A to include a definition which reads very similar to the definition of the new R.C.M. 914B, the only difference is the omission of the word "telephone." The new R.C.M. 914A(b) reads, "Definition. As used in this rule, 'remote live testimony' includes, but is not limited to, testimony by 'videoteleconference, closed circuit television, or similar technology.'" Interestingly enough, the language "is not limited to" is still in the definition, leaving the possibility of remote telephonic testimony for child victim witnesses open.

¹²¹ Exec. Order No. 13,430, 72 Fed. Reg. at 20213–14.

¹²² *Id.* at 20213; MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703(b)(1) (2008) [hereinafter MCM].

¹²³ Exec. Order No. 13,430, 72 Fed. Reg. at 20213.

¹²⁴ *Id.* at 20213–14.

¹²⁵ *Id.* at 20213; MCM, *supra* note 122, R.C.M. 703(b)(1).

remote testimony, to include finding a video teleconference node for the remote witness and arranging for the link.

With all of these government benefits, a skeptic may wonder why an accused would ever consent to remote testimony. A shared benefit between the government and defense is that lengthy delays sometimes needed by the prosecution in order to get witnesses to the court-martial venue may be avoided.

There are also some advantages to the use of remote testimony unique to the defense. To begin with, the accused gains the benefit of ensuring no witnesses will be denied based on military exigent circumstances.¹²⁶ Additionally, the defense maintains goodwill with the higher ranking character witnesses that will appreciate decreasing the impact of testifying on their own day-to-day responsibilities.

Typically, the defense's best character witnesses are those that are superior in rank and seniority because of the credibility attached to their experience. Due to the nature of the military, especially the operational tempo, it is likely that these types of character witnesses will not be geographically co-located with the situs of the trial. In order for a character witness to testify for what may amount to ten minutes of testimony, he will likely be pulled from his unit for a minimum of two days,¹²⁷ but likely more considering the time schedule and chronology envisioned by counsel rarely proceeds as planned. Often character witnesses are deflated when they realize how little time they will be on the witness stand after all of the efforts made to appear at trial. By offering the alternative to certain character witnesses to testify via remote means, there is a high likelihood that the goodwill of the witness will remain unscathed and they will be more enthusiastic about assisting in the defense of the accused.

If done properly, testimony received via remote means also has the potential to ignite the members' interest, causing them to pay a little bit more attention to what is being said, possibly resulting in a little bit more weight being given to that testimony. Imagine a longer trial, with witness after witness providing testimony. For the very reason of breaking up monotony and keeping members focused and interested, counsel often resort to gimmicks in the form of

¹²⁶ MCM, *supra* note 122, R.C.M. 703.

¹²⁷ This assumes the best case scenario allowing one day for travel each way, with testimony occurring on one of the travel days. This is a very generous estimate. The time period would be extended significantly if the witness were deployed in support of Operation Iraqi Freedom or Operation Enduring Freedom.

voice inflection, courtroom position, even demonstrative aids. What better way to break up the monotony than by having a ‘special presentation’ witness? It is something new and interesting for the members, but will only be successful if counsel has done the legwork to ensure that there will be no technical difficulties during the remote testimony, and a well-sized and placed video screen is utilized for the members.

In the end, the defense will likely continue to require the government to produce necessary and relevant witnesses in person because it can be a successful tactic of taking away the focus of the trial counsel from preparing his presentation of the case. This sound defense tactic will result in a trial counsel who has less time to prepare for the merits of trial.

B. Interlocutory Questions

The second major area addressed by the new Executive Order gives power to the military judge to authorize remote witness testimony for interlocutory questions if the practical difficulties of producing the witness outweigh the significance of the witness’ personal appearance.¹²⁸ Interlocutory questions deal with all issues that arise during trial except rulings on guilt, sentence, and administrative matters such as deciding recesses and adjournments.¹²⁹ Interlocutory questions may be questions of law or questions of fact.¹³⁰ A typical interlocutory question will be handled at an Article 39(a)¹³¹ motions session.¹³²

This language, giving the power to the judge to allow remote testimony for interlocutory questions, is added to the Rule for Courts-Martial 703(b)(1), Right to Witnesses.¹³³ The old language regarding the right to witnesses provided to each party production of all relevant and necessary witnesses on the merits and on interlocutory questions.¹³⁴ The new rules substantially alter this right by altering the rule on production of witnesses for interlocutory questions.¹³⁵

¹²⁸ Exec. Order No. 13,430, 72 Fed. Reg. at 20213; MCM, *supra* note 122, R.C.M. 703(b)(1).

¹²⁹ MCM, *supra* note 122, R.C.M. 801(e)(5) discussion.

¹³⁰ *Id.*

¹³¹ MCM, *supra* note 122, R.C.M. 803.

¹³² *See* MCM, *supra* note 122, R.C.M. 801(e)(5) discussion.

¹³³ Exec. Order No. 13,430, 72 Fed. Reg. at 20213; MCM, *supra* note 122, R.C.M. 703(b)(1).

