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SPEECHES AND COMMENTS

FOREWORD

In 1997, a special edition of the Air Force Law Review was published. It was entitled: "The Master Operations Lawyer's Edition," and it was my privilege to write the Foreword. Before tackling the task of writing another Foreword for another volume devoted to operations law, I reviewed that last edition. I was startled by what I found. What we then viewed as a cutting-edge volume seems quite basic today. That observation is a fair measure of just how far the Air Force, and its Judge Advocate General's Department in particular, has come in five years. The pace of change for our armed forces and for the Air Force JAG Department has been incredible.

In some measure, the pace of change that we have seen was dictated by the course of world events. Since the end of the Cold War, we have been called upon to involve ourselves in a steady stream of contingencies: armed interventions in Bosnia, East Timor, and Kosovo; humanitarian assistance missions to Mozambique and South Africa; and engagement and enhancement missions to many other countries. All of these contributed to a concern for the toll that such back-to-back operations were taking on our equipment and our people. Terms like "high opstempo" or "high perstempo" became a part of our everyday terminology. All of these operations have presented unique legal issues.

Partly in response to this increasingly complex world environment, the Air Force evolved into the Expeditionary Air and Space Force. That evolution presented its own unique set of legal issues, but change was absolutely necessary to reshape the Air Force for the 21st Century. An expeditionary Air Force carries with it the promise of providing some measure of predictability in an inherently unpredictable world. By organizing ourselves into Air Expeditionary Forces, we promised to deliver the right combination of capabilities to meet the needs of theater combatant commanders anywhere in the world. "Light, lean and lethal" became more than a bumper sticker. Those words became an accurate description of our global agility and battlefield lethality.

And now, after the September 11, 2001 attacks on the World Trade Center and the Pentagon, we are finding additional reasons to change. New legal considerations emerged as the United States launched a full-scale operation aimed at combating global terrorism. The legal issues associated with this counterattack continue to grow in importance as they shape

military operations. We opened the campaign against global terrorism on two distinct fronts: we took the fight to the enemy in his training camps and his political sanctuary in Afghanistan, and we denied him further tactical victories within the United States through a more robust homeland defense. These operations, and the often complex legal questions they present, remind military legal professionals that we must continue to challenge ourselves--challenge ourselves to provide Authoritative Counsel and Operational Readiness, thus ably discharging two of our core competencies.

Fortunately, as the world in which we operate changes, and the Air Force evolves in response to, and in anticipation of that change, the Judge Advocate General's Department continues to evolve as well. We build new skill sets, gain new knowledge, and adapt to new demands. Along with the Air Force, the Judge Advocate General's (JAG) Department has risen to the challenges presented by the end of the Cold War. We are challenged to operate with a reduced infrastructure (fewer bases and fewer overseas locations), yet still respond to global needs. We have increased our steady state, or home base, responsibilities, yet have taken on a greater role in the deployed operational environment. To meet these challenges, we have continued to improve the way we do business. We have refined our education and training, our equipment, and our legal support capabilities. We have also updated our vision of The Judge Advocate General's Department in the 21st Century to reflect our increased responsibilities both at home and abroad.

In order to assure that we are ready to participate fully in the Expeditionary Air and Space Force, we have positioned more of the Air Force's legal professionals in each AEF library. This means that we have identified more judge advocates and military paralegals for possible deployment than ever before. By tasking these legal professionals as part of Unit Type Codes (UTCs), we have better identified the bases and units that are ready to provide contingency support. In doing so, we have adhered to the Air Force's Teaming Concept--planning to deploy the maximum number of airmen from a single base to a forward operating location. In short, wings are now more likely to take their legal support—the attorney/paralegal teams they know and work with daily, when they deploy. When these teams arrive at their deployed locations, they are also more likely to know the other members of their deployed unit. We have increased manning at certain key bases in order to anticipate these deployments, but we also have worked with

our Reserve component to assure that home base legal support continues when lengthy deployments decrease our permanent party personnel.

We have also increased JA participation, and upgraded requisite skills, at all levels in deployment exercises. We have steadily improved our training in order to ensure that JAGs and paralegals, regardless of component (Active, Guard, Reserve), are ready to deliver superb legal services anywhere in the world. Our major deployment training course, JAGFLAG, has become a robust program that combines academic and "laboratory" approaches to preparation for deployment. It has built on the inherent strengths of our JAGs and paralegals--making them complimentary parts, each having unique skills, and in combination, a sort of "legal weapons system."

We have continued the seminal effort to conduct joint commander/JAG training in DARCLOC -- the Deployed Air Reserve Commander and Legal Operations Course. And, we have developed whole new blocks of material to deal with deployed fiscal law, anti-terrorism law, and contingency contracting. We have thus focused training on the way we plan to fight, and this is now paying dividends in our current operations.

We have begun to develop legal doctrine for the Air Force as well. This developing doctrine will give us a touchstone for every operation in the future. By developing legal doctrine, we will assure that no operation is ever planned or executed without an insightful approach to de-arming the legal land mines that, experience tells us, will always be present. Our legal doctrine will in turn be Air Force doctrine. That is significant. As Air Force doctrine, it becomes an integral part of our Air Force. Legal doctrine is not just for lawyers and paralegals. It will be relevant for operators and planners, logisticians, and communicators. Legal doctrine will capture that which makes our armed forces a moral as well as a physical force. Our legal doctrine will tell all who study it that ours is an Air Force that serves a nation governed by the rule of law. Our doctrine will make it clear that, even facing direct threats to our nation, we wage war in accordance with the law.

Not only must we prepare mentally to meet the challenges of modern operations, we must also supply our airmen with the finest tools available. This includes mundane deployment items such as packs, ponchos, and the other gear our legal offices are purchasing for their members, as well as

providing state-of-the-art deployable equipment and robust support. The Air Force Legal Services Agency, Legal Information Services Directorate (JAS) continues to address the latter challenge, constantly improving the JAG deployment kits, our so-called "Big Blue Box" or "JAG-in-a-box." We have increased their number with many more centrally funded kits delivered to AEF wings and other deployment locations. JAS has also developed operations law CDs for deployment (often overnight in response to an imminent contingency or response). JAS has added new operations law research materials to FLITE to address the increasingly broad scope of material to which our legal professionals must have access in order to maintain Legal Information Mastery and provide Authoritative Counsel in a timely manner. Our International and Operations Law Division (AF/JAI) has likewise stepped up its contributions, developing its Web page into an expansive and easily searchable resource for operations law practitioners. JAI has also developed the Department's first Operations Law handbook, *Air Force Operations and the Law - A Guide for Air and Space Forces*. This book is a single, comprehensive source of legal information for today's expeditionary-minded legal advisor.

As judge advocates and other legal professionals expand their legal capabilities and services to meet today's many challenges, we must remain focused on the Air Force mission. Military legal professionals do not have a separate mission; rather, their mission is always imbedded in the mission of the commander they serve. How then do legal professionals meet changing mission objectives? To do this, we must continue to develop our Core Competencies: (1) Fair Military Justice, (2) Operational Readiness, (3) Robust Legal Programs, (4) Compelling Advocacy and Litigation, (5) Authoritative Counsel, and (6) Legal Information Mastery. We need to prepare commanders to be able to look airmen, their families, and the public "in the eye" and say that each disciplinary decision they made was fair, reasonable, and the right thing to do. Courts-martial must be professionally prosecuted and professionally defended, and they must be presided over by military judges whose competence commands respect. We need to be ready for action—as both airmen and as legal professionals. As dual professionals, we must be personally and professionally prepared for deployment. We need to ensure our programs are up to the challenges of helping Air Force members and their families deal with the routine as well as the extraordinary situations they face. We need to aggressively represent the Air Force and our national security interests, regardless of the complexity of the issue or the legal forum. We must know the legal answers and be able to provide

timely commonsense advice. Finally, we must ensure our legal advisors know where to find, in a timely manner, the information necessary to answer complex questions involving life and death at the intersection of the law and military operations.

These core competencies are contained in our Department's Vision for the 21st Century. Any member of the Department who has not read our Vision, should. No, must. We need to not only read it, but to embrace it—as a Department and as individuals. In order to continue to deliver on the commitments we've made in identifying our Core Competencies, we need to continue to train and develop our skills, both as legal advisors and as airmen. We have made tremendous progress in this area. Our Deployed Fiscal Law and Contingency Contracting Course has grown to 115 students. This year's course also had a two-day extension covering the basics of operations law, and the entire week's instruction was put on a CD to allow deploying JAG/paralegal teams to spin-up or refresh their training in the field. We have also expanded seating for the Operations Law Course and JAGFLAG. Additionally, the JAG School has developed extensive resources for distance learning that will soon be available through streaming video on the Web. Some of these new electronic and web-based training initiatives are truly revolutionary for us. These and other distance learning initiatives help us train tomorrow's legal advisors, but we must fully exploit their capabilities to ensure we can deliver on the commitment we have made in our Core Competencies.

Education and training does not end at the JAG School door or at the base office training sessions--individuals have a responsibility to develop, advance and hone their own professional expertise. The Chief of Staff's Reading List is an excellent place to start in developing professional airmanship. The continuing legal education page the JAG School will soon put on-line is a great place to enhance one's legal training. And simply reading our new Operations Law Guide is a great way to prepare for the future in the Expeditionary Air and Space Force.

But, we must also strive to see beyond the legal horizon and attempt to address the prospective legal issues that loom there. If we stay in reactive mode exclusively, we are ruled by the problem *de jour*. If we anticipate, think ahead, prepare personally and professionally, and then act to influence that which is yet to happen, we help shape what might be termed the "legal battlefield." If we don't do this difficult intellectual work, someone else, with less perspective and perhaps a less noble agenda, might well do it for

us. And, the military legal issues of the future will shape the way we fight and train to fight, just as surely as weapon procurement budgets or the defense planning guidance will shape the available forces. We must not let chance define the battlefield, but rather, we must see that it is shaped prospectively by reasoned thought--expressed, among other ways, through continued professional writing. Likewise, we should ensure our Department's future role is not defined by the happenstance of events and hindsight, but is thought out in advance, planned for, and executed in an orderly and efficient fashion--we must aggressively explore the legal issues our Armed Forces will face. Your professional thought can alter the future, but only if you take the time to write. I challenge you to do so!

I am excited about this International and Operations Law Edition of *Air Force Law Review* and the future writing I hope it will generate. It is not a "Master Operator's" edition published primarily for current application, but a prospective analysis of issues we will certainly face. I commend to your reading in particular the comments and speeches as they reflect not only our greater interoperability with coalition partners (and related legal issues), but also as they give a perspective from senior leaders and visionaries in our Department. As you read these articles, remember that those of you who are members of the United States Air Force Judge Advocate General's Department can shape the final resolution of many of the issues the authors have identified. I urge you to read this volume and then become part of the development of the law. If you are prompted by this volume to become more involved in the operational aspects of our legal practice, then this publication has served us well. If this volume has further encouraged you to mold our Department and the future direction of operations law, then it has served to inspire. I sincerely urge you one and all to become inspired--the Air Force and our military legal practice are worthy of your inspired, professional support.

CIVILIANS AT THE TIP OF THE SPEAR

MAJOR LISA L. TURNER AND MAJOR LYNN G. NORTON*

I. INTRODUCTION

> *[C]ivilians have established themselves as an integral and vital part of the Department of Defense's total force team. With distinction, they perform critical duties in virtually every functional area of combat support and combat service support, both at home and abroad.*[1]

During the last decade, the U.S. Armed Forces have continually encountered a wide variety of civilians across the deployment and conflict scenario, a trend that will only increase in the 21st Century. [2] As the armed

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* *Major Lisa L. Turner (B.A., Randolph-Macon Woman's College; J.D., Arizona State University, College of Law) is the Staff Judge Advocate of the 305th Air Mobility Wing, McGuire AFB. She is a member of the Bar in the state of Virginia. Major Lynn G. Norton (B.A. and J.D., University of Alabama) is a reservist attached to the International and Operations Law Division, Air Force Judge Advocate General School, Maxwell AFB. She is a member of the Bars of Idaho, Alabama and Georgia.* *The authors thank Mr. W. Darrell Phillips, Chief, International and Operations Law Division, Air Force Judge Advocate General School, for his guidance, insights, and patience.*

[1] Air Force Pamphlet 10-231, *Federal Civilian Deployment Guide*, ¶1.1 (Apr. 1, 1999) [hereinafter AFPAM 10-231].

[2] The recently released Department of Defense Quadrennial Defense Review Report (QDR) asserts the Department of Defense must "aggressively" pursue the transfer to the public sector functions indirectly or not linked to warfighting. The QDR calls for the Department of Defense to more clearly identify "core" DOD functions and asserts that a "major change in the culture of the Department" is necessary to end the performance of many non-core functions by uniformed service members. It states, "[a]ny function that can be provided by the private sector is not a core government function." QUADRENNIAL DEFENSE REVIEW REPORT, DEPARTMENT OF DEFENSE, 53-54 (Sep. 30, 2001) [hereinafter 2001 QDR]. Unless noted, a person who is not a member of a uniformed armed force is assumed to be a civilian for the purpose of this article. International law defines "civilians" in a variety of places, but just as often uses the term without definition or by exception. For example, one of the earliest definitions is found in the Draft Convention for the Protection of Civilian Populations Against New Engines of War, art. 1, Aug. 29-Sept. 2, 1938 (reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 223 (Dietrich Schindler & Jiri Toman eds., 1988) which defines "civilian population" as including "all those not enlisted in any branch of the combatant services nor for the time being employed or occupied in any belligerent establishment . . . ." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention IV] defines and discusses "protected persons" rather than "civilians" and does so by exclusion rather than inclusion. Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention I] discusses "persons who accompany the armed forces without actually being members thereof" in art. 13(5). It uses the term "civilian population" without a definition. *See, e.g.*, Protocol Additional to the Geneva Conventions of Aug. 12, 1949, art.18, and

forces have been called upon for ever-increasing support for Military Operations Other Than War,[3] and to privatize and outsource[4] many functions previously performed by military personnel, judge advocates now address complex issues arising out of increased numbers of deploying government civilian employees and contractor personnel. Once in a deployed location, commanders and their judge advocates interact with civilians working with intergovernmental organizations (IGOs), non-governmental organizations (NGOs), private voluntary organizations (PVOs), international refugees, stateless persons, and internally displaced persons (IDPs), each with unique statuses under various international agreements. This article examines the legal statuses of three primary groups of civilians and introduces major issues deployed commanders and their judge advocates are called to address as a result of the civilian presence at the tip of the spear.

The article begins by identifying and defining the three primary groups of civilians encountered across the spectrum of conflict: Department of Defense (DOD) civilian employees; three sub-categories of contractors; and non-affiliated civilians including the media, NGOs, PVOs, IGOs, refugees,

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Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.S.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol I] defines "civilian" by exception in art. 50. Additional Protocol I, art. 43, defines armed forces. Persons who accompany the armed forces without being members thereof, such as civilian employees and most contractors, are civilians under the definition by exception since they are identified in Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4A(4), 6 U.S.T. 3316 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention III]. Of note, Additional Protocol I has not been ratified by the U.S. Further, the definition of civilian in Additional Protocol I is controversial. *See generally* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. Rev. 1, 75, 113 (1990). This article will only briefly discuss this controversy as it relates to authorized nexus to combat. Definitions are given for the specific groups of civilians referenced in this article.

[3] Military Operations Other Than War, also known as MOOTW, or Peace Operations and Disaster Relief entail an extremely broad category of missions, varying from humanitarian assistance, disaster relief, sanctions enforcement, non-combatant evacuation operations, peace making, to peacekeeping. MOOTW falls short of full-scale armed conflict but does not include "routine deployments" or traditional cold-war style stationing of troops overseas. *See* Report of the Secretary of Defense to the President and the Congress 6 (Apr. 1997) (annual defense report required by Department of Defense Reorganization Act of 1986, 10 U.S.C. §§ 113 (c) and (e), and Pub. L. No. 99-403 § 405).

[4] Outsourcing and privatization are common terms, however, the Air Force officially uses the phrase "competitive sourcing and privatization." "Outsourcing" is the "transfer of a support function traditionally performed by an in-house organization to an outside service provider, with the government continuing to provide appropriate oversight." This differs from "privatization" which is "not only the contracting out of support functions, but also the transfer of facilities, equipment and other governmental assets to the private vendor." DEFENSE SCIENCE BOARD TASK FORCE, OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION AND TECHNOLOGY, OUTSOURCING AND PRIVATIZATION 7A (Aug. 1996). The recently released QDR takes the position that not enough privatization and outsourcing has occurred to date. *See* 2001 QDR, *supra* note 2.

stateless persons and IDPs. Each primary group of civilians is examined to assess their importance to commanders and consequently judge advocates.

The body of the article addresses major civilian issues judge advocates may confront. In particular, it examines the physical and functional proximity to hostilities, status upon capture, status under host nation law, wear of uniforms, carrying weapons, force protection concerns and obligations, and medical and legal support for civilians. Even so, some issues leave more questions than answers. Although the U.S. military has been encountering civilians in rapidly increasing numbers since Operations Desert Shield and Desert Storm, doctrine and regulations are only now starting to address many issues judge advocates have been addressing for years.[5] This article compiles relevant information on civilians in one location so judge advocates will have a single resource to quickly answer major civilian issues.

II. CATEGORIES OF CIVILIANS

> *Never has there been such a reliance on nonmilitary members to accomplish tasks directly affecting the tactical success of an engagement . . . the military is facing a fundamental change in the way it conducts warfare, and there is little evidence that the players have been adequately prepared for that change.*[6]

Members of the U.S. Armed Forces have met many challenges in recent years to create infrastructure in places where none had previously existed. From experiences in Bosnia, Haiti, Somalia, and elsewhere, those planning and executing operations have expanded their considerations to encompass METT-TC: mission, enemy, terrain, troops, time available, and now adding civilian concerns to the formula to reflect the changing nature of

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[5] *See, e.g.*, Joint Publication 4-0, *Doctrine for Logistic Support of Joint Operations* (Apr. 6, 2000) [hereinafter JP 4-0] as the first joint doctrine document to address contractors on the battlefield in depth; Army Regulation 715-9, *Contractors Accompanying the Force* (Oct. 29, 1999) [hereinafter AR 715-9] is the first Army policy for contractor support on the battlefield; Army Field Manual 100-10-2, *Contracting Support on the Battlefield* (Aug. 4, 1999) [hereinafter FM 100-10-2] is the first Army capstone doctrine manual for acquiring contractor support; Army Field Manual 100-21, *Contractors on the Battlefield* (Mar. 26, 2000) [hereinafter FM 100-21] is the first Army doctrine for using contractors in support of Army operations; the Air Force released its first interim policy letter addressing several issues on the use of contractors in deployed operations. Memorandum from Lawrence J. Delaney, Acting Secretary of the Air Force, to all MAJCOM-FOA-DRU/CC, Interim Policy Memorandum—Contractors in the Theater (Feb. 8, 2001) [hereinafter Interim Policy Memorandum—Contractors in the Theater]. Draft Joint Publication 1-04, *Joint Tactics, Techniques, and Procedures for Legal Support to Military Operations* (final draft February 8, 2001, not yet published) (copy on file with author) [hereinafter JP 1-04] (draft addresses several issues discussed in this article).

[6] Colonel Steven J. Zamparelli, *Competitive Sourcing and Privatization: Contractors on the Battlefield, What Have We Signed Up For*?, A.F. J. LOG. 9, 10 (Fall 1999).

military operations.[7] To succeed in military operations, Joint Task Force Commanders are now taught that they must consider civilians.[8] Civilians fall within three main categories: DOD civilian employees; contractor personnel which includes personnel under contract with or employed by an organization under contract with the DOD; and non-affiliated persons—a broad group of civilians who share overlapping interests with the military.[9] Each group has varying statuses, rights and responsibilities under international and domestic law, and under DOD and service regulations. Analysis of issues is therefore predicated upon understanding the different types of civilians.

A. Department of Defense Civilian Employees

> *The DoD civilian work force shall be prepared to respond rapidly, efficiently, and effectively to meet mission requirements for all contingencies and emergencies.*[10]

Civilian employees are an integral and essential part of the military total force structure. They comprise a quarter of the force and serve in over seventeen nations.[11] DOD civilian employees, as "partners in national defense," regularly go into harm's way to support military operations.[12] Recently, the General Accounting Office (GAO) estimated that 14,391 civilians deployed to the Middle East in support of Operations Desert Shield and Desert Storm, and 5,900 civilians supported 6,000 uniformed Army personnel in Bosnia for Operation Joint Endeavor.[13] As U.S. forces downsize,

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[7] *See* FM 100-10-2, *supra* note 5, ¶ 8; FM 100-21, *supra* note 5, ¶ C-13.

[8] JOINT WARFIGHTING CENTER, JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS ¶ ii (June 16, 1997) [hereinafter JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS].

[9] The category of non-affiliated persons includes media, IGOs, NGOs, PVOs, refugees, stateless persons, and IDPs. Other sub-categories of non-affiliated civilians include the civilian population of a belligerent force, mercenaries as defined in Additional Protocol I, art. 47, civil defense personnel as defined in Additional Protocol I, arts. 61-67, and independent actors. *Supra* note 2. These additional sub-categories will not be addressed in this article because a large body of work already exists addressing these civilian populations.

[10] Dep't of Defense Directive 1400.31, DOD Civilian Work Force Contingency and Emergency Planning and Execution ¶ D.1 (Apr. 28, 1995) [hereinafter DODD 1400.31].

[11] According to DefenseLink, the Department of Defense News Service, there are 1.37 million active duty forces as of April 2001, 1.28 million ready and stand-by reserves as of September 2000, and 669,000 civilian employees as of April 2001. *Available at* http://www.defenselink.mil/pubs/almanac/ (last visited Nov. 12, 2001) (on file with the Air Force Law Review). *See also*, Gerry J. Gilmore, *DOD Civilians: Partners in America's Defense*, AMERICAN FORCES INFO. SERVICE (May 1996); Staff Sergeant Kathleen T. Rhem, *Civilians Vital to DOD Mission*, AMERICAN FORCES INFO. SERVICE (June 2000).

[12] Gilmore, *supra* note 12 (quoting Edwin Dorn, Undersecretary of Defense for Personnel and Readiness).

[13] *DOD Force Mix Issues: Greater Reliance on Civilians in Support Roles Could Provide Significant Benefits* (General Accounting Office, Washington D.C.) Oct. 19, 1994, GAO/NSIAD-95-5; Gordon L. Campbell, Contractors on the Battlefield: The Ethics of Paying

and as the operations they perform increase, the need to deploy civilians has grown.[14] Judge advocates must prepare to encounter civilian employees in the battlespace of the twenty-first century.

Under international law, civilian employees of an armed force include "persons who accompany the armed forces without actually being members thereof" and who have "received authorization, from the armed forces which they accompany."[15] This definition is important as it triggers prisoner of war protections. The category of DOD civilian employees is very broad, for example, encompassing members of the American United Services Organization (USO), civilian aircrew members, and civilian support personnel.[16]

Civilians to Enter Harm's Way and Requiring Soldiers to Depend Upon Them (Jan. 27-28, 2000) (unpublished paper for presentation to the Joint Services Conference on Professional Ethics 2000) (on file at the Air Force Judge Advocate General School, Maxwell AFB, Ala.); Report of the Advisory Committee on Criminal Law Jurisdiction Over Civilians Accompanying the Armed Forces in Time of Armed Conflict 16 (Apr. 18, 1997) (report required by The National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106 (1996)); Gilmore, *supra* note 12.

[14] The Secretary of Defense recently stated to an audience at the Pentagon,

> In this building—despite this era of scarce resources taxed by mounting threats—money disappears into duplicative duties and bloated bureaucracy—not because of greed, but gridlock…. In this period of limited funds, we need every nickel—every good idea—every innovation—every effort—to help modernize and transform the U.S. military. . . . We must change for one simple reason: The world has, and we haven't. . . . At bases around the world, why do we pick up our own garbage and mop our own floors—rather than contracting those services out, as many businesses do? And surely we can outsource more computer systems support. Maybe we need agencies for some of those functions. Perhaps a public-private partnership would make sense for others. And I don't doubt at least a few could be outsourced altogether.

Donald H. Rumsfeld, Secretary of Defense, Address at the Pentagon (Sept. 10, 2001). *See generally* Headquarters United States Air Force DP/DPXC Message R0813247Z, Deployment of Air Force Federal Civilians in Support of Military Operations (May 1997) [hereinafter DP/DPXC Message]; Letter from Roger M. Blanchard, Assistant Deputy Chief of Staff, Personnel (Mar. 27, 1997) (on file at the Air Force Judge Advocate General School, Maxwell AFB, Ala.)*; Emphasis, More Civilians to Get BDU's*? ARMY LOG. (March/April 1997) *available at* http://www.almc.army.mil/alog/marapr97/maemp.htm (on file with author); Jody Brenner, *Deployment and Civilians: What Incentives Do We Need?*, ARMY LOG. (July/Aug. 1999) *available at* http://www.almc.army.mil/ALOG/JulAug99/MS329.htm (on file with author).

[15] Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 13(4), 6 U.S.T. 3316 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention II]; Geneva Convention III, art. 4A(4), *supra* note 2; Geneva Convention I, art. 13(4), *supra* note 2.

[16] L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 106, nn. 31, 34 (1993).

The DOD defines its civilian work force as "U.S. citizens or foreign nationals hired directly or indirectly to work for the DOD, paid from appropriated or nonappropriated funds under permanent or temporary appointment."[17] Contract employees are specifically excluded and are defined as a separate category.[18] Within this larger pool of civilian employees are civilians that are emergency-essential (E-E) or who fill E-E positions.[19] The majority of DOD civilian employees in deployed locations are designated in E-E positions.[20]

It is Air Force policy to only deploy employees who have agreed to fill these high-risk positions, if possible.[21] Civilians applying for employment in E-E positions sign a written agreement that they will participate in emergency plans exercises, deploy when necessary in the event of an emergency or crisis, and once deployed, will perform their required duties.[22] Incumbent civilians in positions that become emergency-essential are encouraged to sign the agreement, but if they do not, they may still be required to perform their duties until the military mission allows their reassignment to non-E-E positions.[23] Reassignment of those refusing to sign the agreement should occur as soon as

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[17] DODD 1400.31, *supra* note 10, ¶ C.1.

[18] Dep't of Defense Directive 1404.10, Emergency-Essential (E-E) DOD U.S. Citizen Civilian Employees ¶ C.1 (Apr. 10, 1992) [hereinafter DODD 1404.10]; DODD 1400.31, *supra* note 10, ¶ C.1.

[19] DODD 1404.10, *supra* note 18, defines emergency-essential (E-E) civilian employees as employees that fill positions outside the United States or employees:

> that would be transferred overseas during a crisis situation, or which requires the incumbent to deploy or to perform temporary duty assignments overseas during a crisis in support of a military operation. That position is required to ensure the success of combat operations or to support combat-essential systems subsequent to mobilization, an evacuation order, or some other type of military crisis. That position cannot be converted to a military position because it requires uninterrupted performance to provide immediate and continuing support for combat operations and/or support maintenance and repair of combat-essential systems.

See also Emphasis, More Civilians to Get BDU's?, *supra* note 14. Civilian employees not designated as emergency-essential can agree to perform these duties in the event of a crisis situation. Additionally, a civilian employee who is overseas when a crisis occurs can be asked to stay to perform these duties. They can decline but "shall continue to perform the functions of the position if no other qualified employee or military member is reasonably available." They must be removed from the location "as soon as practicable, given the exigencies of the military situation." DODD 1404.10, *supra* note 18, ¶ 6.5. *See generally*, Dep't of Army Pamphlet 690-47, DA Civilian Employee Deployment Guide (Nov. 1, 1995) [hereinafter DA Pam. 690-47].

[20] *See also Emphasis, More Civilians to Get BDU's?*, *supra* note 14.

[21] DP/DPXC Message, *supra* note 14, ¶ 3(A)B.

[22] The details of this agreement are discussed in "Command, Control and Influence of Civilians," *infra* Part III.A.2. DODD 1404.10, *supra* note 18, ¶ 4.6, encl. 3, DD Form 2365.

[23] DODD 1404.10, *supra* note 18, ¶ 4.7.

reasonably practicable and consistent with the needs of the military, and any tour extensions should be disapproved.[24]

Volunteers are solicited to fill E-E positions because these personnel are not evacuated along with other civilians during non-combatant evacuation operations.[25] Non-volunteers may be used in the event of unforeseen contingencies.[26]

B. Contractors

> *In all countries engaged in war, experience has sooner or later pointed out that contracts with private men of substance and understanding are necessary for the subsistence covering, clothing, and moving of an Army.*[27]

Whether deploying for a humanitarian mission, peacemaking, peacekeeping, or combat, U.S. Armed Forces deploy with significant numbers of DOD contractor personnel.[28] While armed forces have used the services of contractors for centuries, the number and variety of contractor jobs has changed dramatically over the last decade.[29] During Desert Shield and Desert Storm, approximately one out of every thirty-six deployed personnel was a contractor.[30] That number rose to one out of ten in operations in the Balkans.[31] In East Timor, contractors provided a substantial portion of the U.S. support to the United Nations operation International Forces East Timor (INTERFET). The contractor support included medium and heavy-lift Russian helicopters, with their air and maintenance crews, used to airlift thousands of

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[24] *Id.*

[25] "The Ambassador, with the approval of the Under Secretary of State for Management, can order the evacuation of [U.S. Government] personnel and dependents other than uniformed personnel of the US Armed Forces and designated emergency-essential DOD civilians who are not under the authority of the US COM." Joint Publication 3-07.5, *Joint Tactics, Techniques, and Procedures for Noncombatant Evacuation Operations*, III-1 (Sept. 30, 1997) [hereinafter JP 3-07.5].

[26] DODD 1404.10, *supra* note 18, ¶ 4.8.

[27] JP 4-0, *supra* note 5, at V-1 (quoting Robert Morris, Superintendent of Finance, 1781).

[28] Zamparelli, *supra* note 6, at 9.

[29] *Id.* Even so, the Continental Army used civilians as carpenters, engineers, wagon drivers, and to obtain food items, among other tasks, so that military men could concentrate on warfighting. *See* Major William W. Eply, *Contracting in War: Civilian Combat Support of Fielded Armies*, (U.S. Army Center of Military History, Washington D.C., 1989); JP 4-0, *supra* note 5.

[30] *DOD Force Mix Issues: Greater Reliance on Civilians in Support Roles Could Provide Significant Benefits*, *supra* note 13; *Introduction*, ISSUES AND STRATEGY 2000 SELECTED READINGS: CONTRACTORS ON THE BATTLEFIELD 5 (A.F. Logistics Mgmt. Agency ed., Dec. 1999) [hereinafter Introduction, CONTRACTORS ON THE BATTLEFIELD].

[31] Introduction, CONTRACTORS ON THE BATTLEFIELD, *supra* note 30, at 5.

IDPs, food, and supplies.[32] Similar use of contractor support personnel is only expected to grow in the twenty-first century.[33]

This rapid and significant growth of DOD dependence on contractor support has several causes.[34] A major factor was force limitations pushing DOD to outsource and privatize. These force limitations were caused by the dramatic post-Cold War reduction in the numbers of uniformed military members coinciding with an equally dramatic increase of deployment of military forces; mandatory limits on the size of deployable forces imposed by the President, Congress or a host nation; and recruiting and retention concerns that call for a reduction in active duty deployment tempo.[35] In addition to these manpower issues, economic necessity has driven the government to outsourcing and privatization to reduce funding as the frequency of extremely expensive deployed operations continues to increase. Highly technical and complex weaponry is flooding the armed forces, requiring contractors to be hired to train military operators, maintain, and even operate the systems. In addition to these factors, there has also been a change in the military's policies on logistics. Contracting for in-theater logistic support is now favored as a significant factor in reducing the military's logistics tail, facilitating a rapidly mobile force needed to keep pace with today's operations. The end result is the military services contracting out tasks once performed only by military members, and contractor employees performing those tasks closer to the battlespace than ever before.[36]

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[32] *See* Brigadier General Philip M. Mattox and Lieutenant Colonel William A. Guinn, *Contingency Contracting in East Timor*, ARMY LOG. (July-Aug. 2000) *available at* http://www.almc.army.mil/alog/julaug00/ms565.htm (on file with author).

[33] *Assistant Secretary of the Army for Acquisition, Logistics and Technology, The Assistant Secretary Talks About Readiness*, ARMY LOG. (March-April 2000) (interview of Mr. Paul J. Hoeper). *See also* Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. 106-259 § 554 (2000) (requiring the Secretary of Defense to launch a study on the feasibility and cost of using civilian contractor personnel as pilots and other aircrew members to fly government aircraft performing non-combat personnel transportation missions worldwide now being performed by military members. This study is to determine whether contracting out would resolve pilot shortages and help improve pilot retention).

[34] *See* Introduction, CONTRACTORS ON THE BATTLEFIELD, *supra* note 30, at 5 (discussing all four reasons listed in this paragraph of text).

[35] JP 4-0, *supra* note 5, at V-I. Some status of forces agreements specifically limit the numbers of contractors the U.S. brings into the country while executing a mission covered by the agreement. For example, The Annex in Implementation of the Mutual Defense Cooperation Agreement Between the Government of the United States of America and the Government of the Hellenic Republic, Jul. 8, 1990, T.I.A.S. No. 12321 (effective Nov. 6, 1990) [hereinafter Greek SOFA].

[36] Major Kim M. Nelson, Contractors on the Battlefield: Force Multipliers or Force Dividers? 3 (Apr. 2000) (unpublished research article, on file with Air Command and Staff College at Maxwell Air Force Base, Ala.) (discussing contracting for formerly military-only tasks); Colonel Herman T. Palmer, *More Tooth, Less Tail: Contractors in Bosnia*, ARMY LOG. (Sept.-Oct. 1999) *available at* http://www.almc.army.mil/alog/ sepoct99/ms408.htm (on file with author) (describing the arrival of contractor personnel at the site of the armed military seizure

Contractors, depending upon the closeness of their affiliation with an armed force, will have special protections under the Law of Armed Conflict. The Geneva Convention Relative to the Treatment of Prisoners of War lists "supply contractors" and "civilian members of military aircraft crews" as examples of contractors who qualify as "persons accompanying the armed forces without actually being members thereof."[37] As with civilian employees, qualifying contractors may be protected upon capture with prisoner of war status. However, not all contractor personnel will qualify. [38]

U.S. doctrine divides contractors into three general categories: systems support, external theater support, and theater support contractors.[39] Systems support contractors "support specific systems throughout their system's life cycle (including spare parts and maintenance) across the range of military operations" such as weapons, command and control, or communications systems.[40] Service component logistic commands or program managers award these prearranged contracts.[41] For example, the F-117 and the Predator Unmanned Aerial Vehicle are heavily dependent upon contractor maintenance. At the extreme, contractors will exclusively maintain the TOW Improved Target Acquisition System (ITAS).[42]

External theater support contractors may be either U.S. or third country vendors.[43] Their contracts are mostly arranged prior to a deployment and are "awarded under the command and procurement authority of supporting headquarters outside of the theater."[44] External theater support contracts may be "awarded or modified during the missions based on the commander's needs" and include contracts such as the Civil Reserve Air Fleet (CRAF), Logistics Civil Augmentation Plan (LOGCAP), Air Force Civil Augmentation Plan (AFCAP), and Naval Facilities Engineering Command (NAVFAC) contracts.[45]

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of a transmission tower in Bosnia during SFOR (Stabilization Force) and unloading supplies within thirty minutes of the conclusion of the combat elements operation).

[37] Geneva Convention III, *supra* note 2; *see also*, AR 715-9, *supra* note2, ¶ 3-3d.

[38] *See* "Prisoner of War Status," *infra,* Part III.B.1.

[39] JP 4-0, *supra* note 5, Ch. V.

[40] *Id.* at V-1. System support contracts are sometimes called "contractor logistics support."

[41] *Id.*

[42] The F-117 is a fighter aircraft that was designed under the "stealth" low-observability technology program to penetrate enemy radar and attack heavily defended, high-value targets. Predators are unmanned aerial vehicles designed to reach targets in enemy territory without endangering American lives. The TOW/ITAS system increases target acquisition ranges for all configurations of TOW missiles. *Product Support for the 21st Century: A Year Later*, REPORT OF THE SECTION 912(C) STUDY GROUP FOR PRODUCT SUPPORT (Dep't of Defense Acquisition and Technology) Sept. 2000.

[43] JP 4-0, *supra* note 5, at V-2.

[44] *Id.*

[45] *Id.* CRAF refers to commercially owned aircraft chartered by the U.S. to augment strategic airlift resources in surge and emergency periods. In exchange for promised future support of the military, the civilian carrier is guaranteed a specified portion of peacetime DOD airlift.

Theater support contractors are personnel employed under contracts awarded and administered by "[c]ontracting personnel with the deployed force" and the contractors work "pursuant to contracts arranged within the mission area, or prearranged through the [host nation] and/or regional businesses and vendors."[46] For example, local vendors' contracts to perform laundry services during a deployment fit into this category.

DOD also classifies some contractor services as "essential," a designation independent of, although overlapping with, the three doctrinal classifications. Essential contractor services are:

> [P]rovided by a firm or an individual under contract to the Department of Defense to support vital systems including ship's (sic) owned, leased, or operated in support of military missions or roles at sea and associated support activities including installation, garrison, and base support serviced (sic) considered of utmost importance to the U.S. mobilization and wartime mission. … Those services are essential because of the following:
>
> > DoD Components may not have military or DoD civilian employees to perform these services immediately.
> >
> > The effectiveness of defense systems or operations may be seriously impaired, and interruption is unacceptable when those services are not available immediately.[47]

Although these distinctions may not be useful for international legal issues, doctrinal distinctions between systems support, external theater support, and theater support are useful for examining issues related to domestic law and DOD and service regulations. For example, it is more important to look to internationally established requirements for determining who has Prisoner of War or POW status, rather than looking at the groups of contractors as set forth by joint doctrine.[48] However, essential contractor service designation is

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Civil Augmentation Plan contracts are cost-plus-award-fee engineering and logistics contracts to provide support in contingency or wartime environments. Particularly in the Army, the use of the LOGCAP contractor (who then often sub-contracts with local nationals) should be incorporated into operations plans and concept plans based upon Theater CINC requirements. Generally, LOGCAP provides transportation, engineering, construction, maintenance, supply operations and field services. LOGCAP is utilized significantly more than AFCAP or NAVFAC. AFCAP is primarily directed at long-term sustainment support, although it can accomplish bed down tasks. Unlike LOGCAP, AFCAP does not cover hostile situations, but rather disaster relief and non-hostile contingencies. Major Maria J. Dowling and Major Vincent J. Feck, *A Joint Logistics and Engineering Contract*, ISSUES AND STRATEGY 2000 SELECTED READINGS: CONTRACTORS ON THE BATTLEFIELD 61-67 (A.F. Logistics Mgmt. Agency ed., Dec. 1999).

[46] JP 4-0, *supra* note 5, at V-2.

[47] Dep't of Defense Instruction 3020.37, *Continuation of Essential DoD Contractor Services During Crises*, Enclosure 2, ¶ E2.1.3 (Jan. 26, 1996).

[48] One must remember that joint doctrine is authoritative and takes precedence over service doctrine for joint activities, although in exceptional circumstances, a commander need not

important for planning purposes and, since DOD requires these contractors be provided identity cards, it affects international legal issues such as status upon capture.

C. Non-Affiliated Civilians

> *The law of war recognizes that the purpose of the military in wartime is killing people and breaking things.*
>
> *~ Legal Advisor to the Chairman, JCS, 1972*
>
> *It seems to me that killing people and breaking things has given way to feeding people and fixing things.*
>
> *~ Legal Advisor to the Chairman, JCS, 1993*[49]

Non-affiliated civilians are comprised of a broad variety of subcategories.[50] This article will focus on the media, non-governmental organizations or NGOs, private voluntary organizations or PVOs, intergovernmental organizations or IGOs, refugees, stateless persons, and internally displaced persons or IDPs.

1. Media

> *Yet so greedy are the people at large for war news that it is doubtful that any army commander can exclude all reporters without bringing down on himself a clamor that may imperil his own safety.*[51]

Commanders should expect journalists will be in the commanders' assigned areas of responsibility, and that such encounters will require "direct command attention."[52] The numbers of media personnel encountered by commanders in most deployed operations has grown exponentially. While fewer than 30 journalists entered Normandy, France, on June 6, 1944, with the

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follow it. Commanders in multinational operations should follow ratified multinational doctrine such as NATO. When not ratified by the U.S., the commander must evaluate the doctrine and apply it where applicable. This statement is laid out in the preface of each joint doctrine publication.

[49] W. Darrell Phillips, Chief, International and Operations Law Division, Lecture at the Air Force Judge Advocate General School, Maxwell Air Force Base, Ala.

[50] The category of non-affiliated persons includes media, IGOs, NGOs, PVOs, refugees, stateless persons, and IDPs. Other sub-categories of non-affiliated civilians include the civilian population of a belligerent force, mercenaries as defined in Additional Protocol I, art. 47, civil defense personnel as defined in Additional Protocol I, arts. 61-67, and independent actors. *Supra* notes 2 and 9.

[51] Lieutenant Commander James J. McHugh, The Media Factor: An Essential Ingredient to Operational Success 3 (June 13, 1997) (unpublished research paper, on file with the Naval War College) (quoting General Sherman).