¹³⁴ *Id.*

¹³⁵ *See id.*

This new rule is likely fashioned after the holding in *United States v. Morrison*.¹³⁶ In *Morrison*, the military judge permitted telephonic testimony of material witnesses located in the Philippines¹³⁷ during an Article 39(a) motions hearing conducted in San Diego, California.¹³⁸ The trial judge balanced the different interests involved, and ultimately ruled against physically producing the witnesses or using interrogatories.¹³⁹ The trial judge ultimately decided that taking the testimony via speakerphone would be the most appropriate means of receiving the testimony.¹⁴⁰ Upon review, the United States Navy-Marine Corps Court of Military Review not only upheld the trial judge's use of an alternative form of testimony, but it commended him for being so innovative.¹⁴¹ Bottom line: the court said that forms of evidence other than live testimony may be used at the discretion of the trial judge for interlocutory questions and issues.¹⁴²

The new Rule for Courts-Martial basically embraces the *Morrison*¹⁴³ ruling. Unlike the original Rule for Courts-Martial 703(b)(1), witnesses will not necessarily be produced for interlocutory questions just because they are relevant and necessary.¹⁴⁴ Production on interlocutory questions need now only be "practically difficult."¹⁴⁵ This should be a low threshold the government must meet in order to produce witnesses remotely. It is hard to imagine a production situation that is practically easy, or necessarily convenient and easily accomplished. Anytime a witness needs to travel, there are practical implications: the witness' personal and work schedules must be adjusted, travel arrangements must be made, billeting must be secured, and funds need to be procured.

The analysis does not stop with finding practical difficulty. The practical difficulty must outweigh the "the significance of the witness' personal

¹³⁶ *United States v. Morrison*, 13 M.J. 649 (N.M.C.M.R. 1982).

¹³⁷ *Id.* at 651 (the witness was an active service member subject to the subpoena power of the court).

¹³⁸ *Id.*

¹³⁹ *Id.* at 652.

¹⁴⁰ *Id.*

¹⁴¹ *Morrison*, 13 M.J. at 652 ("We find that the judge clearly did not abuse his discretion and we commend his innovative and controlled approach in obtaining additional evidence to fully consider appellant's motion").

¹⁴² *Id.* (citing *United States v. Scott*, 5 M.J. 431 (C.M.A. 1978)).

¹⁴³ *Id.*

¹⁴⁴ Exec. Order No. 13,430, 72 Fed. Reg. at 20213; MCM, *supra* note 122, R.C.M. 703(b)(1).

¹⁴⁵ MCM, *supra* note 122, R.C.M. 703(b)(1).

appearance.”¹⁴⁶ Because the taking of this remote testimony only applies to interlocutory questions, the significance of the witness’s personal appearance will be the significance of seeing the witness in person as opposed to seeing and hearing them via video conferencing or hearing them on the telephone for a motions hearing. The impact of the significance will be from the perspective of the military judge since it is the military judge who decides interlocutory questions.¹⁴⁷ Military judges consistently allege that they are basically more able than the member finder-of-fact to make legitimate findings without the emotion that normally affects members.¹⁴⁸ Accordingly, it is unlikely that a personal appearance of a witness during an interlocutory question will be very significant.

The burden, then, appears to be very low to take remote testimony on an interlocutory question. Therefore, a trial shop that has a good speakerphone, or better yet, an established video conferencing capability, should be able to take full advantage of this new Rule for Courts-Martial.

C. Article 39(a) Sessions

Another interesting area dealing with remote testimony which is addressed in the new Executive Order deals with Article 39(a) sessions.¹⁴⁹ The additions enumerated in the new Executive Order regarding Article 39(a) sessions are primarily procedural in nature.¹⁵⁰ Specifically, the new Rules for Courts-Martial 804 and 805 address the presence requirement of the accused, counsel and the military judge during Article 39(a) sessions where one of the above mentioned parties participates remotely.¹⁵¹

These new rules are likely incorporated to avoid an issue like the one encountered in *United States v. Reynolds*.¹⁵² In that case, it was found that the military judge erred when he conducted an initial session under Article 39(a) by speaker telephone since military judge’s physical presence is required by Articles 26 and 39.¹⁵³

¹⁴⁶ *Id.*

¹⁴⁷ MCM, *supra* note 122, R.C.M. 801(e).

¹⁴⁸ *See United States v. Cacy*, 43 M.J. 214, 218 (1995).

¹⁴⁹ MCM, *supra* note 122, R.C.M. 803.

¹⁵⁰ Exec. Order No. 13,430, 72 Fed. Reg. at 20213; MCM, *supra* note 122, R.C.M. 804, 805.

¹⁵¹ MCM, *supra* note 122, R.C.M. 804, 805.

¹⁵² *United States v. Reynolds*, 49 M.J. 260 (1998).

¹⁵³ *Reynolds*, 49 M.J. 260 (error did not require reversal of conviction since the irregular court session had no substantial impact on appellant’s ability to make

By specifically allowing for the presence requirement of Article 39(a) to be satisfied for circumstances where either the accused, counsel, or military judge is participating remotely, the new Executive Order effectively permits not only witness testimony to be taken remotely, but for key members of the trial to also participate remotely. This may come into play more for the services that currently employ regional trial services as opposed to the Marine Corps, which co-locates brigades, courtrooms, judges and counsel in the same geographical location.¹⁵⁴

D. The Use of Remote Testimony in the Rule for Presentencing

In addition to the changes regarding the use of remote testimony in the new Executive Order, the President also made changes to Rule for Courts-Martial 1001(e)(2), adding “remote testimony” as an alternative form of evidence in pre-sentencing procedures. Remote testimony would include telephonic testimony, along with the arguably more superior video teleconferenced testimony.¹⁵⁵ The new amendments permitted remote testimony for interlocutory questions over defense objection,¹⁵⁶ perhaps being influenced by the decision in *United States v. Morrison*.¹⁵⁷ It is equally likely that the Executive Order codified the ruling in *United States v. McDonald* which found no violations of the Confrontation Clause for the use of telephonic testimony during pre-sentencing proceedings so long as 5th Amendment Due Process needs are met¹⁵⁸

1. Justification can be found in United States v. McDonald¹⁵⁹

In *McDonald*, the accused was convicted of committing indecent acts upon a child and forcible sodomy in violation of Articles 125 and 134,

informed choice concerning his court-martial forum, and appellant affirmatively consented to irregular trial procedure).