[52] Joint Publication 3-61, Doctrine for Public Affairs in Joint Operations III-7 (May 14, 1997) (emphasis omitted) [hereinafter JP 3-61].

invasion force,[53] more than 1,600 media representatives from nations throughout the world massed in Saudi Arabia, a society formerly closed to media, during Desert Storm,[54] and more than 1,700 journalists operated in the U.S. sector of Bosnia in 1996.[55] Reporters illuminated the forced night amphibious landing of U.S. forces in Operation Restore Hope, and relayed continuous non-stop live coverage on Operation Uphold Democracy.[56] Combat operations are not the only military missions that attract large media interest; approximately 1,500 journalists reported on relief operations following Hurricane Andrew when it went aground in Florida in 1992.[57]

Without question, the U.S. Armed Forces are "accountable and responsible to the public for performing its mission of national defense,"[58] and the news media is the primary means of relating information about the military to the public.[59] The numbers of media personnel interested in and reporting on military operations are significant in this information age. The reality of the world in which judge advocates find themselves today is such that they must expect and plan for encountering large numbers of news media representatives in all phases of deployment—including actual hostilities. For this purpose, it is important to be able to distinguish between very similar terms: journalists, war correspondents, and freelance journalists.

The civilian media consists of members of the profession of "journalists."[60] Their line of work frequently puts them in close proximity with hostilities, at times equivalent to that of members of an armed force.[61] In the language of Additional Protocol I to the Geneva Conventions, and Relating to the Protection of Victims of International Armed Conflicts, (Additional Protocol I), journalists are often "engaged in dangerous professional missions in areas of armed conflict."[62] The term journalist is interpreted broadly and in

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[53] *Id.* at III-1. Coverage of U.S. operations continued to grow with more than 500 media personnel in each Grenada and Panama.
[54] JP 3-61, *supra* note 52, at I-3 (citing DOD Final Report To Congress, CONDUCT OF THE PERSIAN GULF WAR, Apr. 1992).
[55] *Id.* at III-1.
[56] U.S. Army Center for Legal and Military Operations, *Law and Military Operations in Haiti, 1994–1995: Lessons Learned for Judge Advocates* 78, 80 (Dec. 11, 1995) [hereinafter CLAMO Haiti Lessons Learned].
[57] JP 3-61, *supra* note 52, at III-1.
[58] *Id.* at vi.
[59] *Id.* (emphasis omitted).
[60] *See generally*, HANS-PETER GASSER, THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 228-230 (Dieter Fleck ed., 1995) [hereinafter GASSER, HANDBOOK OF HUMANITARIAN LAW]; CLAUDE PILLOUD ET AL., COMMENTARY OF THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987) [hereinafter PILLOUD].
[61] PILLOUD, *supra* note 60, at 918. Journalist is not further defined in Additional Protocol I, *supra* note 2.
[62] Additional Protocol I, art. 79, *supra* note 2.

accordance with its everyday meaning[63] and it includes "any corespondent, reporter, photographer, and their technical film, radio and television assistants who are ordinarily engaged in any of these activities as their principal occupation."[64] It includes DOD civilian members of military news organizations,[65] but does not, however, include any member of the armed forces, such as military members assigned to the Armed Forces Radio and Television Service.[66]

A separate, but similar category of media representatives, includes war correspondents and freelance journalists.[67] "Media member" and "journalist" are often used interchangeably for both war correspondent and freelance journalist but it is important to distinguish between the two.[68] Some view the term "war correspondent" as reflecting a class of reporters that existed only in days of old.[69] However, modern distinctions still exist and are important.[70] Like civilian employees of an armed force, war correspondents are media members who "accompany the armed forces without actually being members thereof."[71] To qualify as a war correspondent, the media member cannot be a uniformed member of the armed forces[72] and yet must receive "authorization,

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[63] *See* PILLOUD, *supra* note 60, at 921.
[64] *Id.*
[65] Geneva Convention III, *supra* note 2.
[66] *See* PILLOUD, *supra* note 60, at 921.
[67] *See* GASSER, HANDBOOK OF HUMANITARIAN LAW, *supra* note 60, at 228-229; *See also*, Hans-Peter Gasser, *The Protection of Journalists Engaged in Dangerous Professional Missions*, 232 INT'L REV. OF THE RED CROSS 3 (Jan. 1, 1983) [hereinafter Gasser, *Protection of Journalists*].
[68] *See, e.g.*, PILLOUD, *supra* note 60, at 921.
[69] *See, e.g.*, McHugh, *supra* note 51; Telephone Interview with Lieutenant Colonel Kevin Krejcarek, Air University Public Affairs Officer, Maxwell Air Force Base, Ala. (Apr. 26, 2001) [hereinafter Krejcarek Telephone Interview].
[70] This topic will be discussed in detail in "Under Control of the Enemy" in Part III.B. of this article.
[71] *See supra* note 15 and accompanying text. War Correspondent is not further defined in the Geneva Conventions of 1949 or in Additional Protocol I. Interestingly, during Operations Desert Shield and Desert Storm, the British Army required media members to take an oath of office, put them in military uniforms, and assigned them to units for the long term in exchange for access to the theater of operations. Christopher Walker, *Strong-arm Tactics Used to Curb War Reporting*, THE TIMES, Overseas News (Feb. 8, 1991); Media Day, Media Panel, Air Command and Staff College, Maxwell Air Force Base, Ala. (Apr. 26, 2001). Since war correspondents are accredited with the military, they do not fit neatly under the category of non-affiliated persons. Since most media do not qualify as war correspondents, the media as a whole is categorized as non-affiliated.
[72] Geneva Convention III, art. 4A(4), *supra* note 2; GASSER, HANDBOOK OF HUMANITARIAN LAW, *supra* note 60, at 229. *Cf.* GREEN, *supra* note 16, at 106 n.32 (defining war correspondents as "full-time newspaper or other media reporters in uniforms, carrying identity cards indicating their status and attached to the armed forces" and distinguishing them from "journalists engaged on dangerous professional mission" as regulated by Additional Protocol I, art. 79, *supra* note 2). Green's definition is different from that of Geneva Convention III and is not the view adopted in this article.

from the armed forces which they accompany, who shall provide them for that purpose with an identity card."[73] In other words, an armed force accredits war correspondents.[74] Freelance journalists, on the other hand, are not accredited by an armed force and fall into a different status if captured. Both may, however, be issued identification cards by a military to help clarify their status as discussed below.

Defining the exact role of a media member is further complicated for U.S. commanders because Joint Publication 3-61 groups both U.S. servicemembers and DOD civilian employees under the category "military journalist" and all other media into "news media representatives."[75] These characterizations do not allow appropriate identification of important status issues, and therefore this article has not adopted these terms.

2. Non-governmental, Private Voluntary, and Intergovernmental Organizations

> *By melding the capabilities of the military and the NGOs and PVOs you have developed a force multiplier.*[76]

NGOs and PVOs annually contribute between nine and ten billion dollars to over two hundred fifty million needy people and host nations.[77] Particularly in military operations other than war, NGOs and PVOs regularly enter high-threat locations, arriving on scene before the military and remaining after the military departs.[78] "A [joint task force] or multinational force may encounter scores of NGOs and PVOs in a [joint operations area]."[79] Their numbers have exploded in recent years.[80] While NGOs were first recognized in Article 71 of the U.N. Charter,[81] their numbers have only made them a

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[73] Geneva Convention III, *supra* note 2.

[74] Accredited to a party to the conflict is different than any accreditation a media representative may have from the news organization that employs him or her.

[75] JP 3-61, *supra* note 52, at GL-3.

[76] Joint Publication 3-08, *Interagency Coordination During Joint Operations*, Vol. I, II-18 (Oct. 9, 1996) [hereinafter JP 3-08] (quoting Madeline K. Albright, Ambassador, U.S. Representative to the United Nations).

[77] *Id.*

[78] *Id.*

[79] *Id.* at II-19.

[80] Approximately 78 NGOs and PVOs were involved in relief operations in Somalia and over 100 assisted the U.N. relief efforts in Rwanda. *Id.* Additionally, in 1996, over 350 U.S.-based PVOs were registered with United States Agency for International Development (USAID), and that number had increased to over 450 by 2000, Mary Newton, e-mail to author on Dec. 13, 2000 (on file at the Air Force Judge Advocate General School, Maxwell AFB, Ala.); InterAction, a U.S.-based coalition of NGOs and PVOs, has over 165 worldwide members, information on members *available at* http://www.interaction.org/ (on file with author); JP 3-08 V. 1, *supra* note 76, at II-19.

[81] United Nations Charter *available at* http://www.un.org/Overview/Charter/contents.html (on file with author).

significant force on the international scene in recent decades, skyrocketing from 200 registered with the U.N. Department of Public Information in 1968 to well over 1,500 registered in the year 2000.[82]

The dramatic rise in the numbers of NGOs and PVOs results in their increased presence in areas overlapping U.S. forces. Corresponding challenges exist, such as differences in cultures and planning processes.[83] Operation Restore Hope revealed that unless good relations between the Joint Task Force and NGO and PVO personnel are established, accomplishment of the mission could be jeopardized.[84]

The missions, size, expertise, experience, professionalism and willingness of NGOs and PVOs to interact with the U.S. military vary widely among these organizations.[85] Commanders and judge advocates must recognize that NGOs and PVOs may have valid missions that may supplement or complicate military operations, and that they are "major players at the interagency table."[86] "A climate of cooperation should be the goal" in circumstances where the military is in close contact with these organizations, thus enabling the organizations to carry out mutually supportable activities and allowing the armed forces to be successful in their assigned mission.[87] Particularly during military operations other than war, commanders "should be prepared to coordinate civilian and military actions."[88] Joint doctrine recognizes this imperative by establishing a variety of mechanisms to ensure unity of effort through communication and coordination.

The U.N. defines NGOs broadly as "any non-profit, voluntary citizens' group which is organized on a local, national or international level."[89] It recognizes that they are "task-oriented and driven by people with a common interest," as they "perform a variety of services and humanitarian functions" including "bring[ing] citizens' concerns to Governments, monitor[ing] policies

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[82] United Nations Press Release, *On 50th Anniversary of Conference of Non-Governmental Organizations, Deputy Secretary-General Says NGOs Serve As Global Conscience*, U.N. Doc. DSG/SM/38, Dec. 3, 1998; Directory of NGOs Associated with Department of Public Information, United Nations *available at* http://www.un.org/MoreInfo/ ngolink/ngodir.htm (last visited Nov. 14, 2001) (on file with the Air Force Law Review).

[83] Jonathan Dwarken, *Restore Hope: Coordinating Relief Operations*, JOINT FORCES Q. 14 (Summer 1995).

[84] *Id* at 14.

[85] JP 3-08 *supra* note 76, at Vol. 1, II-18.

[86] W. Darrell Phillips, "NGO/PVOs Current Issues," Lecture at Air Force Judge Advocate General School, Maxwell Air Force Base, Ala. (Dec. 2000); JP 3-08, *supra* note 76, at Vol. 1, II-19.

[87] JP 3-08, *supra* note 76, at Vol. 1, II-20.

[88] Joint Publication 3-07, *Joint Doctrine for Military Operations Other Than War* IV-7 (June 16, 1995) (emphasis omitted) [hereinafter JP 3-07].

[89] Department of Public Information, Non-governmental Organizations Section, NGOs and the Department of Public Information: Some Questions and Answers *available at* http://www.un.org/MoreInfo/ngolink/brochure.htm (last visited Nov. 14, 2001) (on file with the Air Force Law Review).

and encourag[ing] political participation at the community level…provid[ing] analysis and expertise, serv[ing] as early warning mechanisms and help[ing] monitor and implement international agreement."[90] Other terms, such as "relief organizations" and "humanitarian organizations," are also used in the international lexicon.[91] DOD defines a non-governmental organization more narrowly, describing it as a "transnational [nonprofit] organization of private citizens that maintain a consultative status with the Economic and Social Council of the U.N. [They] may be professional associations, foundations, multinational businesses, or simply groups with a common interest in humanitarian assistance activities (development and relief)."[92] They include "international humanitarian organizations" such as the International Committee for the Red Cross, Amnesty International, National Red Cross and Red Crescent Societies.[93]

PVOs are very similar to NGOs and are defined as "private, nonprofit humanitarian assistance organization involved in development and relief activities . . . normally U.S.-based.[94] Examples include the American Red Cross, Lutheran World Relief, and World Concern.[95] The terms NGOs and PVOs are often used synonymously and are so used in this article.

Neither U.S. governmental organizations nor the international community formally defines intergovernmental organizations or IGOs.[96]

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[90] Article 71 of the Charter provides "...the Economic and Social Council may make suitable arrangements for consultations with non-governmental organizations which are concerned with matters within its competence." U.N. Charter, *supra* note 81. Such arrangements are governed by the Economic and Social Council Resolution 1296 (XLIV) of May 23, 1968, which makes provision for NGOs to be placed in consultative status with the council, as well as for them to hold consultations with its secretariat.

[91] For example, Geneva Convention IV, art. 11, *supra* note 2; references humanitarian organizations, listing the International Committee of the Red Cross as an example. In art. 63, Geneva Convention IV mentions relief societies after discussing National Red Cross (Crescent) Societies. Geneva Convention IV also addresses relief in art. 59–62, 108, 110 and 111. Additional Protocol I, arts. 69–71, *supra* note 2; also discusses relief organizations and their personnel.

[92] JP 3-07, *supra* note 88, at GL-4. Army Field Manual 100-8, *The Army in Multinational Operations* (Nov. 1977) includes the term "nonprofit."

[93] While JP 3-08, V.I and V.II classify the ICRC as a "regional organization" rather than a NGO, although international legal scholars group the ICRC as a NGO. *See* U.N. PEACE OPERATIONS: A COLLECTION OF PRIMARY DOCUMENTS AND READINGS GOVERNING THE CONDUCT OF MULTILATERAL PEACE OPERATIONS 404 (Walter Gary Sharp Sr. ed., 1995) [hereinafter U.N. PEACE OPERATIONS]. For examples of other NGOs, *see* JP 3-08, *supra* note76, Vol. II, Appendix B.

[94] JP 3-08, *supra* note 76, Vol. 1, at GL-10.

[95] "NGO/PVOs Current Issues," *supra* note 86; JP 3-08, *supra* note 76, Vol. II, at B-A-41.

[96] Joint Publications categorize IGOs as "regional and international organizations [that] possess area or global influence" and "have well-defined structures, roles, and responsibilities and are usually equipped with the resources and expertise to participate in complex interagency operations." JP 3-08, *supra* note 76, Vol. II. This language will not be adopted for this article because international corporations would come within their definition.

However, the U.S. and U.N., as well as international legal scholars, commonly refer to the term IGO in documents and discussions.[97] IGOs are international bodies that are governmental in nature and usually involve humanitarian and relief operations, and may be involved in unification of nations and enforcement of international law. Examples of IGOs include the U.N., Organization for African Unity, Organization for Security and Cooperation in Europe, International Institute for the Unification of Private International Law, and Organization of American States.[98] IGO personnel are usually addressed in this article in conjunction with NGOs and PVOs. For example, U.N. and Associated Persons are distinguished when discussing what happens when they come under control of the enemy.

3. Refugees, Stateless Persons, and Internally Displaced Persons

> *In several of the recent conflicts, "mass population displacements have not been simply a consequence of armed conflict, but have also been the explicit objective of the warring parties." Thus, "civilians are often used as weapons and targets in warfare, and large-scale displacements comprise a political strategy in claiming control over territory."*[99]

The U.N. High Commissioner for Refugees (UNHCR) is primarily responsible for protecting and assisting refugees, but commanders and their judge advocates will address a variety of issues caused by their presence in an

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Additionally, this terminology is not used extensively in the international or intra-governmental arenas.

[97] *See* Convention on the Safety of United Nations and Associated Personnel, art. 1(b)(i), U.N. Doc. A/49/742 (Dec. 2, 1994) [hereinafter Safety of U.N. and Associated Personnel Convention]. For further discussion, *see supra* note 505 and accompanying text. *See also* U.N. General Assembly Resolution 43/131 (1988); s*ee also* Evan T. Bloom, *Current Development: Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel*, AM. J. OF INT'L L. 621, 624 (July 1995) (Evan Bloom, then the Attorney Advisor for United Nations Affairs, Office of the Legal Advisor, United States Department of State, and a member of the delegation that negotiated the Convention on the Safety of United Nations and Associated Personnel, uses the term when classifying NATO in his article on the Convention); *see also Stakeholders in the Postal Sector*, Discussion Paper Presented by the United States of America at the XVIII Congress of the Postal Union of the Americas, Spain and Portugal, Sept. 6-12, 2000, Panama (Bureau of International Organization Affairs, U.S. Dep't of State) released Sept. 28, 2000 by Jeffrey D. Kovar, Asst. Legal Adv. for Private Int'l Law (L/PIL), Office of the Legal Advisor, U.S. Dep't of State, (on file at the Air Force Judge Advocate General School, Maxwell AFB, Ala.) [hereinafter *Stakeholders in the Postal Sector*]; *see also* Julie Mertus, *The State and the Post-Cold War Refugee Regime: New Models, New Questions*, 20 MICH. J. INT'L L. 59, 69 (Fall 1998).

[98] *Stakeholders in the Postal Sector*, *supra* note 97; JP 3-08, *supra* note 76, Vol. II, at II-20.

[99] Mertus, *supra* note 97, at 71 (quoting THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), THE STATE OF THE WORLD'S REFUGEES: A HUMANITARIAN APPEAL 1997-1998, 22 (Oxford University Press 1997); *See also* Gil Loescher, *The International Refugee Regime Stretched to the Limit*?, 47 J. INT'L AFF. 351, 363 (1994).

area of operations. Time and again, the U.S. has called upon its military instrument of power to protect threats to our interests related to refugees, stateless persons, and internally displaced persons. U.S. involvement in Operation Provide Comfort was related to Kurdish refugees; Haitian migrants and refugees triggered Operation Restore Democracy; and Operation Allied Force was designed, in part, to halt displacement of the Kosovo population. Judge advocates should expect to be confronted with issues relating to refugees and displaced persons in both wartime and other than war situations.

The term "refugee" is well defined in international documents and laws. Additionally, some states define refugees differently than the definitions found in international law. When definitions conflict, international law requires the broadest definition be applied.[100] The U.S.'s approach to refugees is expansive when compared to other states.[101] Broadly, the U.S. views a refugee as "any person who does not in fact enjoy the protection of a government"[102] and includes stateless persons.[103] It also includes nationals of the opposing state who left their own country because they believed they were in danger if they remained.[104]

More specific definitions are available in international documents. According to the primary treaty in this area, the U.N.'s 1951 Convention Relating to the Status of Refugees (U.N. Refugee Convention), the term "refugee" applies to any person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it.[105]

Beyond the international agreements, additional regional agreements also exist. For example, the Organization of African Unity or OAU adopted the above definition and then expanded it to include:

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[100] Additional Protocol I, art. 73, *supra* note 2.

[101] Susan F. Martin & Andrew I. Schoenholtz, *Asylum in Practice: Successes, Failures, and the Challenges Ahead*, 14 GEO. IMMIGR. L.J. 589 (Spring 2000).

[102] GASSER, HANDBOOK OF HUMANITARIAN LAW, *supra* note 60, at 286.

[103] Geneva Convention IV, art. 44, *supra* note 2; GASSER, HANDBOOK OF HUMANITARIAN LAW, *supra* note 60, at 286

[104] Geneva Convention IV, art. 44, *supra* note 2; GASSER, HANDBOOK OF HUMANITARIAN LAW, *supra* note 60, at 286.

[105] Convention Relating to the Status of Refugees, July 28, 1951, art. 1A(2), 189 U.N.T.S. 137 [hereinafter U.N. Refugee Convention], presently applicable through Protocol I Relating to the Status of Refugees, Jan. 31, 1967, art. 1, 606 U.N.T.S. 267 [hereinafter Refugee Protocol I]. This definition is reasserted in Refugee Protocol I and expanded only in that a small geographic and time limit restriction was removed. The U.S. ratified the Protocol in 1968.

> Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country or origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[106]

The mandate of the UNHCR broadens these definitions even further and protects all "persons fleeing from persecution, the threat of persecution," as well as "those fleeing from armed conflict or disturbances."[107] Parties to the U.N. Refugee Convention and additional international agreements, such as the OAU Refugee Convention, are required to cooperate with the UNHCR.[108] As a result, "if a State recognizes the competence of the UNHCR with regard to certain persons before the beginning of hostilities … [the refugee] will benefit from Article 73 [of Additional Protocol I] independently of the fact whether or not they were considered refugees under a relevant international instrument."[109]

The next persons to be discussed in this area are stateless persons. Stateless persons are individuals who "are not nationals of any State according to the law of individual States and individuals with an ineffective nationality or

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[106] Convention Governing the Specific Aspects of Refugee Problems in Africa of Sept. 10, 1969, 1001 U.N.T.S. 45 (entered into force June 20, 1974) [hereinafter OAU Refugee Convention]. This Convention is a regional supplement to the 1951 U.N. Refugee Convention and has been adopted by more than 40 African states. Regional agreements and documents also exist for other parts of the world and must be consulted if the judge advocate is addressing issues in those regions, such as The 1984 Cartagena Declaration on Refugees, which broadened the U.N. Refugee Convention's definition of refugee to include persons fleeing events which seriously disrupt public order, such as armed conflicts and disturbances. Cartagena Declaration on Refugees, art. III3, adopted at a colloquium entitled "*Coloquio Sobre la Proteccion Internacional de los Refugiados en American Central, Mexico y Panama: Problemas Juridicos y Humanitarios*" (on file with the UNHCR, but *available at* http://www.unhcr.ch/refworld/ refworld/legal/instrume/asylum/cart_eng.htm) (on file with author). This Central American declaration refers to the OAU Refugee Convention definition as precedence and adopts the same expansive language as the OAU. *See also*, Principles Concerning Treatment of Refugees, the 8th session of the Asian-African Legal Consultative Committee, Bancock 1966 (on file with the UNHCR, *available at* http://www.unhcr.ch/refworld/refworld/legal/instrume/asylum/ treat_eng.htm) (on file with author); Declaration on the Protection of Refugees and Displaced Persons in the Arab World, adopted by The Group of Arab Experts, *Fourt Arab Suminar*, on "Asylum and Refugee Law in the Arab World", Arab Republic of Egypt, Nov. 16-19, 1992 (on file with the UNHCR).

[107] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, Ch. 1, (on file with the Air Force Judge Advocate General School, Maxwell AFB, Ala.).

[108] U.N. Refugee Convention, art. 35, *supra* note 105; OAU Refugee Convention, art. 8, *supra* note 106.

[109] COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, art. 73 at 852 (Yves Sandoz, Christophe Swinarski, Bruno Zimmermann eds., 1987) [hereinafter COMMENTARY, ADDITIONAL PROTOCOLS].

those who cannot establish their nationality."[110] An individual can be "stateless" due to legal rules or factual circumstances, primarily due to "lack of harmonization of rules of private international law, having stateless parents at birth, and disappearance of the State of origin."[111] Most of the laws applicable to refugees overlap with stateless persons, although for states who have ratified or acceded to the treaties on stateless persons, additional obligations may exist.

The next category of persons to be defined is internally displaced persons or IDPs. The International Committee of the Red Cross (ICRC) has purposefully declined to define IDPs.[112] Internally displaced persons or IDPs are part of the civilian population of the nation to which they belong, and therefore protected by the international and state laws that protect the civilian population in general. However, IDPs have additional challenges beyond that of the rest of the civilian population. IDPs have fled their homes, usually without their personal goods, and are similar to refugees.[113] IDPs flee due to any of a variety of reasons, which include internal strife, conflict, or even a natural disaster. Some of the highest mortality rates ever recorded in humanitarian emergencies have involved IDPs.[114] Problems with IDPs have grown dramatically during the 1990s, so much so that a U.S. Secretary-General's Special Representative on IDPs was appointed in 1992 and Guiding Principles on Internal Displacement were prepared by the U.N. Commission on Human Rights and reinforced by a resolution of the U.N. General Assembly.[115] Examples of IDPs include the displaced ethnic Albanian Kosovars who did not flee to Albania, and the Tutsi in Rwanda who fled from the Hutu ethnic cleansing. Students of world news will recall the recent military intervention in Albania, partially in response to the refugee and IDP problems experienced as a result of Serb ethnic cleansing.[116] Judge advocates should not be surprised to find themselves handling IDP problems in the future.

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[110] Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, art. 1, 360 U.N.T.S. 117 [hereinafter 1954 Convention on Stateless Persons]. The U.S. is not a party to this agreement, although as of Feb. 15, 2001, 53 other states, including the United Kingdom, Germany and France are parties.

[111] COMMENTARY, ADDITIONAL PROTOCOLS, *supra* note 109, at 850.

[112] Jean-Philippe Lavoyer, *Guiding Principles on Internal Displacement*, 324 INT'L REV. OF THE RED CROSS 467-480 (Sep. 30, 1998).

[113] *See id*.

[114] ROBERTA COHEN, REFUGEE AND INTERNALLY DISPLACED WOMEN: A DEVELOPMENT PERSPECTIVE (1995).

[115] Lavoyer, *supra* note 112; Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/1998/53/Add.2, Feb. 11, 1998 [hereinafter Guiding Principles].

[116] *Milosevic: Accused Mastermind of Ethnic Cleansing*, CNN.com (Mar. 31, 2001) *available at* http://europe.cnn.com/2001/ WORLD/europe/03/30/milosevic.profile/ (last visited Nov. 14, 2001) (on file with the Air Force Law Review).

III. DEPLOYMENT ISSUES

> *It is well known that in modern armies the numbers of fighting personnel has a tendency to decrease whereas the various support units including civilians are increasing in strength.*[117]

Commanders and their judge advocates encounter a range of issues across the deployment spectrum as they work to create a cohesive total force made up of military, civilian employees, and contractor personnel. Central to all other issues is the question of permissible duties a civilian may perform for an armed force. This issue is referred to as "nexus to combat" in this section. The line between permissible combat support roles and impermissible military combat roles is also summarily examined below.[118] Closer analysis of associated issues such as arming civilians, wear of uniforms by civilians, and civilian identification cards is required.

The U.S. is moving closer and closer to the gray line between permissible and impermissible civilian functional and physical proximity to conflict. We must carefully consider the significant and far-reaching consequences of employing civilians directly in military operations. The degree of authority a commander holds over these civilians is significantly different than that held over combatants. Commanders are accustomed to issuing orders and having unity of command over their assigned and attached personnel. However, this article reveals that such will not be the case for civilians. A commander's ability is limited even to ensure civilians perform those tasks they may lawfully be assigned. This article examines the limitations and risks involved with providing uniforms and weapons to each category of civilians, and the possibility of turning civilian employees and contractors into unlawful combatants. Non-affiliated persons may not take direct part in or support hostilities or military operations, and thus their functional proximity to an armed force is not discussed in depth. However, they may be endangered by their physical proximity to hostilities so protections that may be afforded to them are mentioned.

Judge advocates and civilians must appreciate the risks associated with physical proximity to enemy forces. Accordingly, this article examines the issue of protections and legal status civilians receive if they fall into enemy hands. Our examination reveals that most, but not all, civilians employed by and contracted with DOD will be treated as POWs upon capture, but that is not always the case. Non-affiliated persons will not be entitled to POW status unless they are war corespondents. NGOs, PVOs, refugees, stateless persons

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[117] SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 77 (1971).

[118] Major Michael Guillory examines this issue in more detail in his companion law review article entitled "*Civilianizing the Force: Is the United States Crossing the Rubicon?"* also found this volume at 111.

and IDPs are generally protected as civilians, although some additional protections will be identified and discussed. The importance of providing identification cards to civilians to trigger POW protection is highlighted.

A supported commander is also tasked with determining the degree of restrictions placed on some categories of civilians by host nation laws. This article, therefore, explores the myriad of definitions and protections Status of Forces Agreements afford civilian employees and contractors. Other issues addressed include foreign criminal jurisdiction, force protection responsibilities, and medical and legal support. The judge advocate must be prepared to advise his commander on those legal issues surrounding civilians in the deployed area of operations.

A. Authorized Nexus to Combat Operations

> *The citizen must be a citizen and not a soldier . . . war law has a short shrift for the non-combatant who violates its principles by taking up arms.*[119]

Traditionally, the accepted practice of employment of civilians was simply stated: "the closer the function came to the sound of battle, the greater the need to have soldiers perform the function because of the greater need for discipline and control."[120] This began to change during the Vietnam War, and has continued exponentially since that time.[121] "Never has there been such a reliance on nonmilitary members to accomplish tasks directly affecting the tactical successes of an engagement."[122] As a result, government employees and contractors are in closer physical proximity to the battlespace than ever before, and in roles functionally close to combatants; many of these roles formerly exclusively held by uniformed members of the armed forces.[123] Civilians perform actual mission tasks, such as airlift of IDPs by contracted flight crews on contracted helicopters; maintaining vital weapons systems such as Joint Surveillance Target Attack Radar System (JSTARS), Patriot, and Predator in the field and air even during combat operations; providing support, even within minutes of the conclusion of combat operations; and operating and

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[119] Parks, *supra* note 2, at 188 (quoting James Maloney Spaight, 1911).
[120] Eply, *supra* note 29, at 1-6.
[121] Zamparelli, *supra* note 6, at 10
[122] *Id.* at 9.
[123] Civilian personnel have been employed in frontline maintenance of combat aircraft and vital warfighting systems such as Patriot, JSTARS, and M1A1 Tank. *Id.* at 16. The Patriot Missile Battery is a ballistic missile system used for air defense. The JSTARS aircraft provides surveillance, command and control, and attack support to ground and air commanders. The Abrams M1A1 Tank is the main battle tank of the U.S. Army and the U.S. Marine Corps.

managing intelligence and information systems.[124] It is vital that civilians do not cross the line between lawful non-combatant support and unlawful participation in hostilities. To more clearly discern that line, we must focus our analysis on the international law of armed conflict.

The U.S. is a world leader in the creation of and adherence to the law of armed conflict or LOAC, rules that have evolved to govern the conduct of war.[125] LOAC regulates relations between belligerent governments and persons associated with the belligerents' armed forces during hostilities.[126] LOAC also seeks to regulate relations between the civilian populations of each belligerent.[127] LOAC only began to infuse a protection for civilians within the battlespace in the latter half of the twentieth century.[128] It attempts to divide combatants from non-combatants, protecting civilians from the horrors of war, and easing the return to a peaceable end-state.[129] The political pressure to protect civilians is growing rather than diminishing, as evidenced in the justification for U.S. intervention in operations such as Allied Force and Restore Hope, as well as expansions in international law.[130]

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[124] Mattox & Guinn, *supra* note 32 (regarding contracted helicopter crews and machinery during INTERFET); Palmer, *supra* note 36 (regarding contractor support in Bosnia arriving on scene within 30 minutes of combat arms operations); Zamparelli, *supra* note 6, at 9, 11, 16 (regarding all listed contractor activities generally, and specifically intelligence and information support, movements toward contracting for all Air Force F-117 maintenance, and support for JSTARS and Patriot).

[125] This is true despite the oft-quoted dismissal of international law by Carl von Clausewitz: "War is an act of force to compel our enemy to do our will . . . attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it." CARL VON CLAUSEWITZ, ON WAR 75 (Michael Howard & Peter Paret trans., 1989). Throughout history, except for brief periods, there have been highly-ritualized practices associated with war. *See generally*, MICHAEL HOWARD, THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 1 (Michael Howard, George J. Andreopoulos, & Mark R. Shulman eds., 1994).

[126] The phrase "law of armed conflict" is used broadly and synonymously in this article with "law of war," "humanitarian law," and "international humanitarian law." Although originally the law of war or armed conflict was distinct from humanitarian law, these terms have become blurred in international law. Adam Roberts & Richard Guelff, *1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, DOCUMENTS ON THE LAWS OF WAR 419, Prefatory Note (2000). *See also* Additional Protocol I, art. 2(b), *supra* note 2 (defining "rules of international law applicable in armed conflict" as "rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict." Parties to a conflict are often referred to as "combatants," "belligerents," the "enemy," or "adverse party." GREEN, *supra* note 16, at 84.

[127] Air Force Policy Directive 51-4, Compliance with the Law of Armed Conflict ¶ 1 (26 April 1993) [hereinafter AFPD 51-4].

[128] HOWARD, *supra* note 125, at 2, 4.

[129] *See* AFPD 51-4, *supra* note 127, ¶ 1.

[130] The U.N. Security Council has repeatedly permitted the use of force to create "safe areas" for relief efforts. For operations in Bosnia and Herzegovina the Security Council mandated the

It is not necessary that Congress declare war for LOAC to apply.[131] LOAC applies during armed conflicts, although much of it is not binding under international law during intra-state or "civil" wars or conflict between non-state actors, as we frequently encounter in situations other than war. However, the U.S. has adopted the policy of complying with LOAC beyond international law's requirements, instructing its armed forces to: "comply with the law of war during all armed conflicts . . . [and] unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations."[132]

Despite the U.S.'s voluntary application of LOAC to a broad range of operations, many other nations have not followed suit. Although some protections of civilians supporting an armed force do exist, they are not broad enough to address the variety of issues in inter-state conflict, much less MOOTW.

1. Combatants and Non-combatants

Personnel involved in an armed conflict are generally classified as either combatants or non-combatants.[133] This distinction is one of the most important in international law relating to armed conflict and determines an individual's legal status.[134] In most instances the differences will be clear.[135]

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use of force to create and protect safe areas to ensure the protection of civilian populations. *See* U.N. SCOR S/RES/792 (1993). Later, the U.N. authorized "all necessary measures, through the use of air power, in an around the safe areas in the Republic of Bosnia and Herzegovina…and the Republic of Croatia." U.N. SCOR S/RES/958 (1994). The United Nations Security Resolution for Operation Restore Hope in Somalia authorized "all means necessary" to create a "secure environment" necessary for relief. U.N. SCOR S/RES/794 (1992).

[131] Geneva Conventions I – IV, art. 2, *supra* notes 2 and 15.

[132] Chairman of the Joint Chiefs of Staff Instruction 5810.01A, Implementation of the DOD Law of War Program ¶ 5a. (Aug. 27, 1999); *See also* Chairman of the Joint Chiefs of Staff Instruction 3121.01A, Standing Rules of Engagement for U.S. Forces, A-2 ¶ 1g (Jan. 15, 2000) [hereinafter CJCS Inst. 3121.01A]; Dep't Of Defense Directive 5100.77, DOD Law of War Program (Dec. 9, 1998) [hereinafter DODD 5100.77]; AFPD 51-4, *supra* note 127, ¶ 2; Memorandum from W. Hays Parks, Special Assistant to The Judge Advocate General of the Army for International and Operational Law, Just Cause Law of War Obligations Regarding Panamanian Civilian Wounded and Dead (Oct. 1, 1990); United States v. Noriega, 808 F. Supp. 791, 795 (S.D. Fla. 1992) (holding that Operation Just Cause was "armed conflict" for the purposes of the Geneva Conventions despite that it was not between two state actors).

[133] *See generally*, GREEN, *supra* note 16, at 85. Some commentators separate civilians from non-combatants, while others group civilians under non-combatants. This article does the latter. KNUT IPSEN, THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 65, 66 (Dieter Fleck ed., 1995).

[134] IPSEN, *supra* note 133, at 65.

[135] *See* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 8 (1996) ("The current definition of a combatant is any member of the armed forces of a party to the conflict except medical

However, technology, outsourcing, and privatization are blurring the line between the two groups, complicating the question of civilian nexus to combat.

Most uniformed members of an armed force are combatants, regardless of whether the uniformed member is with or without a combat task.[136] To qualify as a lawful combatant, the individual must: (1) be under the command of a person responsible for his subordinates and subject to an internal disciplinary system; (2) have a fixed and distinctive emblem recognizable at a distance; (3) carry arms openly; and (4) conduct operations in accordance with the laws and customs of war.[137] Combatants "have the right to participate directly in hostilities" and, when captured, are afforded POW status.[138] They are immune under a state's internal national law for their combatant acts as long as they comply with LOAC.[139] Non-combatants are, by negative definition, those who are not members of an armed force, as well as a few specific members of an armed force such as medical personnel and chaplains.[140]

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personnel and chaplains. All other persons are considered to be civilians." (citing Additional Protocol I, art. 43 ¶ 2, and art. 50 ¶ 1, *supra* note 2).

[136] The 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 3, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV] (in attached regulations); Additional Protocol I, art. 43, *supra* note 2; IPSEN, *supra* note 133, at 66. Participants in *levee en masse* are the only lawful civilian combatants. Hague IV, art. 2, *supra* note 136; Geneva Convention III, art. 4, *supra* note 2. To qualify as *levee en mass* and therefore, combatants, the persons taking part in hostilities must meet four requirements: 1) armed resistance that occurs only in territory which is not under the factual control of the enemy, such as an occupation; 2) the taking up of arms must be spontaneous on the approach of the enemy; 3) the state and individuals being invaded must not have had time to organize a militia or volunteer corps; and 4) the participants in the *levee en masse* must conform to the law of armed conflict and applicable international law.

[137] Hague IV, *supra* note 136; Geneva Convention III, art. 4A(2), *supra* note 2. Additional Protocol I, art. 44 ¶ 3, *supra* note 2, attempts to amend customary international, Hague and Geneva law in this area in several ways, notably by indicating that armed irregulars needn't always distinguish themselves from civilians and by removing the requirement for adherence to the law of armed conflict for certain organizations although this requirement was retained for states. *See* Letter from George P. Shultz, Secretary of State, to President Ronald Reagan (Dec. 13, 1986) (on file with Mr. W. Darrell Phillips, Chief, International and Operations Law Division, Air Force Judge Advocate General School, Maxwell Air Force Base, Ala.) (forwarding the text of Additional Protocol II along with detailed analysis and recommended understandings and reservations); s*ee also* Parks, *supra* note 2, at 97.

[138] Additional Protocol I, art. 43 ¶ 2, *supra* note 2; Hague IV, *supra* note 136. Hague IV has generally been accepted to develop into customary international law. *See* Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 113, n. 27 (1985); Geneva Convention III, art. 4A(4), *supra* note 2.

[139] IPSEN, *supra* note 133, at 68.

[140] Geneva Convention I, arts. 28, 30, *supra* note 2; Geneva Convention II, arts. 36, 37, s*upra* note 15; Geneva Convention III, art. 33, *supra* note 2; Additional Protocol I, art. 43, *supra* note 2; *see also* GASSER, HANDBOOK OF HUMANITARIAN LAW, *supra* note 60, at 209-210; IPSEN, *supra* note 133, at 67. Other examples of non-combatants are those *hours de combat* due to being shipwrecked, wounded, or sick.

a. Civilian Employees and Contractors

Non-uniformed employees of an armed force and contractor personnel of an armed force are non-combatant civilians and must never take part in hostilities. "In all instances, contractor employees cannot lawfully perform military functions and should not be working in scenarios that involve military combat operations where they might be conceived as combatants."[141] Non-combatants working physically close to hostilities incur a risk of being made an object of attack. Non-combatants who perform a military function incur the risk of being an unlawful combatant.

Being close to the battlespace entails significant risks for civilians such as capture and being made the target of attack. Generally, civilians may not be made the object of military attack.[142] This is based upon the well recognized LOAC principle of discrimination requiring attacks be focused only against military objectives.[143] "Military objectives" are "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[144] Combatants, unless *hors de combat,*[145] are lawful military targets and may be directly targeted by a party to the hostilities. As such, their location in relationship to combat is irrelevant in law, although in fact they are less likely to be targeted if removed from the immediate vicinity of combat.[146]

Should civilians place themselves in close proximity to military objectives, they are responsible for the associated risk of attack directed against the military target. Civilian presence at the site of a military target "provides no immunity for legitimate military targets in the vicinity."[147] Simply put, civilians can become "collateral damage." Additional Protocol I requires, to the extent feasible, parties to a conflict remove civilians from the areas of military objectives.[148] Arguably, employing civilians in physical

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[141] JP 4-0, *supra* note 5, at V-I.

[142] ROGERS, *supra* note 135, at 8; Additional Protocol I, art. 50, *supra* note 2; s*ee also* Parks, *supra* note 2, at 116-145. Civilians participating in *levee en masse* are combatants and may be attacked as such.

[143] Additional Protocol I, art. 48, *supra* note 2; Parks, *supra* note 2, at 113.

[144] Additional Protocol I, art. 52(2), *supra* note 2.

[145] Meaning out of action or disabled. HOUGHTON MIFFLIN CO., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

[146] While in previous times, the "front lines" of combat were the danger zones and those in the rear were practically immune from the rigors of war, air forces and modern technology allow long-range, precision, and stealth targeting of individuals far removed from a ground element. In reality, lawful targets are not safe from the global reach of military forces except when constrained by political considerations.

[147] Additional Protocol I, art. 51 ¶ 7, *supra* note 2; AFPAM 10-231, *supra* note 1, ¶ 6.3.3.

[148] Additional Protocol I, art. 58(a), *supra* note 2. The U.S. State Department has not objected to this provision. Additional Protocol I has several articles that protect civilians. The U.S. signed Additional Protocol I on Dec. 12, 1977, but has not ratified it and is therefore only

proximity to hostilities, as during Operation Desert Storm where civilian contractors served on JSTARS during combat missions, runs counter to this principle. However, such a position puts Additional Protocol I in conflict with article 4A of Geneva Convention III, which specifically recognizes placing civilians in the battlespace, including as aircrew members provided with POW protection when captured.[149]

Functional proximity of civilians to roles appropriately reserved for uniformed armed forces is a more significant issue for judge advocates and civilians alike, although physical proximity is one indicator of the nature of the function in question. Civilians generally are not authorized to take *direct* part in hostilities.[150] Civilians who take direct part in hostilities are "unlawful combatants" and "regarded as marauders or bandits and may be tried as such if captured by the adverse party."[151] In any form of armed conflict, unlawful combatants lose the protections afforded their civilian status, although not the status itself, and may be resisted by a party to the conflict by all lawful means of warfare for combating enemy armed forces.[152] Thus, if a civilian employee or contractor, or other civilian discussed in the substance of this article, performs a function reserved for combatants, such as taking up arms and firing at the opposition, he forfeits his protection from being made the object of direct attack.