¹⁵⁴ Email from Lieutenant Colonel Jeffrey Meeks, United States Marine Corps, Senior Military Judge, Navy-Marine Corps Western Judicial Circuit (Jan. 17, 2008, 14:11 EST) (on file with author).

¹⁵⁵ See Exec. Order No. 13,430, 72 Fed. Reg. at 20213 Exec. Order No. 13,430, 72 Fed. Reg. at 20213. (definition of remote testimony includes “videoteleconference, closed circuit television, telephone or similar technology”).

¹⁵⁶ *Id.*

¹⁵⁷ *Morrison*, 13 M.J. at 652.

¹⁵⁸ *McDonald*, 55 M.J. 173.

¹⁵⁹ *Id.*

respectively, of the Uniform Code of Military Justice.¹⁶⁰ At the start of the trial, the prosecution informed the court that it intended to call the father of the victim, an active duty Sergeant Major stationed at another post an hour and a half away, as a witness in aggravation for pre-sentencing proceedings.¹⁶¹ The prosecution also made the court aware that the Sergeant Major had just received the alert that he would be deploying as part of the Rapid Deployment Force to Iraq the following morning.¹⁶² After ruling not to move the trial to the distant base or to take a deposition of the deploying witness, the judge permitted the government to take the testimony telephonically over defense objection.¹⁶³ The lower court found that the Confrontation Clause did not apply to pre-sentencing proceedings, nor did the Uniform Code of Military Justice, the Military Rules of Evidence or the Rules for Court-Martial prohibit taking telephonic testimony during pre-sentencing proceedings.¹⁶⁴

Deciding this as a case of first impression,¹⁶⁵ the United States Court of Appeals for the Armed Forces agreed that the Confrontation Clause does not apply to pre-sentencing proceedings in a non-capital court-martial.¹⁶⁶ Interestingly enough, the court quickly dismissed *any* notion that the *Sixth Amendment* Confrontation Clause was applicable at pre-sentencing and instead focused nearly the entire analysis of using telephonic testimony on the due process requirements of the *Fifth Amendment*.¹⁶⁷

Ultimately, the court concluded that telephonic testimony at non-capital pre-sentencing proceedings was constitutional under both the Fifth and Sixth Amendments.¹⁶⁸ In reaching that conclusion, the court found that the accused's Fifth Amendment due process rights are protected in pre-sentencing proceedings when the government follows the "safeguards established in governing statutes and regulations."¹⁶⁹ Reliability of the evidence continues to be a focus of the court, as it also requires that any evidence introduced meet the minimum standards of reliability.¹⁷⁰

¹⁶⁰ *Id.*

¹⁶¹ *United States v. McDonald*, 53 M.J. 593, 596 (A.F. Ct. Crim. App. 2000).

¹⁶² *Id.*

¹⁶³ *McDonald*, 55 M.J. at 174.

¹⁶⁴ *McDonald*, 53 M.J. at 596.

¹⁶⁵ *McDonald*, 55 M.J. at 174.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 174–178.

¹⁶⁸ *Id.* at 177–178.

¹⁶⁹ *Id.* at 175.

¹⁷⁰ *McDonald*, 55 M.J. at 177.

With respect to following the procedural safeguards, like the lower court, the United States Court of Criminal Appeals for the Armed Forces found the Uniform Code of Military Justice, the Military Rules of Evidence and the Rules for Court-Martial did not prohibit taking telephonic testimony.¹⁷¹ In fact, they found the Rules for Courts-Martial provide greater latitude to counsel regarding pre-sentencing evidence,¹⁷² subject to the discretion of the trial judge.¹⁷³ The Rules do provide the trial judge with some limitations in which to guide his discretionary decision on whether the government must produce a witness for testimony.¹⁷⁴

One of those rules states that the government does not need to produce the witness if other forms of evidence would be sufficient to meet the needs of the court-martial in determining an appropriate sentence.¹⁷⁵ The rule specifically lists *other forms of evidence*, including oral depositions, written interrogatories and former testimony.¹⁷⁶ By listing these other forms of evidence, the Manual basically provides the trial judge with procedural protection for taking alternative forms of testimony for pre-sentencing proceedings. This is the procedural protection mentioned by the *McDonald*¹⁷⁷ court which, if followed, would comport with any Fifth Amendment due process concerns. In other words, the accused is not protected by the Confrontation Clause during pre-sentencing, but trial courts must still ensure he receives due process protections.¹⁷⁸ These protections are achieved if the trial courts are otherwise following the procedures designated in the relevant statutes and regulations governing pre-sentencing hearings.¹⁷⁹

¹⁷¹ *Id.* at 176–177.

¹⁷² *Id.* at 176–177 (citing MCM, *supra* note 122, R.C.M. 1001(e)(1) (“during the presentence proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses”)).

¹⁷³ *Id.* at 177 (citing MCM, *supra* note 122, R.C.M. 1001(e)(1) (“Whether a witness shall be produced to testify during presentencing proceedings is a matter within the discretion of the military judge, subject to the limitations in subsection (e)(2)”).

¹⁷⁴ MCM, *supra* note 122, R.C.M. 1001(e)(2).

¹⁷⁵ MCM, *supra* note 122, R.C.M. 1001(e)(2)(D).

¹⁷⁶ MCM, *supra* note 122, R.C.M. 1001(e)(2).