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legally bound to provisions that reflect customary international law. *See The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 416, 428 (1987) (remarks of U.S. Department of State Deputy Legal Advisor, Mr. Michael Matheson) [hereinafter U.S. State Dep't Remarks]. Because the U.S. has objected to the applicability of Additional Protocol I to wars of national liberation, this article will examine the provisions the U.S. has not objected to only in terms of international armed conflict, unless otherwise noted. Letter from Secretary of State to President Ronald Reagan, *supra* note 137; of note, many U.S. allies have ratified Additional Protocol I and are therefore bound by it, complicating the face of allied and coalition operations. Major Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of War in Space*, 48 A.F. L. REV. 1, 56 (2000).

[149] Geneva Convention III, art. 4A(4), *supra* note 2.

[150] Additional Protocol I, art. 48, *supra* note 2; GREEN, *supra* note 16, at 105.

[151] *Id.*; Annotated Supplement to THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 73 (A.R. Thomas & James C. Duncan eds., Supp. 1999) [hereinafter 1999 Supp. to NAVAL COMMANDER'S HANDBOOK].

[152] Additional Protocol I, art. 51 ¶ 3, *supra* note 2; Geneva Convention IV, art. 5 ¶ 3, *supra* note 2; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, art. 13, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol II]; GREEN, *supra* note 16, at 102; *see* U.S. State Dep't Remarks, *supra* note 148. For non-international armed conflict, the U.S. supports Additional Protocol II, art. 13, that protects civilians from being the object of attack, violence, or threats of violence, as long as they do not "take a direct part in hostilities." *See* Letter from Secretary of State to President Ronald Reagan, *supra* note 137.

As such, discerning what "direct part in hostilities" entails becomes very important. This article will touch on the topic but not thoroughly explore the answer, leaving that task for a more concentrated law review article. The definition of "direct part" is not settled under international law, as the U.S. Army acknowledges; "taking part in hostilities has not been clearly defined in the law of war, but generally is not regarded as limited to civilians who engage in actual fighting."[153] Generally, taking direct part in hostilities entails "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[154] Civilians who take direct part in hostilities are those who take up arms, or in some other fashion attempt to capture, injure or kill enemy forces, or damage or destroy enemy property.[155] Some argue direct participation also includes "functioning as a guard, lookout, or intelligence agent for an armed force."[156]

Commentators broadly defining "direct act" argue "[p]ersons who participate in the use of a weapon or a weapon-system in an indispensable function may not under any circumstances be designated as non-combatants by national decision."[157] This expansion of the definition goes too far. If these views are adopted, many civilian employees and contractors are already directly participating in hostilities and are subject to being made the target of intentional attack. At the present time, direct participation in hostilities must be judged on a case-by-case basis.[158]

Customary international law does not recognize the ability of an unlawful combatant to regain the protections of his civilian status. However, a controversial provision of Additional Protocol I allows the civilian to regain his protection from attack when he ceases direct participation in hostilities.[159] Now, exactly when a civilian ceases his direct participations in hostilities is unclear. If "direct part" in hostilities is an affirmative behavior akin to taking up arms, such as sniping at military members, such a civilian should not regain his non-combatant protection. Otherwise, a civilian who is a valid military target while he is planning or executing an attack becomes immune from attack once he is not involved in planning another attack, even if he will become involved in the conflict later.[160] Great inequities could result. A serviceman would be subject to a charge of a violation of LOAC should he kill a civilian

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[153] DA Pam. 690-47, *supra* note 19, § 1-22, Geneva Convention, Prisoner of War Status, Combatant/Non-Combatant Status.
[154] COMMENTARY, ADDITIONAL PROTOCOLS, *supra* note 109, at 619.
[155] 1999 Supp. to NAVAL COMMANDER'S HANDBOOK, *supra* note 151, at 484.
[156] *Id.; c.f.* ROGERS, *supra* note 2, at 132.
[157] IPSEN, *supra* note 133, at 67.
[158] 1999 Supp. to NAVAL COMMANDER'S HANDBOOK, *supra* note 151, at 484.
[159] Additional Protocol I, art. 51, *supra* note 2; *see also* GASSER, HANDBOOK OF HUMANITARIAN LAW, *supra* note 60, at 233; GREEN, *supra* note 16, at 102.
[160] Recall that the right of the use of force in self-defense extends even over civilians and applies when there is a hostile act or demonstration of hostile intent. CJCS Inst. 3121.01A, *supra* note 132, ¶ 7.

while he is out of the hostilities, even if the civilian had recently taken a direct part in hostilities.

Ground combat troops particularly are left in an untenable position when making split-second decisions such as when they can fire at a civilian sniper or other hostile civilian.[161] Airmen who have been involved in a military operation short of war may recognize the scenario as analogous to the need for a hostile act and/or hostile intent prior to engagement for self-defense. For example, an airman over flying an area where the opposition has not been declared hostile may still engage in self-defense. Applying this policy, he is fired upon by anti-aircraft artillery and feels he must act in self-defense, he may take offensive action against the site. However, without other rules of engagement authorization, he may not then make another pass at the site simply to strike it. This is true even if he knows he will be flying in the area later in the week and there is a chance gunfire may be directed his way on that occasion as well.[162] This issue is unsettled in international law for those not a signatory to Additional Protocol I.

While it is clear that civilians taking direct part in hostilities are unlawful combatants and subject to attack, it is not so clear under international law whether civilians who perform functions classified as "direct support" are unlawful combatants and even if not, whether they may be directly targeted.[163] Certainly, civilians who provide "direct support of the enemy's war-fighting or war-sustaining effort are at risk of incidental injury from attack."[164] Some legal scholars argue that civilians who directly support the war effort through combatant-like activities such as logistical support for combat forces, or intelligence gathering, lose their civilian protections and become lawful targets.[165] Others criticize such arguments as amounting to improperly creating a quasi-combatant status that is job function dependent.[166] Instead, these commentators assert civilians in these supporting roles do not lose their civilian status protection.[167]

Our allied and coalition partners who have ratified Additional Protocol I may not directly target supporting civilians, except in self-defense. Additional Protocol I explicitly distinguishes support of the war effort from

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[161] *See* Parks, *supra* note 2, at 132 (discussing the ground argument).
[162] This is a relatively simplified scenario. Several factors can complicate the analysis, such as the degree of immanence of the threat and the need for self-defense.
[163] Preliminary attempts to draw a line more clearly between civilians who contribute to the "war effort" and civilians who directly participate in military operations were rejected during the drafting of Additional Protocol I because of concern that a new category of civilian would be created, neither combatants nor civilians. Bothe et al., *New Rules for Victims of Armed Conflicts*, THE HAGUE 260, 294, nn.1&8 (1982) (citing Int'l Comm. of the Red Cross, Conf. of Gov't Experts Rep. vol. I ¶ 3.1117, 1972).
[164] 1999 Supp. to NAVAL COMMANDER'S HANDBOOK, *supra* note 151, at 484.
[165] *See* Parks, *supra* note 2, at 132.
[166] ROGERS, *supra* note 135, at 8-9.
[167] *Id.*

direct participation in hostilities when defining what activities make a civilian subject to direct attack.[168] The commentary to Additional Protocol I recognized modern states involve a multitude of activities that directly or indirectly contribute to the war effort and define "making a contribution to the war effort" with the examples of participating in military transportation, weapons production, or other logistical support for combat forces.[169] More than this level of activity is required to move a civilian to improperly participating in hostilities and becoming a lawful target.[170] The U.S. did not object to these provisions of Additional Protocol I although it did object to other provisions.[171]

Joint doctrine speaks generally to this issue, stating: "In all instances, contractor employees cannot lawfully perform military functions and should not be working in scenarios that involve military combat operations where they might be conceived as combatants."[172] It asserts that contractors are neither combatants nor non-combatants, thereby creating what otherwise does not exist in international law: a third category of civilians.[173] The 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, commonly called Hague IV, for example, states, "[T]he armed forces of the belligerent parties may consist of combatants and non-combatants."[174] There is no mention in the Hague or Geneva Conventions or Additional Protocols of "quasi-combatants." In fact, the "quasi-combatant" approach was specifically rejected during the drafting of Additional Protocol I.[175]

Each service interprets international law and joint doctrine differently. The Air Force has published a pamphlet wherein the position is taken that civilians are non-combatants (rather than quasi-combatants), but those performing "duties directly supporting military operations may be subject to direct, intentional attack."[176] A 2001 Air Force Policy Memorandum may lead to the conclusion that civilians providing support in close proximity may also be attacked.[177] These statements may be intended to represent the reality of

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[168] *See* COMMENTARY, ADDITIONAL PROTOCOLS, *supra* note 109.
[169] *Id.* at 619; *See also* ROGERS, *supra* note 135, at 8.
[170] *Id.*
[171] U.S. State Dep't Remarks, *supra* note 148. In fact, the U.S. Army Judge Advocate General School teaches these provisions are probably customary international law and, therefore, binding. Capt Jeanne Meyer, *Protection of Civilians During Armed Conflict*, INTERNATIONAL AND OPERATIONAL LAW BASIC COURSE DESKBOOK 9-9 (Int'l & Operational L. Dep't, The Judge Advocate General's School, United States Army, 2000).
[172] JP 4-0, *supra* note 5, at V-1.
[173] *Id.* at V-7.
[174] Hague IV, art. 3, *supra* note 136.
[175] *Supra* note 163; *see also* COMMENTARY, ADDITIONAL PROTOCOLS, *supra* note 109, at 515, ("All members of the armed forces are combatants. This should therefore dispense with the concept of 'quasi-combatants.'")
[176] AFPAM 10-231, *supra* note 1, ¶ 6.3.3.
[177] Interim Policy Memorandum—Contractors in the Theater, *supra* note 5. It is not Air Force policy to target civilians. Interview with Ms. Marcia Bachman, SAF/GC, Jan. 14, 2002.

the risk encountered by civilians near hostilities rather than a position on international law, but the documents do not clarify the issue further. If the 2001 memorandum represents an interpretation of international law, it shifts the analysis from functional proximity to combat, to physical proximity to combat. The Army has taken a different stance on the issue, apparently concluding "war-essential civilian employees working on a U.S. military base during time of [international armed conflict] would be subject to direct attack."[178] A prominent lawyer in The Army Judge Advocate General's Office endorses targeting civilians directly supporting the combatant by emphasizing the criticality of the civilian support to the mission.[179] The Judge Advocate General School of the Army recently adopted this view teaching "the contract technical advisor that spends each day working with members of an armed force to make a weapon system more effective … is integrated with [the] force, [and taking an] active role in hostilities, [and therefore] may be targeted."[180] The Navy has taken yet another position. The Navy describes direct support as "support by civilians to those actually participating in battle or directly supporting battle action, and military work done by civilians in the midst of an ongoing engagement" and holds they are not subject to direct attack although they assume the risk of collateral damage because of their physical proximity to valid military targets.[181]

Consider this ground-centric version of the scenario commonly discussed: If a military member is driving a truck filled with supplies for

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[178] Parks, *supra* note 2, at 134 n. 400 (citing letter from DAJA-IA to Counselor for Defense Research and Engineering (Economics), Embassy of the Federal Republic of Germany (Jan. 22, 1988)).

[179] Parks, *supra* note 2, at 132 ("the work of some civilians has become so critical to military success that those individuals are civilians in name and garb only").

[180] *Protecting Human Rights During Military Operations*, 48TH GRADUATE COURSE DESKBOOK 15-3 (Int'l & Operational L. Dep't, The Judge Advocate General's School, United States Army, 2000) (providing the example of civilians subject to attack).

[181] 1999 Supp. to NAVAL COMMANDER'S HANDBOOK, *supra* note 151, at 484 n.14, and accompanying text. Like the Air Force, in 1991 the Navy published documents with unclear language, stating

> Unlike military personnel . . . civilians are immune from attack unless they are acting in direct support of the enemy's war-fighting or war-sustaining effort. Civilians providing command, administrative, or logistic support to military operations are subject to attack while so engaged. Similarly, civilian employees of naval shipyards, merchant seamen in ships carrying military cargos, and laborers engaged in the construction of military fortifications, may be attack [sic] while so employed.

COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 11.3 (cited in *The Law of Naval Operations* 64, INTERNATIONAL LAW STUDIES 309 (Horace B. Robertson, Jr., ed., 1991)). The commentary published by the Naval War College Press criticized the unclear language as leading to a possible incorrect interpretation of international law that civilians in roles other than those taking direct part in hostilities may be intentionally targeted. *Id.* at 310.

combat, such as ammunition, while his state is involved in an international armed conflict, that military member is subject to being made the target of attack by the opposing state.[182] Once the military member goes back to the barracks that evening, or his home in the civilian community, he is still individually subject to being made the object of attack. What then, if a civilian is driving the very same truck? Certainly, the truck itself is a military target and may be destroyed. The civilian driver would be permissible collateral damage. The debate is about whether the civilian himself is a valid object of attack. If one decides the civilian is subject to direct, intentional attack as an individual when involved in this level of activity, what may happen when he goes home for the night to his civilian community? [183] The same scenario can be applied to an airman's perspective when questioning whether the civilian aircrew member can be intentionally attacked when he stops performing support duties and goes home for the evening.

It is very dangerous for the U.S. to assert that civilians who directly support the war effort may be targeted. With U.S. political sensitivities to civilian casualties, it is unlikely that the U.S. would target an enemy civilian intentionally. At the same time, the U.S. is increasingly vulnerable to such targeting due to the numbers of civilians performing such functions.

A variety of questions need to be answered: What is "direct support" and "direct participation?" Are persons who accompany the armed forces without being members thereof "quasi-combatants?" When can each group be intentionally targeted?[184] As the situation exists today, civilian employees and contractors in deployed locations may be victims of incidental injury because of their proximity to military targets. They may also, depending upon the definition of "direct part" and "direct support" be the direct target of attack, whether near a military target or not. More severe consequences exist if these civilians have crossed the line into unlawful combatant status.

Unlawful combatants may be criminally prosecuted by the capturing state for their participation in hostilities, even when that participation would otherwise be lawful for a combatant.[185] Civilians may also be subject to prosecution by the international community for violations of LOAC, more commonly termed "war crimes," if they violate the laws of war.[186] The future risk of being tried by an international tribunal increased significantly in 1998 with adoption of the Rome Statute of the International Criminal Court

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[182] Parks, *supra* note 2, at 135.
[183] *See id.* at 134; ROGERS, *supra* note 135, at 8.
[184] *See* Major Michael Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, this volume, for an in-depth look at these and other questions.
[185] GREEN, *supra* note 16, at 105.
[186] LAW REPORTS OF TRIAL OF WAR CRIMINALS (vol. XV) 111 (1949) (stating during the U.S. Military Tribunal at Nuremberg after World War II "the rule is established that a civilian who aids, abets, or participates in the fighting is liable to punishment as a war criminal under the laws of wars." Fighting is legitimate only for the combatant personnel of a country).

(ICC).[187] When ratified by sixty states, the ICC will have authority to prosecute both military members and civilians for war crimes, genocide, and crimes against humanity. Criminal jurisdiction will extend even to citizens of states that are not party to the treaty for activities they have conducted in a state that is a party to the treaty.[188] Judges from the nations of the world will decide the fate of those before the court. Unlike the influence the U.S. has on the U.N. Security Council, the U.S. will not be able to veto an ICC ruling. Accordingly, civilian employees and contractors who become unlawful combatants may be subject to criminal prosecution by an international court and under rules of evidence and procedure fundamentally different than those of the U.S. constitutional criminal system.

These issues extend beyond what happens to the individual. A state and members of an armed force, such as commanders, have an affirmative duty to prevent civilian non-combatants from participating in hostilities.[189] Members of the U.S. Armed Forces must comprehend, observe and enforce LOAC.[190] Commanders are charged with training their personnel in LOAC, reporting violations, and holding violators accountable.[191] Commanders who authorize or permit a civilian to actively participate in hostilities could become responsible for the civilian's acts and may be liable under international law of armed conflict, as well as U.S. law.[192]

b. Non-Affiliated Persons

Simply stated, the media, NGOs, PVOs, refugees, and other non-affiliated persons may not take up arms and participate in combat operations. This group is comprised of non-combatant civilians who lose the protections of their civilian status should they directly participate in hostilities, as discussed above. Although they may be physically near hostilities they are not functionally close to being combatants and therefore the analysis is much more straightforward. Because of the physical proximity to hostilities, these civilians experience risk. For example, a journalist who places himself close to a military unit or target would not lose his protected status as a civilian, but may lose the reality of his status as a civilian because he is near a military unit

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[187] President Clinton signed the treaty on Dec. 31, 2000. As of Aug. 31, 2001, 139 states have signed the treaty, including every member of the European Union and most other major allies, such as Canada and Australia, and 37 states have ratified the treaty. Status of ratification of the International Criminal Court Rome Treaty is *available at* http://www.un.org/law/icc/statute/status.htm (last visited Nov. 14, 2001) (on file with the Air Force Law Review).
[188] *Id.*
[189] *See* Parks, *supra* note 2, at 118.
[190] DODD 5100.77, *supra* note 132, ¶ 4 ; AFPD 51-4, *supra* note 127, ¶ 2.
[191] DODD 5100.77, *supra* note 132, ¶ 5.8; AFPD 51-4, *supra* note 127, ¶ 5.
[192] *See* GREEN, *supra* note 16, at 102.

or target, both legitimate objects of attack.[193] If he wears clothes similar to the military uniform and travels in the midst of a military unit, the opposition soldier "cannot reasonably be asked to spare an individual whom he cannot identify as a journalist."[194] A brief additional comment should be made about the media. Some enumerated specific activities by the media, even ones that may be construed as direct participation in hostilities if conducted by another civilian, do not propel the media member into unlawful combatant status. When a media member is performing tasks related to his position as a journalist, such as photographing enemy positions, taking notes on operations, and transmitting that information, they have not become spies or been deemed otherwise direct participants in hostilities.[195]

2. Command, Control and Influence of Civilians

> *Sound logistics forms the foundation for the development of strategic flexibility and mobility. If such flexibility is to be exercised and exploited, military command must have adequate control of its logistics support.*[196]

When discussing combatant versus non-combatant status earlier, two essential characteristics of combatants were mentioned**:** combatants are under the command of a person responsible for his subordinates and subject to an internal disciplinary system. Uniformed military members are controlled, directed, organized, coordinated, and employed by a commander through a chain of command. Command is "authority that a commander in the Armed Forces lawfully exercises over subordinates by virtue of rank or assignment."[197] Chain of command is "the succession of commanding officers from a superior to a subordinate through which command is exercised."[198] Should a subordinate fail to obey the lawful orders of a commander above him, he is subject to criminal punishment in accordance with the Uniform Code of Military Justice (UCMJ).[199]

This same command does not exist over civilian employees, contractors, or non-affiliated persons. Civilians are not subject to the UCMJ except in time of declared war.[200] This is even during events the military and

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[193] PILLOUD, *supra* note 60, at 922.
[194] *Id.*
[195] Gasser, P*rotection of Journalists*, *supra* note 58, at 3-18.
[196] Nelson, *supra* note 36, at 7 (quoting Rear Admiral Henry E. Eccles).
[197] JP 1-02, *supra* note 5. This has been so since the time of the great Roman Army. "The centurion replied…'For I myself am a man under authority, with soldiers under me. I tell this one, 'Go,' and he goes; and that one, 'Come,' and he comes.'" *Matthew 8:8-9* (New International Version).
[198] JP 1-02, *supra* note 5.
[199] 10 U.S.C. § 801 (May 5, 1950).
[200] Reid v. Covert, 354 U.S. 1222 (1957); 10 U.S.C. § 802, art. 2a(10), Uniform Code of Military Justice (May 5, 1950); *See also* Rules for Courts-Martial 202, Persons Subject to the Jurisdiction of Courts-Martial, Discussion, MANUAL FOR COURTS-MARTIAL (2000 ed.) at II-13.

international law would view as a major-theater war, but which Congress has not declared as war.[201]

a. Civilian Employees

Commanders have *control* over civilian employees. The Unified Combatant Commander/Component Commander exercises control over deployed civilian employees through the deployed on-site supervisor and the attached or assigned supervisory chain.[202] The supervisor assigns tasks, reviews performance and initiates disciplinary action.[203] The deployed supervisor may impose reasonable rules, directives, policies and orders based upon mission necessity, safety, and unit cohesion.[204] Emergency-Essential or E-E civilian employees who have signed a DD Form 2365 have agreed to perform their assigned duties in the event of a crisis situation or war until relieved by the proper authorities.[205] Personnel filling E-E positions who have declined to sign the agreement may still be required to perform their duties until the needs of the military mission allow their detail or reassignment to non-E-E positions.[206]

Commanders can take administrative action when civilians fail to perform or are otherwise injure the mission. The civilians can be barred from base, or have their benefits limited or terminated.[207] Should an E-E civilian refuse to perform his duties during an emergency, he is subject to administrative penalties in accordance with labor laws, ranging from oral admonition to removal from federal service.[208] The Air Force normally returns the employee to his home station for suspension or removal action.[209] There is

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[201] U.S. v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970) (holding that there was no court-martial jurisdiction over an Army contractor employee serving in Vietnam). Of note, World War II was the last declared war in which the U.S. was involved.