¹⁷⁷ *McDonald*, 55 M.J. at 175.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

Therefore, since the United States Court of Appeals for the Armed Forces has already determined that the accused does not have a Sixth Amendment right to confrontation during presentencing proceedings, and has likewise determined that any Fifth Amendment due process concerns will be protected if the court follows the safeguards established in the governing statutes and regulations (e.g. the Rules for Courts-Martial), then the door was opened wide for the President to include in his new Executive Order *remote testimony* as another form of alternative testimony available in presentencing procedures.

2 *It makes logical and legal sense to include remote testimony as an alternative form of evidence in R.C.M. 1001(e)(2)*

By listing remote testimony specifically in the Rule for Courts-Martial governing other forms of evidence, the President brought remote testimony under the same protected umbrella as oral depositions, written interrogatories and former testimony.¹⁸⁰ And why not? If telephonic testimony has been ruled to be a constitutionally protected form of evidence during sentencing proceedings, it should, along with the arguably more robust video teleconferenced testimony, likewise be included in the procedural umbrella of “other forms of evidence.”

a. *Remote testimony is superior to the other enumerated alternative forms of testimony*

Arguably, both telephonic and video teleconferenced remote testimony are superior to the other listed alternative forms of evidence in Rule for Courts-Martial 1001(e)(2)(D), e.g. oral depositions, written interrogatories, and former testimony, because it is heard real-time by the fact finder. And for video teleconferenced testimony, unlike depositions, written interrogatories and former testimony, the testifying witness’s demeanor is visible to the sentencing authority while answering questions posed under direct and cross-examination. This visible picture provides the sentencing authority with another tool to evaluate the witness’s credibility.¹⁸¹

In addition to being able to visibly see and hear the witness’s demeanor while he is testifying, another advantage to video teleconferenced and/or telephonic testimony is one mentioned in *United States v. Gigante*.¹⁸² The

¹⁸⁰ MCM, *supra* note 122, R.C.M. 1001(e)(2)(D).

¹⁸¹ See *Craig*, 497 U.S. at 847 (citing *California v. Green*, 399 U.S. 149, 158 (1970) (observing a witness’ demeanor while testifying assists the trier of fact in assessing witness credibility)).

¹⁸² *Gigante*, 166 F.3d at 80.

Second Circuit noted that including video teleconferenced testimony as an alternative form of evidence in pre-sentencing will permit the cross-examining attorney to craft his cross-examination of the witness *after* viewing the impact his direct testimony had on the members. This gives the advantage to the cross-examining attorney to adjust his tactics according to the real-time impact the testimony has based on members' reactions, as opposed to guessing what will and will not be effective without that benefit of viewing members' reactions.¹⁸³

b. Other policy reasons support including remote testimony as an enumerated alternative form of testimony

There are also some policy reasons that would support specifically including remote testimony as an alternative form of evidence for the pre-sentencing proceedings. These reasons include protection from re-victimization and safety of the courtroom.

i. Protection from re-victimization

Including remote testimony as another alternative form of evidence in Rule for Courts-Martial 1001(e)(2) would prevent re-victimization of the victim. If a victim has already taken the stand during the case on the merits in order to allay any reliability concerns by facing the accused in front of members or a judge, and the members or the judge have found the victim credible enough to convict the accused of the alleged offenses, then why should we force the victim to once again face his or her aggressor?¹⁸⁴

With a greater focus being given to protecting the interests of victims,¹⁸⁵ codifying the allowance of victims to avoid having to face their

¹⁸³ It is true that members often surprise the court on what they find important, but it is equally true that counsel constantly watch the members in an attempt to surmise how the members feel about aspects of the case at hand.

¹⁸⁴ Duffy, *supra* note 5, at 1 (quoting judge as stating that he found that victim was relieved that she did not have to be in the same room as the defendant).

¹⁸⁵ See generally The Victim and Witness Protection Act, Pub.L. No. 97-291, 96 Stat. 1248 (codified at 18 U.S.C. § 1501 note, 1503, 1505, 1510, 1512 note, 1512-1515, 3146, 3579 note, 3580, Fed.R. Crim.P. 32(c)(2) (1982)); President's Task Force on Victims of Crime, Final Report (Dec. 1982); Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, 47 LAW & CONTEMP. PROBS. 225 (1984); Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS.L.J. 515 (1982).

aggressors while the victims recount just how much impact the accused's acts have had on their lives is appropriate. Providing victims this relief should not be the subject of a motion. Since the Confrontation Clause does not apply to pre-sentencing procedures,¹⁸⁶ there is no constitutional requirement that a victim be in the same room ever again with his aggressor. Because the President included remote testimony as an enumerated alternative form of testimony for sentencing proceedings, the victim will be protected from the procedural issues of the due process elements of the Fifth Amendment as addressed in *McDonald*.¹⁸⁷

ii. Safety of the courtroom

Another policy reason for enumerating remote testimony as an alternative form of evidence during pre-sentencing would be to enhance the safety of the courtroom.¹⁸⁸ In an already emotionally charged trial, it may be in the court's best interest to avoid the confrontation of particular testifying witnesses from the convicted accused and/or his family.

As much as the courtroom is a formal environment, demanding the highest of decorum, a clash between the accused and a witness testifying as to how the accused's actions have severely impacted his or her life, is not unfathomable in particularly devastating cases. A clash can also be foreseen between the witness and any members of the gallery supporting the accused. Likewise, some testifying witnesses may desire that their friends or family be in the courtroom during their testimony in order to provide moral support. A clash between support systems can be avoided if the testifying witness did not need the support system in the courtroom since he would have testified from a remote location.

IV. THE MISSED OPPORTUNITY

Though the Executive Order did make progress by acknowledging the use of remote testimony in different phases of the courts-martial process, it nevertheless fell short in at least two areas. The most disappointing shortfall was its complete bar to utilizing remote testimony on the merits over the accused's objection. Another substantial shortfall was its failure to establish a sufficient baseline of procedural rules for utilizing remote testimony in order to ensure its reliability.

¹⁸⁶ *McDonald*, 55 M.J. at 177.

¹⁸⁷ *Id.* at 179 (Sullivan, concurring) (providing the accused adequate notice and opportunity to rebut/explain evidence admitted against him).

¹⁸⁸ Poulin, *supra* note 5 (discussing various effects of the utilization of video technology).

A. There should not be a complete bar on the use of remote testimony during the case on the merits

Although the new Executive Order acknowledges the new technology available for use at courts-martial by addressing it in the amendments, the amendments take a conservative approach to adapting modern day courtrooms to modern day conveniences. It has been nearly two decades since the Supreme Court has opened the doors for use of remote testimony on the merits in criminal cases with its decision in *Craig*.¹⁸⁹ Although the Court in *Craig* only enunciated clear permission to utilize remote testimony on the merits in cases involving child victim witnesses, it set a standard that could fit other circumstances as well.¹⁹⁰ Specifically, the Court's ruling permitted the use of remote testimony on the merits when it is necessary to further an important public policy and the reliability of the testimony is otherwise assured.¹⁹¹

By including the limiting language in the new Rule for Courts-Martial 703(b)(1) that remote testimony "will not be admissible over the accused's objection as evidence on the ultimate issue of guilt,"¹⁹² the Manual conclusively closes the door to the use of remote testimony during the case on the merits, despite jurisprudence that has not taken such a firm stance.¹⁹³ Such an absolute closing of the door to such evidence was not necessary and in fact went beyond what it should have.

The Supreme Court, federal courts and military courts have all addressed the issue of using remote testimony during the merits phase of the trial, and none of them have ruled conclusively that remote testimony may never be utilized.¹⁹⁴ Why then should the President do so in the Manual for Courts-Martial?

The Supreme Court articulated a test to permit remote testimony on the merits, stating the validity of its use when it is necessary to further an important public policy.¹⁹⁵ The President may not have an articulated important public policy other than protection of child victim witnesses at this point, but the

¹⁸⁹ *Craig*, 497 U.S. 836.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 850.

¹⁹² Exec. Order No. 13,430, 72 Fed. Reg. at 20213; MCM, *supra* note 122, R.C.M. 703(b)(1).

¹⁹³ *Craig*, 497 U.S. 836; *Shabazz*, 52 M.J. at 592.

¹⁹⁴ *Craig*, 497 U.S. 836; *Gigante*, 166 F.3d at 81; *Shabazz*, 52 M.J. at 592.

¹⁹⁵ *Craig*, 497 U.S. 836.

inflexible language of the new rule¹⁹⁶ has effectively closed the door to any future important public policy that may present itself.

Since the introduction of limited witness video teleconferencing testimony in military courts-martial in 1999, the United States military has seen a dramatic change in its operational tempo. With constant troop rotations in and out of the Middle East, the need for maintaining the efficiency of trials has raised the importance of the use of video teleconferencing witness testimony. United States service men and women are constantly being physically moved around the globe to carry out real world peace and security operations, thus placing their potential for witness availability in question. Additionally, the constant global positioning of our troops for extended periods of time inevitably results in criminal offenses being committed in foreign nations.¹⁹⁷ These offenses will likely entail witnesses who are foreign nationals and outside the subpoena power of the United States.¹⁹⁸ The impact of these worldwide considerations is that readily available remote testimony should be a viable option in modern day courtrooms.

B. The Executive Order should have implemented specific procedural requirements

Despite the omission of including remote testimony as an enumerated alternative form of testimony for pre-sentencing procedures in the new Executive Order, the order did reference remote testimony in the limited circumstances of interlocutory questions, Article 39(a) sessions, pre-sentencing and when the accused consents to its use.¹⁹⁹ Whether from a Fifth Amendment²⁰⁰ or Sixth Amendment²⁰¹ perspective, reliability continues to be

¹⁹⁶ MCM, *supra* note 122, R.C.M. 703(b)(1) (remote testimony “will not be admissible over the accused’s objection as evidence on the ultimate issue of guilt”).

¹⁹⁷ Consider recent events in Hamdaniya, Haditha, and Abu Ghraib.

¹⁹⁸ MCM, *supra* note 122, R.C.M. 703(e)(2)(A) discussion; *see* Matthew J. Tokson, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?*, 74 U. CHI. L. REV. 1581, 1581 (2007) (*citing* United States v. Filippi, 918 F2d 244, 246 n.2 (1st Cir 1990) (stating that U.S. statutes only provide for serving subpoenas on U.S. nationals or residents located in foreign countries, and do not provide for subpoenas of foreign nationals located abroad); Walsh Act, 28 USC § 1783 (2000) (providing that courts may issue subpoenas directed towards U.S. nationals or residents in foreign countries)).

¹⁹⁹ Exec. Order No. 13,430, 72 Fed. Reg. at 20213.

²⁰⁰ *McDonald*, 55 M.J. 173.

the focus of the courts when dealing with remote testimony. As such, the Executive Order should have delineated specific procedures, or at least guidelines, which military judges could follow in order to better guarantee the reliability of remote testimony.