[202] DODD 1400.31, *supra* note 10, ¶ D.4; AFPAM 10-231, *supra* note 1, ¶ 1.5; DA Pam. 690-47, *supra* note 19, § 1-4, Command and Control.

[203] AFPAM 10-231, *supra* note 1, ¶ 1.5.

[204] *Id.*

[205] DODD 1404.10, *supra* note 18, at 6.2.

[206] Reassignment or detailing should occur as reasonably practicable and consistent with the needs of the military, and any tour extensions should be disapproved. DODD 1404.10, *supra* note 18, at 4.7.

[207] These benefits may include Morale, Welfare and Recreation (MWR) privileges, exchange, commissary, and check cashing privileges. For example, if a civilian gets into fights at the club, he can be barred from the club while still permitted to perform his duties. The right of a commander "to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command" was recognized in *United States v. Spock*, 424 U.S. 824 (1976). *See also* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).

[208] 5 U.S.C. §§ 7504, 7514, 7543 (Oct. 13, 1978); Office of Personnel Management's (OPM) implementing regulations in 5 C.F.R., Part 752, Subparts A-D, Adverse Actions, (Jan. 1, 1997 ed.); DODD 1404.10, *supra* note 18, DD Form 2365 at encl. 3.

[209] DP/DPXC Message, *supra* note 14, § 7(A).

an extensive body of law governing federal employee labor issues that must be followed in the event a civilian either commits misconduct or fails to perform his duties satisfactorily.[210]

b. Contractors

Control of contractor support personnel was a primary challenge for commanders during Operation Desert Storm.[211] These relationships "often left commanders scratching their heads" in Operation Uphold Democracy,[212] and they continue to challenge commanders and their judge advocates today. A commander has much less control over contractors than he does over civilian employees. A contractor cannot be "ordered" to do anything, even the services for which he has contracted. The commander does not even directly supervise him.[213] In fact, "[t]he warfighter's link to the contractor is through the contracting officer or the contracting officer's representative."[214]

The rights, duties and obligations of the government and the contractor are set forth in the terms and conditions of the contract.[215] Mission essential services should be designated as such in the contract statement of work.[216] The key performance terms must be carefully planned when contracting for work that will be performed in a deployed location. The contract can incorporate theater commander orders, directives and standard procedures that relate to personal safety, unit cohesion and mission accomplishment.[217] The contractor then directs the contractor employees. The contract should specify any requirement for a contractor to have weapons familiarization, immunizations, nuclear, biological, and chemical protective mask and clothing

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[210] *See generally* 5 U.S.C. §§ 7504, 7514, 7543, *supra*, note 208; 5 C.F.R. Part 752, *supra* note 208; AFPD 36-7, Employee and Labor-Management Relations (Jan. 11, 1994); Air Force Instruction 36-704, Discipline and Adverse Actions (July 22, 1994).

[211] Kathleen A. Bannister, *One-Stop Shopping at CECOM*, ARMY LOG. (Jan.-Feb. 1999).

[212] CLAMO Haiti Lessons Learned, *supra* note 56, at 143.

[213] Army Pamphlet 715-16, *Contractor Deployment Guide* (Feb. 27, 1998) [hereinafter DA Pam. 715-16].

[214] JP 4-0, *supra* note 5, at V-I; s*ee generally* General Servs. Admin. et al., FEDERAL ACQUISITION REG. 1.602 (Apr. 1, 1984 as amended) [hereinafter FAR] (regarding contracting and contracting officers); AR 715-9, *supra* note 5, ¶ 3-2f; Lieutenant Colonel Douglas P. DeMoss, *Procurement During the Civil War and Its Legacy for the Modern Commander*, THE ARMY LAWYER 9 (Mar. 1997) (an interesting historical examination of why contracting rules, such as the use of a contracting officer, developed and how they are useful today).

[215] JP 4-0, *supra* note 5, at V-I; Dep't of the Army, Memorandum Subject: Policy Memorandum – Contractors on the Battlefield (Dec. 12, 1997) (reprinted in FM 100-10-2, *supra* note 5, Appendix F, and FM 100-21, *supra* note 5, Appendix C) [hereinafter Army Policy on Contractors on the Battlefield].

[216] DODI 3020.37, *supra* note 47, ¶ 6.1.

[217] DA Pam. 715-16, *supra* note 213, ¶ 1-5b. In Operation Uphold Democracy, contractors were subject to General Order Number One and prohibited from possessing privately-owned firearms, drinking alcohol, gambling, eating in local Haitian restaurants, and having intimate relations with Haitian locals. CLAMO Haiti Lessons Learned, *supra* note 56, at 143.

familiarization, and force protection training and measures. If such a clause is in the contract, the government should ensure the personnel sent to fulfil the contract have the required training. The contract can include a provision authorizing the contracting officer to require the contractor to direct the unsatisfactory employee be removed and replaced.[218]

If the contract needs to be altered due to changes in the requirements for performance, the commander must work through the contracting officer rather than directing the contractor or contractor employee to make changes.[219] The contracting officer will make the necessary contract modifications and the cost of the contract to the government may increase if the modification is outside the scope of the original contract.[220] However, contractual changes should be carefully considered. For example, during U.N. Mission Implementation Force (IFOR) in Bosnia, commanders were not informed of the fiscal ramification of the decision to accelerate a camp construction schedule. In order to comply with the new schedule, the contractor was required to purchase plywood from the U.S., as there was not enough available in Europe at the time. Consequently, a four feet by eight feet sheet of three-quarter inch plywood cost up to $85.98 per sheet.[221] Contract changes are possible, but fiscal restraints may mandate an alternative course of action.

The commander must not obligate funds, or act to award, terminate, or administer contracts.[222] Should the contractor perform services or deliver goods without proper contractual arrangements through a contracting officer, generally one of three courses is available: ratification; compensation (under secretary residual powers or as an informal commitment); or submit a claim to the General Accounting Office, none of which is an optimal situation.[223] Judge advocates must be involved in damage minimization for these complex and often highly visible actions.

It is imperative that commanders recognize and plan for a contractor's possible failure to perform the services for which he has been hired or contracted.[224] If a contractor fails to perform, the commander, through a contracting officer, may direct the contract be terminated for default. Depending upon the terms of the contract, the contractor employee may be

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[218] DA Pam. 715-16, *supra* note 213, ¶ 1-5c.
[219] AR 715-9, *supra* note 5, ¶ 3-1a; Army Policy on Contractors on the Battlefield, *supra* note 215; FM 100-10-2, *supra* note 5; DA Pam. 715-16, *supra* note 213, ¶ 1-5c.
[220] *See generally* FAR, *supra* note 214, Part 43 (Contract Modifications).
[221] JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS, *supra* note 8, at VI-16.
[222] *See* FAR, *supra* note 214, at 1.602-1.
[223] *See id.* at 1.602-3 (ratification actions), 50.302(d) (service secretarial compensation), 50.302-3 (informal commitment actions); 31 U.S.C. § 1342, Voluntary Payments-Government Reimbursement Liability; B-115761, 33 Comp. Gen. 20 (1953) (GAO claims).
[224] JP 4-0, *supra* note 5, at V-3; AR 715-9, *supra* note 5, ¶2-2g (requiring all deliberate and crisis action plans to plan for continuation of services in the event of a contractor's failure to perform).

removed from the theater of operations or limited from access to all or part of the U.S.-controlled facility. Whenever a commander intends to take action against a contractor, the contracting officer and contracting specialists should be consulted.

A commander's remedies against civilians who violate contractual directives or otherwise fail to perform are essentially limited to, at most, removing the civilian from working on the government contract and terminating the contract. Administrative remedies comparable to those available for civilian employees can be asserted.[225] Withdrawal of base exchange privileges, Morale, Welfare and Recreation privileges, and barring civilian contractors from part or all of the base are some of the options that can be taken.[226]

c. U.S. Extraterritorial Jurisdiction

The deployed commander will very rarely find himself in a situation where he can take criminal action against a civilian employee or contractor who decides to walk off the job, even during hostilities. The United States Government may, in certain cases, prosecute certain civilians employed by or accompanying the U.S. military overseas.[227] Recent legislation permits some civilians who commit a felony-equivalent crime[228] to be tried criminally in the U.S. if the host nation has declined to prosecute.[229] If a nation having jurisdiction of the offense is prosecuting or has prosecuted the civilian, the U.S. must obtain the approval of the Attorney General or Deputy Attorney General prior to prosecuting a civilian.[230] The Office of the Secretary of Defense General Counsel is currently writing implementing regulations.[231]

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[225] *See, e.g.*, DEP'T OF ARMY FED. ACQUISITION REG. SUPP. 37.7096-3 (May 10, 1993) (discussing when contracting officer may require the contractor to remove contractor personnel from the job: "(a) for misconduct on or off duty, (b) for conduct reflecting adversely against the interests of the United States, (c) for conduct which endangers persons of property, or (d) whose continued employment under the contract is inconsistent with the interest of military security."); Steven Shaw, *Suspension and Debarment: The First Line of Defense Against Contractor Fraud and Abuse*, THE REPORTER v. 26, at 4-10, n.1 (discussing details of the procedures to exclude contractors from base or to suspend their contract).

[226] *See* AR 715-9, *supra* note 5, ¶ 3-2f; DA Pam. 715-16, *supra* note 213, ¶ 9-3.

[227] 18 U.S.C. § 3261, The Military Extraterritorial Jurisdiction Act of 2000 (Nov. 22, 2000). This bill also allows prosecution of a limited group of former military personnel. *See* Captain Glenn R. Schmitt, *The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad – Problem Solved*? THE ARMY LAWYER 1 (Dec. 2000).

[228] A federal offense punishable by one year or more within the jurisdiction of the U.S.

[229] 18 U.S.C. § 3261, *supra* note 227.

[230] *Id.*

[231] Message from The Judge Advocate General, United States Air Force to The United States Department of the Judge Advocate General, TJAG Online News Service (Dec. 6, 2000) (on file with the Air Force Judge Advocate General School, Maxwell AFB, Ala.).

This legislation will allow commanders to gain jurisdiction over even non-U.S. citizen civilian employees, most types of contractor and subcontractor employees, and war correspondents to the jurisdiction of a U.S. District Court where they may be prosecuted for serious offenses such as rape, murder, and child abuse.[232] Jurisdiction over theater support contractors and other non-affiliated persons cannot be gained under this statute unless the contract employee is a third-country national brought by the U.S. into a country in which they do not ordinarily reside.[233] The statute does not provide for prosecution for failure to obey orders or dereliction of duty, or other prosecutions that are used to support a commander's command authority over military members. Prosecution is also dependent upon convincing the U.S. Attorney to file charges in District Court.[234] There are a few other federal criminal laws that provide broader extraterritorial jurisdiction than the Military Extraterritorial Jurisdiction Act, although the types of offenses are limited in scope and will not solve the command and control challenge commanders face most frequently.[235]

Lack of command and limited control over civilian employees and contractors presents significant challenges. The U.S. has recognized the possibility that civilians, contractors more specifically, may not perform even

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[232] For example, in 1996 a civilian from Misawa Air Base raped a twelve-year-old American girl. Since Japan declined to prosecute him, no criminal action could be taken against him and he was simply sent back to the U.S. *See* Technical Sergeant Chris Haug, *AF General Counsel Supports U.S. Jurisdiction Overseas*, U.S. ONLINE NEWS (Apr. 13, 2000), *available at* http://www.af.mil/newspaper/v2_n14_s7.htm (last visited Nov. 14, 2001) (on file with the Air Force Law Review). In another incident, an Air Force civilian employee molested twenty-four children between the ages of 9 and 14. The host nation refused to prosecute the employee and he was barred from base. *See* Saxby Chamblis & Bill McCollum, *Joint Statement on the Introduction of the Military Extraterritorial Jurisdiction Act* (Dec. 12, 1999) (on file with the Air Force Judge Advocate General School, Maxwell AFB, Ala.).

[233] 18 U.S.C. § 3261, *supra* note 227.

[234] In addition to current overburdening the U.S. federal criminal system, there are other factors creating pressure not to prosecute under this statute except in the most extreme circumstances. The practical problem of bringing in witnesses from thousands of miles away is compounded by the lack of subpoena power by U.S. district courts over foreign witnesses, although foreign civilian witnesses often voluntarily testify in military courts-martial. *See* Major Crawford, Thesis on the Military Extraterritorial Jurisdiction Act (2000) (unpublished thesis for LL.M., on file at The Army Judge Advocate General School); Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114 (1995).

[235] *See, e.g.*, 18 U.S.C. § 2441 (1996) (war crimes); 18 U.S.C. § 32 (destruction of aircraft); 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 201 (bribery and graft); 18 U.S.C. § 2401 (grave breaches of the Geneva Conventions); 18 U.S.C. § 793 (espionage); 18 U.S.C. § 1116 (murder or manslaughter of foreign officials, official guests, or internationally protected persons); 18 U.S.C. § 1201 (kidnapping); 18 U.S.C. §§ 286, 287 (conspiracy to defraud the government); 18 U.S.C. §2332 (terrorism).

essential services during a contingency.[236] In the vast majority of situations, civilian employees and contractors fulfil the terms of their employment or contract, even at personal risk to themselves.[237] However, civilians have walked off the job during crisis situations. During Operation Desert Storm, food support contractor employees refused to perform until they were provided with chemical attack protective equipment.[238] Immediately following the August 1976 Korean tree-cutting incident, military alert status was increased to Defense Readiness Condition-3, and hundreds of Army civilian employees requested immediate evacuation out of South Korea.[239] The civilians were working in depot maintenance and supply where they had replaced military workers.[240]

If a civilian employee or contractor violates the host nation law, his services may well be lost to his assigned unit. Recently, an essential contractor employee supporting Operation Southern Watch decided to take a weekend trip from one country to another. He did not notify military personnel, nor was he required to do so. He had entered the original host nation on a one-entry visa and was not provided other entry protections under a SOFA. When he returned to the original host nation, he was apprehended and the military personnel were contacted. A subordinate commander went to the airport and secured the contractor's release after assuring a minor agent of the host nation that the contractor's services were necessary. Unfortunately, the unit judge advocate was not contacted until the next day after higher-ranking host nation personnel discovered the incident and expressed serious concerns. The incident resulted in multiple calls to the contractor, the embassy and higher headquarters until the contractor employee could be put on the first airplane back to the U.S.

Commanders accustomed to command authority, unity of command, and flexibility may find direction of civilians difficult in the fluid deployed scenario. Due to the restrictive nature of contracts, contractor employees often cannot adapt to the commander's intent, an essential capability for execution of a mission. Contractors may also have different agendas than commanders.

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[236] JP 4-0, *supra* note 5, at V-3; DODI 3020.37, *supra* note 47; FM 100-10-2, *supra* note 5. They may fail to perform due to their desire to remove themselves from the hostilities, or because they are prevented from doing so due to a situation beyond their control.

[237] For example, contractors performed during Operations Desert Storm in Saudi Arabia; Uphold Democracy in Haiti and Restore Hope in Somalia. James C. Hyde, *Defense Contractors Serve on the Front Lines of Operations Desert Storm*, ARMED FORCES J. INT'L 32 (Mar. 1999); CLAMO Haiti Lessons Learned, *supra* note 56.

[238] Dowling & Feck, *supra* note 45, at 63.

[239] *See* History of the U.S. Air Force's 8th Fighter Wing (extract on file with the Air Force Judge Advocate General School, Maxwell AFB, Ala.); s*ee also* Eric A. Orsini & Lieutenant Colonel Gary T. Bublitz, *Contractors on the Battlefield: Risks on the Road Ahead?* ARMY LOG. (Jan./Feb. 1999) *available at* http://www.almc.army.mil/alog/janfeb99/ms376.htm (on file with author).

[240] Orsini & Bublitz, *supra* note 239.

Lack of control by a commander over contractor employees, except through the contracting officer, can present significant problems when rapid direction needs to be given and when communications are limited due to technological or time zone problems. For example, in 1998, it was not an on-site commander, but instead contracting officers working at seven stateside locations that controlled contractors deployed with an Army element in Kuwait.[241] Communications problems are also an aggravating factor in controlling civilians. For example an Army transportation battalion supporting Operation Joint Endeavor in the Balkans had mission-impacting telephone communication problems as they moved Task Force Eagle from Hungary into Croatia.[242] Limited remedies for civilians who fail to perform hamstring commanders who need the civilian services urgently. What good is it to have the option to fire a civilian when that civilian is the only person who can perform a necessary task? We have already given up organic military support of some entire weapons systems, such as the TOW missile successor—the ITAS.[243] What happens to the commander who needs ITAS support when the contractor has gone home and the weapon system is inoperable?

Judge advocates must fight hard to ensure civilians, whether contractors or civilian employees, are not placed in mission-essential positions. Commanders must have back-up plans in the event a civilian refuses to or cannot perform.[244] Unfortunately, the U.S. has already lost organic capabilities in some critical functions, leaving the commander with no option but to rely upon contractor support and the trend is not slowing.[245] In addition, judge advocates must have a basic grasp of the civilian employee labor system and corresponding administrative remedies, as well as an understanding of the contractual requirements and remedies associated with those civilians involved in their mission.

d. Non-Affiliated Persons

Military forces will not have command over non-affiliated persons such as media, IGOs, NGOs, PVOs, refugees, stateless persons, and IDPs. There may be some degree of control, depending upon the individual and the

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[241] Major Melvin S. Hogan, Contractors in the Joint Theater: The Need for a Joint Doctrine 12 (Jan. 5, 1999) (unpublished manuscript, on file with the Air Force Judge Advocate General School).

[242] Major James P. Herson, Jr., *Road Warriors in the Balkans*, ARMY LOG. (March-April 1997) *available at* http://www.almc.army.mil/alog/marapr97/ms113.htm (on file with author).

[243] Telephone Interview with Ms. Amy Barnett, Chief, Logistics Division, Close Combat Anti-Armor Weapons Project Office, Redstone Arsenal, Huntsville, Ala. with Major Michael Guillory [hereinafter Barnett Telephone Interview]. Raytheon will provide all maintenance support for the ITAS. Information is available at http://www.army-technology.com/projects (last visited Nov. 14, 2001) (on file with the Air Force Law Review).

[244] DODI 3020.37, *supra* note 47, ¶ 4.4, 6.5.

[245] Zamparelli, *supra* note 6, at 12.

organization to which he is attached and there are mechanisms to influence these civilians.

Media: A proactive and assertive judge advocate can aid a commander greatly in media relations. While the Public Affairs (PA) staff has primary responsibility in this area, the judge advocate should always be alert to spot potential media issues and plan for ways to respond to media inquiries. Particularly on deployments, the assigned PA representative may be a very junior officer with little experience compared to the judge advocate. Judge advocates have even found themselves in front of the microphone during operations answering questions for the waiting world.[246]

In the past, the military restricted information or limited access by the media to military operations and information. Today, the military starts from a position of almost complete open access combined with "security at the source."[247] Commanders are taught to "[g]et out front, fill the vacuum with useful information" so that the media will be the commander's ally rather than adversary.[248] Particularly during operations other than war, the commander will need to work with the media, facilitating their access to information while minimizing the disruption to the military operation. This facilitation can take the form of providing both information and support. Support can include specialized equipment such as flak vests, gear and helmets, transmission of media reports, transportation in the area of operations, escort, food, and billeting.[249] For example, during Operation Provide Comfort in northern Iraq the media was provided military transportation on C-130s, helicopters and vehicle convoys, provided access to relocation camps as well as troops, including special operations forces.[250]

The control and influence of media coverage and support will usually be coordinated through the Joint Information Bureau (JIB).[251] Other names for the coordination cells, depending upon the constitution of the mission, include Allied Press Information Center, Coalition Press Information Center, or Combined Information Bureau.[252] The Army also refers to these coordination cells as media operations centers when at or below the theater level.[253]

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[246] CLAMO Haiti Lessons Learned, *supra* note 56, at 79. Media training for judge advocates is available in a variety of forms and is highly encouraged.

[247] Army Field Manual 3-61.1, Public Affairs Tactics, Techniques and Procedures (Oct. 1, 2000) at Ch. 4 [hereinafter FM 3-61.1].

[248] JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS, *supra* note 8, at xxii.

[249] FM 3-61.1, *supra* note 247, §§ 4-35, 4-36.

[250] JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS, *supra* note 8, at VIII-I (quoting General J. P. McCarthy, Deputy Commander in Chief, U.S. European Command).

[251] *Id.* at VIII-II.

[252] FM 3-61.1, *supra* note 247, § 4-13

[253] *Id.*at § 4-11, 4-13.

Typically, an open and cooperative approach is most effective and the judge advocate should be prepared to support the commander in this manner, while also understanding how the media can be influenced in more restrictive ways if the need requires. Commanders have methods at their disposal to influence the media in order to maintain operational security.[254] To say the military can and does exercise control over the media is to invite misunderstanding and, therefore, criticism from First Amendment advocates and members of the media.[255] However, it must be made clear that a commander has the ability to put reasonable conditions on access to areas of hostilities, credentialing, and/or censor information solely for the purpose of operational security and to protect U.S. forces, but not for prohibited purposes such as withholding embarrassing information.[256] Other preconditions can be placed upon access, information, and support provided to the media.