Instead of producing standardized rules, the Executive Order places the responsibility on the trial judge.²⁰² Under the new Rule for Courts-Martial 914B in the Executive Order, the military judge shall be the one to determine the procedures used to take remote testimony.²⁰³ The only guidance provided to military judges in the new order is that “all parties shall be able to hear each other,²⁰⁴ those in attendance at the remote site shall be identified,²⁰⁵ and the accused shall be permitted private, contemporaneous communication with his counsel.”²⁰⁶

As a result of this limited guidance, military judges are left to wade through various appellate decisions and law journals to decide what procedures will constitute a reliable taking of remote testimony. The new Executive Order should have promulgated minimum control procedures for remote testimony rather than taking the easy road out by passing the responsibility to the trial judges.

The array of trial judges vary greatly and, likely, so would their implementation of procedures for taking remote testimony. Until specific procedures are included in the Rules for Courts-Martial, it would be a far better solution to this issue if judicial circuits enacted their own standing operating procedures regarding the use of remote testimony. Doing so would provide counsel forewarning of what will be required prior to filing any motion asking for the use of remote testimony. It will also avoid the potential pitfall of having each military judge determine the requirements individually and likely inconsistently. Until a judicial circuit enacts its own standing operating procedures for utilizing video conferencing technology at trial, counsel should include a draft court order in their motion for appropriate relief.

²⁰¹ *Craig*, 497 U.S. 836.

²⁰² Exec. Order No. 13,430, 72 Fed. Reg. at 20213.

²⁰³ *Id.*

²⁰⁴ Likely fashioned after the facts in *Gigante*, 166 F.3d at 79, where two-way closed circuit was utilized, and preferred, over one-way closed circuit.

²⁰⁵ Likely fashioned after the reliability concerns arising out of the circumstances in *Shabazz*, 52 M.J. at 594.

²⁰⁶ Exec. Order No. 13,430, 72 Fed. Reg. at 20214; MCM, *supra* note 122, R.C.M. 914B.

C. Remote Testimony Considerations

There are various considerations to take into account when utilizing remote testimony which could have been addressed in the new Executive Order. The considerations below are designed to address testimony taken by video teleconference, but some may also apply to testimony taken by other remote means.

1. *Go beyond identification of persons in the room at the distant end.*

Although the Executive Order includes as one of its minimum requirements that “those in attendance at the remote site shall be identified,”²⁰⁷ there are other considerations to take into account. In addition to identifying themselves on camera, all persons on the distant end should also state their purpose for being there.²⁰⁸ This provides the trial judge the information he needs to exert control over the situation. Having more than merely a name will also assist the judge in ensuring that no witness coaching occurs.²⁰⁹ A trial judge can then make a ruling that persons present have a need to be present, and he also protects the record in case an issue should arise after the testimony.²¹⁰

During this preliminary discussion with the witness prior to receiving any substantive testimony, the trial judge should ensure the video teleconferenced witness is properly instructed on how his testimony would be given along with permissible environmental factors. Much like when taking telephonic testimony,²¹¹ the trial judge should ensure the witness is properly instructed on the procedures he will follow while testifying.

²⁰⁷ Exec. Order No. 13,430, 72 Fed. Reg. at 20214.

²⁰⁸ *Shabazz* 52 M.J. at 594.

²⁰⁹ *See id.*; Fredric I. Lederer, *The Randolph W. Thrower Symposium: Changing Litigation with Science and Technology: Technology Comes to the Courtroom, and...*, 43 EMORY L.J. 1095, 1121 (1994).

²¹⁰ *See Shabazz*, 52 M.J. at 591.

²¹¹ An example of a telephonic testimony foundation may read as follows:

Trial Counsel: “With whom am I speaking?”

Witness: “Bob Smith.”

Trial Counsel: “Mr. Smith, are you currently alone and in a location that would permit you to testify free from any distractions?”

Witness: “Yes, I am.”

Instructing a witness not to talk over any other speaker takes on a new meaning with video conferencing. Because there is often a delay between sites, it will be easy to cause confusion and discontent, especially for the court reporter, if speaking parties do not make any interruptions of distant-end speaking parties.²¹² It is important to instruct the witness that if he does not understand the question being asked, whether due to comprehension or technical difficulties, that the witness must ask only the person actually asking the question, and not a person in the room with the witness who may have heard the question more clearly.²¹³ The witness needs to be properly instructed so that as much of the courtroom environment as possible is preserved. He needs to understand that protective wall that surrounds him during testimony, one that is only penetrated by counsel or the military judge.

2. *Establish a bailiff at the site of the remote testimony*

In order to further ensure that the witness is not purposefully or inadvertently coached during his testimony, the trial judge should detail a bailiff for the remote location.²¹⁴ This should occur even if the trial is without members, where a bailiff is normally not utilized. In addition to ensuring that protective wall around the testifying witness is maintained, having a bailiff present will contribute to the formal atmosphere of the remote location. Having a formal atmosphere is viewed as a critical function of the adversarial process.²¹⁵

Trial Counsel: "Where are you exactly Mr. Smith?"

Witness: "I am currently sitting in my office, the door is closed, and I am the only person in here."

Trial Counsel: "Very well, Mr. Smith. You are advised you are to testify from your memory and that you are not permitted to have anything there with you to assist you with your testimony. Do you have anything there, Mr. Smith, that would assist you with your testimony?"

Witness: "No, I do not."

²¹² Unless of course there is an objection. This brings up the valid argument against the use of video conferencing that members may hear portions of a witness' testimony that should have ceased immediately upon an objection of counsel. Due to a time delay, a witness will likely not know when to stop talking until they have finished what they were saying.

²¹³ See *Shabazz*, 52 M.J. at 591.

²¹⁴ Lederer, *supra* note 209, at 1120.

²¹⁵ Zachary M. Hillman, *Pleading Guilty and Video Teleconference: Is a Defendant Constitutionally "Present" when Pleading Guilty by Video Teleconference?*, 7 J. HIGH TECH. L. 41 n.58 (2007) (citing *Estes v. Texas*, 381

3. *Ensure the display of the remote site has a formal background*

Critics of utilizing video teleconferencing for witness testimony have declared that the remote testimony lacks the dignity and decorum of testimony which occurs inside the courtroom.²¹⁶ In order to ensure that both the testifying witness and members in the courtroom treat video teleconferenced testimony appropriately, ensure the background of the remote site has a sense of formality to it. Always avoid the newsroom scenario that has distracting things occurring in the background. At the very least, have the testifying witness emplaced before a blank wall if more formal surroundings cannot be achieved.

4. *Size matters*

The size of the television screen depicting the image of the testifying witness should be as true to life as possible.²¹⁷ Not all courtrooms will be equipped with large LCD televisions, but legal units should strive to include high quality audio-visual equipment in their budgets when able. The sooner we update our courtrooms with technically relevant equipment, the sooner the judiciary will be able to identify with its usefulness.

5. *To the best extent possible, ensure the remote witness is dressed for court*

There may be times when a remote witness will be testifying from a combat zone and thus his dress uniform will be understandably unavailable. But that should be the only time that a remote witness is not dressed appropriately. Remote witnesses who are located at established bases should do all that is possible to ensure they are testifying in the court's uniform of the day.

U.S. 532, 561 (1965) (Warren, C.J., concurring, joined by Douglas and Goldberg, JJ.) (declaring the setting of the courtroom an important element in the constitutional conception of a trial, contributing a dignity essential to "the integrity of the trial process").

²¹⁶ VTC hearings can lack "the dignity, decorum, and respect one would anticipate in a personal appearance before the court." Gerald G. Ashdown & Michael A. Menzel, *The Convenience of the Guillotine?: Video Proceedings in Federal Prosecutions*, 80 DENV. U.L. REV. 63 (2002) (quoting Amendment to Fla. Rule of Juvenile Procedure 8.100(a), 796 So. 2d 470, 473 (Fla. 2001)).

²¹⁷ Frederic I. Lederer, *Trial Advocacy: The Road to the Virtual Courtroom? A Consideration of Today's – and – Tomorrow's – High-Technology Courtrooms*, 50 S.C. L. REV. 799, 819 (1999).

6. *Ensure the technical support know to mute the sound from the courtroom upon instruction from the military judge*

Just as the military judge may excuse the witness for certain matters that may arise between counsel in an R.C.M. 802 or Article 39(a) hearing, the military judge should be cognizant to likewise ensure the monitor for the remote witness is muted. Depending on the technical set up a particular courtroom may have, this will require pre-coordination with the technicians on the distant end so that they are able to know when to un-mute the sound.

7. *When to say stop*

The judge should halt the procedures at any time reliability becomes doubtful.²¹⁸ If the judge cannot take corrective measures, the trial judge should reevaluate his decision to permit remote testimony. Under no circumstances should the judge be asleep at the wheel, as appears to have been the case in the *Shabazz* proceedings, where the judge took no action when the reliability of the testifying witness came into question.²¹⁹

V. CONCLUSION

Although constitutional law is not ready to embrace the full use of video teleconferenced technology for criminal proceedings, technology should still be utilized to the fullest extent possible within the bounds of the Constitution. In the almost two decades since the Supreme Court endorsed video teleconferencing's limited use, the Manual for Courts-Martial has done little to provide clear rules for utilizing the technology and has provided almost no standardization of the practicalities of its use. The new Executive Order took baby steps in an area that could have provided "giant steps for mankind."²²⁰

²¹⁸ *Id.* at 822; *see also Shabazz*, 52 M.J. at 594.

²¹⁹ *Shabazz*, 52 M.J. at 585.

²²⁰ "One small step for man; one giant leap for mankind." Neil Armstrong, July 20, 1969.

Appendix A.

Excerpt of Executive Order 13,430, 72 Fed. Reg. 20213, 20213-14 (2007):

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801-946), and in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12473 of April 13, 1984, as amended, it is hereby ordered as follows:

Section 1. Part II of the Manual for Courts-Martial, United States, is amended as follows:

(a) R.C.M. 703(b)(1) is amended by adding at the end the following new sentences:

"With the consent of both the accused and Government, the military judge may authorize any witness to testify via remote means. Over a party's objection, the military judge may authorize any witness to testify on interlocutory questions via remote means or similar technology if the practical difficulties of producing the witness outweigh the significance of the witness' personal appearance (although such testimony will not be admissible over the accused's objection as evidence on the ultimate issue of guilt). Factors to be considered include, but are not limited to, the costs of producing the witness; the timing of the request for production of the witness; the potential delay in the interlocutory proceeding that may be caused by the production of the witness; the willingness of the witness to testify in person; the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training; and, for child witnesses, the traumatic effect of providing in-court testimony."

(b) R.C.M. 804 is amended by redesignating paragraphs (b), (c), and (d) as paragraphs (c), (d), and (e), respectively, and inserting the following new paragraph (b):

"(b) *Presence by remote means.* If authorized by the regulations of the Secretary concerned, the military judge may order the use of audiovisual technology, such as videoteleconferencing technology, between the parties and the military judge for purposes of Article 39(a) sessions. Use of such audiovisual technology will satisfy the "presence" requirement of the accused only when the accused has a defense counsel physically present at his location. Such technology may include two or more remote sites as long as all parties can see and hear each other."