War correspondents and freelance journalists can be restricted from access to combat locations or other information.[257] Additionally, civil or military authorities may subject the media to additional restrictions and link credentials to compliance with the restrictions.[258] The U.S. encourages and, in some operations, can require all media members to become credentialed by registering with the JIB PA officer.[259] During Desert Storm, access to the theater of operations was denied unless the media member registered, signed an agreement to comply with military rules, and remained with their escort.[260] The media members were then given credentials indicating they were associated with the military and entitled to treatment equivalent to a military major (O4).[261] Thus, when with their escort, they were considered "persons accompanying the armed forces."[262]

The authority to establish accreditation criteria and issue credentials has been delegated to the Assistant Secretary of Defense for Public Affairs.[263] Issuing credentials and identification cards then confers upon a media member the special status of war correspondent and thereby entitles him to POW

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[254] The command and control rules for DOD civilian media members are set forth above under "Command, Control and Influence of Civilians," *infra* Part III.A.2.

[255] *See, e.g.*, Lieutenant Colonel Murrell F. Stinnette, The Military and the Media in Combat: Winning the Hearts and Minds of the American Public (Apr. 10, 2000) (unpublished strategy research project, on file with U.S. Army War College).

[256] *See generally*, JP 3-61, *supra* note 52.

[257] *Id.* at III-2; FM 3-61.1, *supra* note 247, Ch. 4. *Cf.* National Magazine v. United States, 762 F.Supp. 1558, 1572 (S.D.N.Y. 1991).

[258] *See generally*, PILLOUD, *supra* note 60, at 921.

[259] JP 3-61, *supra* note 52, at III-2. *See also*, Dep't of Defense Directive 5122.5, Assistant Secretary of Defense for Public Affairs (Sept. 27, 2000) Enclosure 3, 1.4 [hereinafter DODD 5122.5]. Credentialing or registration is different and distinct from accreditation with a news organization or government.

[260] Krejcarek Telephone Interview, *supra* note 69.

[261] *Id.*

[262] *Id.*

[263] DODD 5122.5, *supra* note 259, ¶ 5.7.

protections upon capture.[264] Credentials hold practical value beyond the POW status protection. Members of the media who do not register and agree to abide by military ground rules should only be provided the information and support that is provided to the general public, thus creating incentive to register.[265] For example, transportation, messing and billeting should only be provided to credentialed media.

The U.S. has taken the position that "[j]ournalists not credentialed by the Department of Defense may not necessarily be given the same access as those who have credentials."[266] Such was the case during Operation Desert Storm.[267] Even media members registered and with DOD credentials will not always have the access they desire.[268] However, the trend is to relax access for reporters to the operation and explain the importance of delayed reporting of sensitive information. For example, during Operation Uphold Democracy, the media was not limited to the long-term press pools of Operation Desert Storm.[269] Rather, reporters voluntarily delayed reporting information such as the departure of aircraft carrying troops from Fort Bragg.[270]

Media members that register to obtain U.S. credentials agree to abide by ground rules established to protect U.S. forces and the operation.[271] These ground rules should be equally applied to military and civilian members of the media.[272] The Operation Desert Shield ground rules listed a variety of forms of "information [that] should not be reported because its publication or broadcast could jeopardize operations and endanger lives" such as: information about future operations, including canceled or postponed operations; details of rules of engagement; tactics employed by special operations forces; and information that would disclose the specific location of military units.[273] "Violations of the ground rules can result in suspension of credentials and

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[264] *See* "Media" *infra* Part II.C.1. (defining war correspondent and discussing the criteria for such designation); *see also* "Under Control of the Enemy" *infra* Part III.B. (regarding status upon capture).

[265] FM 3-61.1, *supra* note 247, § 4-47.

[266] JP 3-61, *supra* note 52, at III-2.

[267] PETER YOUNG AND PETER JESSER, THE MEDIA AND THE MILITARY: FROM THE CRIMEA TO DESERT STRIKE 175 (St. Martin's Press, New York, 1997).

[268] Approximately 10 percent of the media members with credentials were able to get to the front lines of Desert Storm. Stinnette, *supra* note 255, at 9.

[269] CLAMO Haiti Lessons Learned, *supra* note 56, at 79; *Strong-Arm Tactics Used to Curb War Reporting*, *supra* note 71.

[270] CLAMO Haiti Lessons Learned, *supra* note 56, at 79.

[271] JP 3-61, *supra* note 52, at III-3; DODD 5122.5, *supra* note 259, Encl. 3, ¶ 1.4; FM 3-61.1, *supra* note 247, §§ 4-38, 4-46.

[272] Dep't of Defense Directive 5400.13, Joint Public Affairs Operations ¶ 4.4.10 (Jan. 9, 1996) [hereinafter DODD 5400.13].

[273] McHugh, *supra* note 51, Appendix C; *See also* FM 3-61.1, *supra* note 247, Appendix X (reprint of Operation Desert Storm Media Ground Rules).

expulsion from the combat zone of the journalists involved."[274] Given the gravity of the impact upon a journalist who loses his credentials, the decision to suspend credentials or expel a reporter is reserved for the Assistant Secretary of Defense for Public Affairs, and "should only be made after clear and severe violations have been committed."[275] Judge advocates should encourage their commanders to enforce the revocation of privileges to serve as a general deterrent so that other media members will abide by the established rules.[276]

Censorship is another method whereby the commander can influence the media to protect the mission and the forces. Censorship was used in Operations Desert Shield and Desert Storm where public affairs officers reviewed the media products prior to their transmission.[277] When the NBC media network violated the ground rules during Operation Desert Storm, Israel barred them from transmitting reports on the conflict until NBC made an on-air apology.[278] The practical ability of a commander to censor the media may be limited in today's high technology world. Live reporting from the battlefield enabled by satellite coverage and cell phones restricts censorship options except in the most extreme circumstances. However, it is always an option that should be kept on the table. While some members of the media may not appreciate the necessity for censorship, the American public supported its employment during Operation Desert Storm by a majority of two to one.[279]

NGO, PVO and IGO: Military forces must work with NGOs, PVOs and certain IGOs to obtain a better state of peace.[280] NGOs and PVOs are often the first and last on the scene and their personnel often operate in high-risk areas. The U.S. military recognizes that NGOs and PVOs are powerful organizations and commanders must factor in their activities when planning an operation.[281] When a mutually beneficial relationship can be established with the primary NGOs and PVOs in an area of operations, these organizations can be "critical" to the successful accomplishment of the operation.[282]

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[274] JP 3-61, *supra* note 52, at III-3 (emphasis omitted); *See also*, DODD 5122.5, *supra* note 259, Encl. 3, ¶ 1.4. However, Robert Simon, the CBS media representative who violated the rules during Operation Desert Storm and who was consequently captured by the Iraqis, suffered, instead, the punishment of 40 days in an Iraqi prison. *See generally*, Jane Hall, *A 'Most Searing Experience'; Bob Simon Relives His 40 Days as Iraq's Hostage During the Gulf War In New Book*, LOS ANGELES TIMES F12C.1 (May 11, 1992).
[275] JP 3-61, *supra* note 52, at III-3.
[276] *See* FM 3-61.1, *supra* note 247, at ¶ 4-46.
[277] Krejcarek Telephone Interview, *supra* note 69; Walter V. Robinson, *Media, Military in War Over Words; War in the Middle East*, THE BOSTON GLOBE, Jan. 23, 1991, National/Foreign 4.
[278] Robinson, *supra* note 277.
[279] PETER YOUNG AND PETER JESSER, *supra* note 267, at 189.
[280] JP 3-08, *supra* note 76, at Vol. I, ¶ viii.
[281] *Id.*
[282] *Id.*

The relationship between the military and NGO/PVOs is that of associates or partners rather than supported or supporting. [283] NGOs and PVOs do not usually accept direction or task assignments from the military and many will not even coordinate or inform others of their activities.[284] Joint doctrine summarizes this issue succinctly when it states "[w]orking with NGOs, PVOs, and IGOs requires a high degree of tolerance for ambiguity."[285] However, if unity of effort is to be achieved, commanders must work with, sometimes influence, and very rarely directly control through area restrictions, NGO/PVO personnel.

There is presently no statutory link between NGOs, PVOs and the Defense Department. The primary means by which the U.S. Armed Forces coordinates activities with NGOs and PVOs is through a Combined Military Operations Center (CMOC). If the mission of the operation is humanitarian relief, the coordination cell may be called a Humanitarian Assistance Coordination Center (HACC). In all cases, the coordination center works to link commanders with NGOs, PVOs and IGOs so that, through mutually supporting communication and planning, unity of effort can be achieved. CMOCs have been effectively utilized in a variety of operations such as in Somalia, Haiti and northern Iraq.[286] General A.C. Zinni, USMC, former Commander, U.S. Central Command, described CMOCs as a political committee that replaces a combat or fire support operations center as the heart of an operation.[287] Judge advocates are integrated into the CMOC, and attend key liaison meetings regularly. For example, in Operation Uphold Democracy, the multi-national force staff judge advocate attended the liaison meetings, once a week at a minimum, and the CMOC had a full-time reserve judge advocate assigned to the civil affairs unit who attended meetings daily.[288] These and other attorneys involved in the operation liaised with NGOs, PVOs and IGOs in a variety of ways, particularly with the ICRC.[289]

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[283] *Id.*
[284] *Id.* ¶ I-9.
[285] *Id.*
[286] *See id.* CMOCs can be organized in a variety of ways and levels. For further discussion, *see* JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS, *supra* note 8 and CLAMO Haiti Lessons Learned, *supra* note 56, at 93. However, some in the NGO community have criticized Joint Doctrine and associated CMOCs as, at best, a necessary evil. *See* John Howard Eisenhour & Edward Marks, *Herding Cats: Overcoming Obstacles in Civil-Military Operations*, JOINT FORCES Q. 86-90 (Summer 1999); *cf.* Jean-Daniel Tauxe, The ICRC and Civil-Military Cooperation in Situations of Armed Conflict, Remarks to the 45th Rose-Roth Seminar, Mantreaux (Mar. 2, 2000) available at http://www.icrc.org/icrceng.nsf/5cacfdf48 ca698b641256242003b3295/986986d70b7667bb41256869004b0e46?OpenDocument/ (last visited Nov. 14, 2001) (on file with the Air Force Law Review) (describing the ICRC view that CMOCs, or CIMICs as they term them, have been helpful, but reasserting that both the appearance and reality of NGO separation from the military is imperative).
[287] JP 3-08, *supra* note 76, at Vol. I, ¶ III-19.
[288] CLAMO Haiti Lessons Learned, *supra* note 56, at 94.
[289] *Id.* at 95.

While a CMOC is a positive structure in theory and practice, the very nature of NGOs and PVOs do not always allow liaison, much less unity of effort. Some NGOs and PVOs refuse to deal with the military or have objectives that run counter to the military objective. Many NGOs and POVs do not have well defined or coordinated internal heirarchical structures, leaving their field personnel with little control or direction and the military with no individual person to communicate with when accomplishing tasks.[290] NGOs and PVOs are often at odds with each other since they are usually competing for the same charitable contributions from the public and other organizations. This competition is often reflected in the intense desire and need of the NGOs and PVOs to have media coverage of their activities.[291]

The traditional means of influence over those whom we do not have control are available to commanders partnering with NGOs and PVOs. For example, establishing relationships with the primary NGO and PVO leaders in an area of operation, working toward understanding and supporting each others' needs, and not taking actions that are not necessary for mission accomplishment when those actions would negatively impact an NGO or PVO partner.[292] Logistics, security, and communications are other ways the military can and does work with an NGO or PVO to accomplish the mission within a climate of cooperation.[293] Judge advocates familiar with fiscal laws applicable in overseas disasters, humanitarian and civic assistance missions will recall that monies and support can be provided to NGOs and PVOs under certain circumstances. For example, space-available transportation of relief supplies furnished by an NGO or PVO is permissible when the Secretary of Defense so authorizes after determining such transportation advances U.S. foreign policy, the supplies are suitable for a legitimate need, they will be used for humanitarian purposes, an adequate distribution arrangement exists, and they are not distributed to military or para-military groups.[294] While the military can be an enabler of the NGO and PVO missions, it cannot take over an NGO or PVO task for itself.[295] While the power of the purse can be an important tool when attempting to influence an organization, the nature of these organizations is such that it is often the military that is influenced to do anything possible to assist in the humanitarian relief mission.[296]

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[290] *See* JP 3-08, *supra* note 76, at Vol. I, ¶ I-9, I-11 (citing Operation Support Hope After Action Review, Headquarters USEUCOM).
[291] *See id.* ¶ I-14.
[292] *Id.*
[293] Security is addressed *infra* Part III.A.5., "Force Protection."
[294] Denton Amendment, 10 U.S.C. § 402 (Dec. 4, 1987 as amended).
[295] JP 3-08, *supra* note 76, at Vol. I, ¶ II-20.
[296] Judge Advocates lecturing at the Air Force Judge Advocate General School between 1997 and 2000, when the authors were instructors at the School, often relayed stories of extraordinary measures taken to comply with fiscal restrictions while supporting humanitarian relief organizations in every and any way possible. For example, during food relief missions in Somalia, the U.S. not only transported humanitarian supplies for NGOs, but allowed some

If the relationship with an NGO or PVO has degraded, yet a commander requires some leverage with that NGO or PVO, the judge advocate must determine the mission and affiliations of the NGO or PVO; whether it is protected under a treaty or other international agreement; the minimum restrictions or limitations that are necessary for military mission accomplishment; and prepare the commander for potential media and political scrutiny.

An NGO or PVO may be entitled to special protections in carrying out its mission if it has a protected mission.[297] It may also be protected if the U.N., a state party to a conflict, or a receiving state recognizes it. Unless an NGO or PVO is operating under a U.N. mission and in accordance with the Safety of U.N. and Associated Persons Convention or is providing humanitarian relief under a Chapter VII-authorized U.N. mission, an NGO or PVO must have the receiving state's permission to operate. Because such permission often takes a great deal of time, some NGOs and PVOs operate without such permission.[298] The judge advocate must know the ramifications of international agreements prior to attempting to restrict activities of such NGOs and PVOs. The ICRC, in particular, is protected under international treaties, such as Geneva Convention III and Additional Protocol I.[299] The ICRC must be allowed to carry out their humanitarian missions as assigned by the Geneva Conventions, Additional Protocol I and state parties to the conflict.[300]

During international armed conflict, civilian medical personnel must be allowed access to "any place where their services are essential, subject to such supervisory and safety measures as the relevant Party to the conflict may deem necessary."[301] Civilians, whether general populace or members of a relief society such as a National Red Cross, may not be interfered with by a party to a conflict when the civilians are collecting and caring "for the wounded, sick and shipwrecked" or searching for the dead or reporting their location.[302]

NGOs to put an enlarged emblem identifying the NGO owning the relief supplies on military airlift assets. The goal of the NGOs was allegedly to elicit more support and donations from the media viewing public as they saw the actual relief activities in which the NGO was involved.

[297] Farouk Mawlawi, *New Conflicts, New Challenges: The Evolving Role for Non-Governmental Actors*, 46 J. INT'L AFFAIRS 391 (Winter 1993).

[298] *Id.* Doctors Without Borders is such an organization.

[299] *See, e.g.*, Geneva Convention III, arts. 3, 9-11, *supra* note 2; Additional Protocol I, arts. 5, 6, 33, 81, *supra* note 2. As another example, Geneva Convention IV, art. 23, *supra* note 2, protects the passage of relief stores destined for the civilian population of war-torn countries. Except in very limited circumstances, a state may not interfere with these supplies even when destined for the enemy's civilians. While this section addresses the articles themselves and not those transporting them, unimpeded harassment of humanitarian organizations transporting the supplies would effectively terminate the protections of this provision.

[300] Additional Protocol I, art. 81, *supra* note 2.

[301] *Id.* at art. 15.

[302] *Id.* at art. 17.

Additional Protocol I, article 17, codifies this protection but does not explicitly make an allowance for restrictions based upon military necessity or the safety or security of the protected civilians.[303] However, because state approval is necessary prior to the operation of a society in the territory in question, state approval can be removed when necessary.

National Red Cross societies must be afforded facilities by their parent state to carry out their assigned function.[304] States must facilitate the accomplishment of the mission of the Red Cross societies as charged by the Geneva Conventions and Additional Protocols.[305] States are encouraged, "as far as possible" to support other humanitarian organizations they have recognized as they use their Red Cross organization.[306]

During armed conflict that is not of an international nature, humanitarian relief societies,[307] and the civilian populace may offer their services to help with collection and care of wounded, sick and shipwrecked.[308] States who are party to Additional Protocol II may consent to humanitarian relief for the civilian populace in the way of food, medial supplies and other forms of relief.[309] Unlike Additional Protocol I, which protects relief organizations once they have obtained the consent of a party to the conflict, Additional Protocol II has no such provisions. The original draft of Additional Protocol II as submitted for consideration by the ICRC had several proposed articles addressing relief societies that were not adopted by the international community in the final version of Additional Protocol II.[310]

Recognition and approval of an NGO or PVO by a Party to an international armed conflict triggers Additional Protocol I protections. Impartial humanitarian relief organizations that have been approved by a party to the relief action are also protected from interference when transporting or distributing relief consignments and equipment, food and medical supplies, even when the relief is directed at the civilian populace of the opposition belligerent party.[311] Relief personnel, once approved by the party in whose territory they will carry out their duties, are due respect and protection, and their relief activities may be impeded, in a limited manner or temporarily, in the event of "imperative military necessity."[312] Parties to the conflict are charged with protecting the relief supplies and in aiding in their prompt

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[303] *Id.*
[304] *Id.* at art. 81.
[305] *Id.*
[306] *Id.*
[307] Including national Red Cross societies.
[308] Additional Protocol II, art. 18, *supra* note 152.
[309] *Id.*
[310] *See* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS, *supra* note 2, at 698.
[311] Additional Protocol I, arts. 69, 70, 71, *supra* note 2.
[312] *Id.* at art. 70(4).

distribution.[313] These relief personnel are strictly limited to the mission for which the state has approved them and may, "under no circumstances" exceed that mission.[314] Additional Protocol I explicitly recognizes that because these provisions are based upon party approval, one means to influence NGOs and PVOs is to make their recognition and approval by the government contingent upon certain terms and conditions, such as security requirements.[315] Certainly, any terms and conditions placed upon the relief organizations must be taken for military necessity and not to hinder or deny access to the relief organizations for less pure motives. Should an NGO or PVO violate the terms of their recognition and approval, their approval to perform relief activities may be terminated.[316]

Stating the obvious, political sensitivities to terminating relief organization access to needy people must be carefully weighed against the seriousness of the breach of the terms of the recognition and approval. Any recommendation of restrictions on these personnel must be carefully coordinated with public affairs personnel so that the purpose for the termination can be clearly and accurately explained to the public. Similarly, the Security Council or its representatives can exclude NGOs or PVOs who threaten force or obstruct the accomplishment of the U.N. mandate from the area of operations.[317]

NGOs, PVOs and IGOs bring a great deal of value to the interagency table and are often essential in achieving a better state of peace. Former Chairman of the Joint Chiefs of Staff, General John M. Shalikashvili, said it this way: "What's the relationship between a just-arrived military force and the NGOs and PVOs that might have been working in a crisis-torn area all along? What we have is a partnership. If you are successful, they are successful; and, if they are successful, you are successful. We need each other."[318] At the same time, judge advocates must be capable and willing to advise commanders on means by which these organizations can be influenced should mission accomplishment so require.

3. Civilian Wear of Uniforms

Combatants generally have a duty to distinguish themselves from civilians while preparing for or engaging in an attack or military operations.[319] Combatants must also "have a fixed and distinctive emblem recognizable at a

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[313] *Id.*
[314] *Id.*
[315] *Id.*
[316] *Id.*
[317] U.N. PEACE OPERATIONS, *supra* note 93, at 403.
[318] JP 3-08, *supra* note 76, at Vol. I, II-1.
[319] Additional Protocol I, art. 44 ¶ 3, *supra* note 2; IPSEN, *supra* note 133, at 75.

distance."[320] It is international customary law that the means to satisfy this requirement is through the wear of a distinctive uniform.[321] The purpose of this requirement is to protect civilians from hostilities.[322]

a. Civilian Employees

Today, civilian employees and contractors often wear uniforms. The DOD asserts that it does not violate international law for a civilian employee with an armed force to wear a uniform.[323] Thus, both U.S. and non-U.S. citizen DOD employees in an overseas location may be required to wear a uniform under specific conditions.[324] For a theater or component commander to require a U.S. citizen employee to wear the uniform, Air Force instructions require that he must "determine there is an actual or threatened outbreak of hostilities, involving war, major civil disturbance (or other equally grave situations), or … the deployment necessitates the wearing of uniforms in specifically defined geographic areas."[325] Army regulations require wear of uniforms by U.S. citizen employees when the commanding general determines is "necessary for their ready identification, comfort, protection, and safety."[326]

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[320] Arguably, Additional Protocol I weakens the required use of uniforms through its broad definition of "armed forces" in article 43 (includes guerrillas and removes a requirement for such irregulars to distinguish themselves from civilians through the wear of fixed insignia). *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, *supra* note 138, at 128. However, such an irregular must carry his weapon openly when visible to an adversary while both "engaged in a military deployment preceding the launching of an attack in which he is to participate" and while engaged in hostilities. Additional Protocol I, art. 44 ¶ 3, *supra* note 2.