(c) R.C.M. 804(c)(2) is redesignated as R.C.M. 804(d)(2) and amended to read as follows:

"(2) *Procedure.* The accused's absence will be conditional upon his being able to view the witness' testimony from a remote location. Normally, transmission of the testimony will include a system that will transmit the accused's image and voice into the courtroom from a remote location as well as transmission of the child's testimony from the courtroom to the accused's location. A one-way transmission may be used if deemed necessary by the military judge. The accused will also be provided private, contemporaneous communication with his counsel. The procedures described herein shall be employed unless the accused has made a knowing and affirmative waiver of these procedures."

(d) R.C.M. 805(a) is amended by adding at the end the following new sentence:

"If authorized by regulations of the Secretary concerned, for purposes of Article 39(a) sessions solely, the presence of the military judge at Article 39(a) sessions may be satisfied by the use of audiovisual technology, such as videoteleconferencing technology."

(e) R.C.M. 805(c) is amended by adding at the end the following new sentences:

"If authorized by regulations of the Secretary concerned, for purposes of Article 39(a) sessions solely, the presence of counsel at Article 39(a) sessions may be satisfied by the use of audiovisual technology, such as videoteleconferencing technology. At least one qualified defense counsel shall be physically present with the accused."

(f) R.C.M. 914A is amended by deleting the third sentence of paragraph (a).

(g) R.C.M. 914A is further amended by redesignating paragraph (b) as paragraph (c) and inserting the following new paragraph (b):

"(b) *Definition.* As used in this rule, "remote live testimony" includes, but is not limited to, testimony by videoteleconference, closed circuit television, or similar technology."

(h) New Rule R.C.M. 914B is inserted after R.C.M. 914A:

"Rule 914B. Use of remote testimony.

(a) *General procedures.* The military judge shall determine the procedures used

to take testimony via remote means. At a minimum, all parties shall be able to hear each other, those in attendance at the remote site shall be identified, and the accused shall be permitted private, contemporaneous communication with his counsel.

(b) *Definition.* As used in this rule, testimony via "remote means" includes, but is not limited to, testimony by videoteleconference, closed circuit television, telephone, or similar technology."

(i) R.C.M. 1001(e)(2)(D) is amended by deleting the "or" before "former testimony" and inserting ", or testimony by remote means" after "former testimony."

Appendix B.

Recommended VTC Courtroom Procedures for In re San Juan Dupont Plaza Hotel Fire Litigation 129 F.R.D. 424 (D.P.RICO 1990)

I. COURTROOM IN PUERTO RICO

A. Court and parties -- places as usual

B. Witness --

1. Replaced by 30-inch screen on witness stand ("witness screen").
2. Witness screen facing podium and jury box.
3. Full torso frontal image on witness screen at all times.
4. Witness will be seen on all monitor screens (including jury box and public area) during his testimony to ensure all present have proper view.
5. Admitted exhibits and evidence shown via satellite to the witness (pending ruling on admissibility) will be shown on all courtroom screens with the exception of the image on the witness stand, i.e., the witness will be displayed on the witness screen at all times.

C. Questioning attorney --

1. Will address screen as if witness were on stand.
2. Amended Pretrial Order No. 181 . . . and other pertinent Orders apply, i.e., face witness, stand behind podium, . . . etc.

D. Side bars and objections --

1. When side bar is allowed by the Court, the jury's sound will be automatically cut off but not the sound to the place of origin of the transmission so that the studio courtroom clerk can follow the arguments and the Court's subsequent ruling.
2. The witness hears all objections unless instructed by the Court, pursuant to a party's request, to use the headphones. (He remains on witness screen and studio courtroom clerk will advise him when to take them off.)

II. LOCATION WHERE TRANSMISSION IS ORIGINATING FROM

- A. The witness will sit facing the camera.
- B. A monitor will be placed in front of the witness where he will see the courtroom proceedings as if he were sitting in the witness stand.
- C. During questioning the witness will have a full view of the attorney at the podium.
- D. During objections the witness will see a view of the courtroom well focusing on each attorney addressing the Court or the judge when speaking.

E. Due to technical reasons the monitor should not be "blacked out" (ATT may believe that signal is off and that there is a problem with the transmission). Therefore, should there be a need for the witness not to look into his monitor, the Judge will instruct the witness not to look/face the monitor and the courtroom clerk at the studio shall so be advised to ensure the witness complies.

F. The witness will see the judge in the monitor whenever the presiding judge addresses him, i.e., instruct or question. (Judge must address camera located over his monitor.)

G. Documents available at the studio (listed by PSC in agenda) will be handed to witness by courtroom clerk in studio. Other documents or evidence will be shown to the witness on the screen or sent by telecopier.

III. MISCELLANEOUS

A. Identify for record who is present with the witness before he starts to testify. (Scan area with camera)

B. Location of studio courtroom clerk vis-a-vis camera and monitor at studio.

C. Advise the parties, the jury and the witness that there is a slight delay of seconds between questions and answers. Witness must wait for the objections.

D. Breaks -- will only be allowed for emergencies. In the event of an emergency break the witness will remain in the room in the presence of the studio deputy clerk at all times without communication to or from any person or other source. If it is an extended break the witness will be permitted to go the rest room and be provided with lunch.

E. Instruct witness not to talk to counsel during breaks.

F. Duties of studio courtroom clerk.

G. Video recording at studio not allowed; only in Puerto Rico.

H. Court reporter in Puerto Rico -- official record.

INFORMATION FOR AUTHORS

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