[321] IPSEN, *supra* note 133, at 76. *See generally*, Additional Protocol I, art. 44 ¶ 7, *supra* note 2, ("This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.")

[322] IPSEN, *supra* note 133, at 75.

[323] DODD 1404.10, *supra* note 18, ¶ 6.9.8; AFPAM 10-231, *supra* note 1, ¶ 6.3.4; DA Pam. 690-47, *supra* note 19, § 1-22, Geneva Convention, Prisoner of War Status, Combatant/Non-Combatant Status. It is impermissible to use enemy uniforms, flags, or insignia during combat, although this prohibition does not apply before or after actual hostilities. *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, *supra* note 138, at 148; Hague IV, art. 23(f), *supra* note 136. Additional Protocol I extends that prohibition to uses "in order to shield, favor, protect or impede military operations." Additional Protocol I, art. 39, *supra* note 2.

[324] DODD 1404.10, *supra* note 18, at 6.9.8; Dep't of Defense Manual 1400.25-M, Ch. 500, Subchapter 591, DOD Civilian Personnel Manual (Classification, Pay, and Allowances (Uniform and Uniform Allowances for Civilians)) (Dec. 3, 1996); Air Force Instruction 36-801, Uniforms for Civilian Employees 1.1 (Apr. 29, 1994) [hereinafter AFI 36-801]; AFPAM 10-231, *supra* note 1, ¶ A4.15; Army Regulation 670-10, Furnishing Uniforms of Paying Uniform Allowances to Civilian Employees (July 1969) [hereinafter AR 670-10]; Army Regulation 700-84, Issue and Sale of Personal Clothing (Feb. 28, 1994).

[325] AFI 36-801, *supra* note 324, ¶ 1.1.2.

[326] AR 670-10, *supra* note 324, § 8-2.

The Army regulation acknowledges that such wear of uniform will ordinarily only be in forward areas and field condition support areas where actual or threatened hostilities involving war or a major civil disturbance exist.[327] Should the tactical environment require it, Army civilians can be required to wear kevlar helmets and load-bearing equipment.[328] Direct hire non-U.S. citizens may be required to wear a uniform when the commander determines it is necessary for the mission.[329]

"Uniform" for members of an armed force is customarily accepted to include utilities, chemical warfare protective clothing and similar combat outerwear.[330] Uniform wear by DOD civilian employees is governed by service regulations and specific identification insignia is required so that the civilian can be distinguished from the military.[331] The Air Force has designated a subdued insignia consisting of a black equilateral triangle with the letters "U.S." in olive drab color printed on an olive drab green cloth background and instructs civilians to obtain these items from the Army and Air Force Exchange Service.[332] However, these items are difficult to obtain and civilian employees often go without them. Because wear of a tape that says "U.S. Air Force" is prohibited "so as not to confuse them with . . . a military member" some wear a tape stating "DAF," identifying them as Department of the Air Force civilians.[333] The civilian employee may either be provided with an allowance to cover the uniform costs, or provided with the uniform itself, in accordance with service regulations.[334]

b. Contractors

Joint doctrine identifies the ability of theater commander to contractually require a contractor to wear a battle dress uniform "when camouflage integrity or other military necessity dictates."[335] The terms of the contract may specify the need for specific clothing and equipment, including mandating uniforms.[336] Unless specified in the terms of the contract, the U.S.

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[327] *Id.*
[328] DA Pam. 690-47, *supra* note 19, § 1-13, Clothing and Equipment Issue.
[329] AFI 36-801, *supra* note 324, at 1.1.2.
[330] *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, *supra* note 138, at 128 n.108.
[331] *See, e.g.*, AFI 36-801, *supra* note 324, ¶6.7; Army Regulation 670-1, *Wear and Appearance of Army Uniforms and Insignia* (Sept. 1, 1990) (discussing wear of the battle dress uniform); AR 670-10, *supra* note 324.
[332] AFI 36-801, *supra* note 324, ¶ 6.7.
[333] Interview with Mr. W. Darrell Phillips, Chief, International Law and Operations Division, Air Force Judge Advocate General School at Maxwell Air Force Base, Ala. (May 10, 2000).
[334] 10 U.S.C. §1593 (Nov. 29, 1989), Uniform Allowance: Civilian Employees. The Air Force requires an allowance or provision of uniforms in AFI 36-801, *supra* note 324, ¶ 1.3.1. The Army's provisions are in AR 670-10, *supra* note 324.
[335] JP 4-0, *supra* note 5, at V-7.
[336] Army Policy on Contractors on the Battlefield, *supra* note 215.

is not required to provide contractors with uniforms. There is no DOD regulatory direction regarding the wear of camouflage utility uniforms by contractors, as there is for civilian employees. The Air Force generally provides that contractors should not be issued military garments, except for compelling reasons.[337] The Army prohibits contractors who accompany the armed forces from wearing military uniforms "except for specific items required for safety or security, such as: 'chemical defense, cold weather, or mission specific safety equipment.'"[338] However, it authorizes the sites that outprocess deploying contractors from the U.S. to issue Battle Dress Uniforms (BDUs) in addition to Chemical Defensive Equipment and Extreme Weather Clothing.[339] Joint doctrine sets the minimum standard stating: "commanders should ensure that contractors wear a symbol that establishes their contractor status."[340] Should a contractor take it upon himself to wear a uniform, he should ensure he is distinguishable from a member of the armed forces.

Wear of uniforms by contractors should be very restrictive. First, civilians are putting themselves at risk of being targeted as a combatant when they wear uniforms only slightly different than those worn by combatants.[341] The stated purpose of the authorization to require civilian employees to wear uniforms is to protect them by identifying them as members of the civilian component of the U.S. Forces.[342] However, the capability to target individuals, even from the ground, from long distances makes distinguishing civilians and military difficult at best. It was recognized as early as the war in Vietnam that "[t]he speed of even the slowest fixed-wing aircraft is so great that the pilot has little chance of positively identifying an enemy who is not wearing a distinctive uniform, unless the latter obligingly waves a rifle or shoots at him."[343] Air Force policy requires contractors who wear a uniform provided by the military to wear a uniform distinguishable from military personnel, such as armbands, headgear, or patches.[344] Civilians wearing this distinctive uniform, with the exception of a different tape or patch will not be easily distinguished from military. One would need to be on close quarters to see the distinctive patch worn by civilians. Instead, an enemy force may see the utility uniform, assume the individual is military, and target him as such.[345]

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[337] Interim Policy Memorandum—Contractors in the Theater, *supra* note 5.
[338] AR 715-9, *supra* note 5, ¶ 3-3e.
[339] DA Pam. 715-16, *supra* note 213, ¶ B-1.
[340] JP 4-0, *supra* note 5, at V-7.
[341] Interestingly, a proposal was made during a working group meeting to draft what became Article 79, Additional Protocol I, to obligate journalists protected under Article 79 to wear a clearly visible and distinctive emblem shaped like a bright orange armlet with two black triangles, but the proposal was rejected primarily because such identification might increase the danger to the journalist and civilians near him. PILLOUD, *supra* note 60, at 919.
[342] AFI 36-801, *supra* note 324, ¶ 6.2.
[343] Parks, *supra* note 2, at 116 (quoting J. CROSS, CONFLICT IN THE SHADOWS 98 (1963)).
[344] Interim Policy Memorandum—Contractors in the Theater, *supra* note 5.
[345] PILLOUD, *supra* note 60, at 919.

A quote regarding Operation Restore Democracy in Haiti encapsulates this concern very well: "[LOGCAP contractors and subcontractors] often physically resembled military personnel, carried identification cards, and appeared to be members of the force from the perspective of Haitian citizens."[346]

Secondly, wear of uniforms brings civilians ever nearer the risks of being found an unlawful combatant. Commentators who support the ability to directly attack civilians who are critical to military success point to these civilians differing from military "in name and garb only."[347] Even if one disagrees with the proposition that civilians in direct support roles may be the object of attack, the wear of uniforms strengthens the argument that such civilians have stepped into military essential roles and should be valid military targets.

At least two external theater support contractors actively discourage the wear of uniforms by their contract employees because they do not want to endanger their protected status.[348] However, the current LOGCAP contractor allows wear of the BDU uniform by its personnel and considers uniforms in operations in the Balkans as one of the keys to its success. Contract employees supporting the TOW/ITAS also wear uniforms as well as carry weapons.[349] At a minimum, civilians should be advised of the danger of wearing uniforms and commanders should ensure they do not wear insignia, badges, or tapes identifying them as members of an armed force.[350]

c. Non-Affiliated Persons

A member of the media who wears a uniform similar to an armed force or close to hostilities, is acting at his own risk.[351] Unless the military places restrictions on wear of uniform in the media ground rules, the individual media member and his parent organization decide what the journalist will wear. Such restrictions were not employed in Operation Desert Storm[352] and would be highly suspect. Most media members wore military type uniforms during that operation.[353] It is up to the media to determine what is an acceptable level of

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[346] CLAMO Haiti Lessons Learned, *supra* note 56, at 142-143.
[347] Parks, *supra* note 2, at 132.
[348] E-mail responses from Chris Heinrich, Brown & Root Corp., former LOGCAP contractor (May 1, 2001). DynCorp Technical Services, Briefing on Contractors on the Battlefield, Slide 10, *available at* http://www.cascome.army.mil/Rock_Drill/c/Contractors_on_the_Battlefield/AUSA_Symposium/ (on file with author); Dowling & Feck, *supra* note 45, at 70 (stating Brown & Root and DynCorp resist the wear of uniforms by their employees).
[349] DynCorp Technical Services allows wear of uniforms in the Balkans. Raytheon is the current contractor for TOW/ITAS. Barnett Telephone Interview, *supra* note 243.
[350] *See* Interim Policy Memorandum—Contractors in the Theater, *supra* note 5.
[351] PILLOUD, *supra* note 60, at 923.
[352] Krejcarek Telephone Interview, *supra* note 69.
[353] *Id.*

risk for their personnel. Four media members wearing military style BDUs during Operation Desert Storm were captured and initially viewed as possible spies.[354] Security requirements, however, may call for provision of specialized uniform items such as helmets and flak vests to credentialed media members.[355] Other non-affiliated persons generally have no claim to uniform items, although the U.S. military is not in a position to prohibit them from wear of uniform items available on the open market. National Red Cross employees, however, may and have worn desert BDUs on deployment with nametapes identifying them as Red Cross.

d. Nuclear, Biological and Chemical Gear for Civilians

Civilian employees "shall" also be provided necessary protective equipment and training, such as Nuclear, Biological, Chemical (NBC) defensive equipment, as determined by the in-theater commander.[356] The employees' sending base issue and train on CDE and NBC equipment.[357] NBC gear is issued "only as necessary to perform assigned duties during hostilities, conditions of war, or other crisis situations."[358]

Theater admission requirements for contractors "should" include provisions on issuance of, and training in, defensive protective gear comparable to that issued to military in theater.[359] Contractors have been issued this specialized equipment in more than one instance. When contracted flights into the Desert Storm theater of operations were jeopardized by the threat of weapons of mass destruction, DOD provided biological and chemical protective gear to Civilian Reserve Air Fleet (CRAF) aircrews in order to

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[354] *See* Hall, *supra* note 466.

[355] *See* FM 3-61.1, *supra* note 247, ¶ 4-35.

[356] Joint Publication 3-11, Joint Doctrine for Nuclear, Biological, and Chemical (NBC) Defense § 8.a (July 10, 1995) [hereinafter JP 3-11]; DODD 1404.10, *supra* note 18, § 6.9.8; AFPAM 10-231, *supra* note 1, ¶¶ 3.8, 3.9.

[357] DODD 1404.10, *supra* note 18, at 6; AFPAM 10-231, *supra* note 1, ¶ 3.8.

[358] AFPAM 10-231, *supra* note 1, ¶ 3.9.1; DA Pam. 690-47, *supra* note 19, § 1-13, Clothing and Equipment Issue.

[359] DODI 3020.37, *supra* note 47, ¶ 8b, E3.1.2. The Unified Combatant Commander is responsible for establishing theater admission requirements for civilian employees and contractors which at minimum must include issuance of an identification card; POW training; Law of War training; issuance of and training in uniforms. DODD 1400.31, *supra* note 10, ¶ D.5; Dep't of Defense Directive 1400.32, DOD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures ¶ E.3.b-e (April 24, 1995) [hereinafter DODD 1400.32]; DODI 3020.37, *supra* note 47 (enclosure 3 delineates guidelines for theater admission procedures for contractors); AFPAM 10-231, *supra* note 1, ¶ 2.4. Air Force planning is directed by Air Force Instruction 36-507, (July 21, 1994) [hereinafter AFI 36-507]. *See also* JP 3-11, *supra* note 356, § 8.a. It is the deploying component's responsibility to ensure compliance with the theater admission requirements. DODD 1400.31, *supra* note 359, ¶ D.5. For civilians already in theater at the time of requirement establishment or update, the responsibility for compliance is shifted to the unit in-theater where the employee is assigned or attached. *See Id.*

obtain their compliance with the contract requiring them to fly into the theater.[360] DOD then restricted CRAF flights from access to airfields tainted by chemical or biological weapons.[361] Additionally, several corporations that had previously contracted to provide CRAF support reduced their involvement in the program following Desert Storm.[362] This is a significant issue in that CRAF provides approximately thirty-three percent of heavy airlift during call-up contingencies.[363] Today, chemical suits are stockpiled and ready for CRAF's utilization during a call-up.[364] However, all civilians will not be so forward-leaning in preparation.

Issuance to other civilians is ambiguous. Of non-affiliated persons, media members credentialed with the military have the only authoritative claim to this equipment. Since the military takes on security responsibilities for registered media personnel, specialized chemical gear may be provided.[365] Conversely, the military is not in a position to prevent civilian wear of uniforms, including specialized gear, in most circumstances except by restricting access to the uniforms or gear. For example, military members stationed at Prince Sultan Air Base in Saudi Arabia are not permitted to dispose of their uniforms in such a way that they could provide the civilian populace a complete uniform part.[366]

4. Civilian Use of Weapons

The U.S. asserts that it does not violate international law for a civilian employee or a contractor with an armed force to carry a weapon for personal defense.[367] However, as with the wear of uniforms, carrying arms openly is one of the four factors distinguishing combatants from non-combatants.

a. Civilian Employees and Contractors

The U.S. Code authorizes service secretaries to promulgate regulations authorizing civilian employees to carry weapons on duty.[368] Even so, the services and host nation law significantly limit carrying weapons overseas. Civilian employees and contractors may only carry a weapon in-theater in very

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[360] Zamparelli, *supra* note 6, at 14.
[361] *Id.*
[362] *Id.*
[363] *Id.*
[364] Peter Grier, *The Comeback of CRAF*, A.F. MAG. (July 1995).
[365] *See* FM 3-61.1, *supra* note 247, ¶ 4-35.
[366] This was the standing policy at the time the author was deployed to Prince Sultan Air Base, Saudi Arabia in the Summer of 1999.
[367] DODD 1404.10, *supra* note 18, ¶ 6.9.8; AFPAM 10-231, *supra* note 1, ¶ 6.3.4; JP 4-0, *supra* note 5, at V-7; DA Pam. 690-47, *supra* note 19, § 1-22, Geneva Convention, Prisoner of War Status, Combatant/Non-Combatant Status.
[368] 10 U.S.C. § 1585 (Jul. 31, 1958) (carrying firearms).

limited situations for personal defense and only with the express approval of the theater commander.[369] The commander "in light of the circumstances of each deployment" must carefully consider this "extremely sensitive matter."[370] The stated purpose is: "Civilians deployed to the operational area may be regarded by the enemy as combatants; therefore, combatant commanders may authorize the issue of weapons to DOD civilians and contractor employees on a by-exception basis for personal protection."[371] On the other hand, joint doctrine details several reasons for contractors not to be issued weapons and restricts the issuance during international armed conflict.[372] The Air Force holds that contractors should only be issued weapons with the express permission of the CINC, after consultation with host authorities, and only in the most unusual circumstances, such as protection from dangerous animals or bandits when there is not military force protection.[373] In any case, acceptance by a civilian of a firearm is strictly voluntary and based on the contract provisions for contractors.[374] Issued weapons must be military specification small arms using military specification ammunition.[375] The LOGCAP contractors do not permit their employees to carry weapons but the contractor supporting TOW/ITAS does allow weapons.[376]

Other laws may also prohibit arming civilian employees or contractors. Individuals whom a supervisor or commander knows or should have reason to know have a domestic violence conviction must be denied firearms in accordance with U.S. domestic law.[377] There may also be host nation legal restrictions on the issuance of firearms to civilians, as mentioned in Section III.C., Status of Forces Agreements (SOFAs), below.[378] U.S. commanders are responsible for civilian employees, and must abide by the SOFA. Although commanders are not responsible for contractor personnel who decide to arm themselves, commanders may not aid in the violation of host nation law. Since contractors are rarely covered under SOFAs, they will seldom be given waivers of host nation arming restrictions. Accordingly, U.S. commanders

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[369] *Id.*; DODD 1404.10, *supra* note 18, ¶ 6.9.8; JP 4-0, *supra* note 5, at V-7; DA Pam. 715-16, *supra* note 213, ¶ 5-3; FM 100-21, *supra* note 5, ¶ C-50.
[370] AFPAM 10-231, *supra* note 1, ¶ 2.3.3.
[371] JP 1-0, *supra* note 197, at O-2.
[372] JP 4-0, *supra* note 5, at V-7.
[373] Interim Policy Memorandum—Contractors in the Theater, *supra* note 5.
[374] AFPAM 10-231, *supra* note 1, ¶ 2.3; DP/DPXC Message, *supra* note 14, § 4(A); JP 4-0, *supra* note 5, at V-7; DA Pam. 690-47, *supra* note 19, § 1-12, Weapons and Training; DA Pam. 715-16, *supra* note 213, ¶ 5-3.
[375] AFPAM 10-231, *supra* note 1, ¶ 2.3.2; FM 100-21, *supra* note 5, ¶ C-50.
[376] E-mail response from Chris Heinrich, Brown & Root Corp., former LOGCAP contractor (May 1, 2001). Barnett Telephone Interview, *supra* note 243.
[377] Lautenberg Amendment, 18 U.S.C. §§ 922(d)(9), (g), (s), & 925(a)(1) (Sept. 30, 1996) (amending the Federal Gun Control Act of 1968, 18 U.S.C. § 922 (1968)); AFPAM 10-231, *supra* note 1, ¶ 2.3.1.
[378] *See* "Status of Forces Agreements" *infra* Part III.C.

will find themselves in the position of authorizing possession of or issuing weapons to contractors in few, if any, circumstances.

Commanders face the dilemma of authorizing the carrying of weapons prior to the need for their use when the situation may not warrant it, versus the urge to issue them when needed, just when the commander is consumed with directing detailed and complex operations. As with the wear of uniforms, commanders and civilians must consider that arming then will increase the chances civilians will be mistaken as military members. Joint Publication 4-0 acknowledges that the wear of arms by contractors in a "uncertain or hostile environment can cloud their status, leaving them open to being targeted as a combatant."[379] Authorization for a civilian to carry weapons should be strongly resisted except in the most extreme circumstances. Civilians associated with the U.S. were denied the right to carry weapons during Operation Uphold Democracy.[380]

Civilian employees must receive training in proper use and handling of the firearm in accordance with service regulations and be qualified prior to issuance of the weapon.[381] Contractors should also have this training when contractually required, either as a mandated theater admission requirement or provided at Individual Deployment Sites or Continental Replacement Centers.[382] This training should be conducted prior to deployment and should ensure the civilian understands they may be subjecting themselves to charges of violations of international law and loss of their protected status as non-combatants and POW protections should they use the weapon.[383] Although not stated in DOD or Air Force regulations, these standards should be established for contractor personnel.

b. Non-affiliated Persons

Members of the media may, and have, been restricted by the U.S. Armed Forces from carrying personal weapons. For example, one of the conditions for media to receive U.S. credentials during Operations Desert Shield and Desert Storm barred carrying weapons.[384] Other non-affiliated persons may be restricted from wear of weapons if in U.S. control, such as refugees seeking asylum on a U.S. vessel in the high seas, in a refugee camp overseen by the U.S., or NGOs and PVOs entering a U.S. compound.

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[379] JP 4-0, *supra* note 5, at V-7.
[380] CLAMO Haiti Lessons Learned, *supra* note 56, at 391.
[381] AFPAM 10-231, *supra* note 1, ¶ 2.3; DODD 1404.10, *supra* note 18, ¶ 6.9.8; Field Manual 23-35, Combat Training With Pistols and Revolvers (Oct. 3, 1988).
[382] *See* Army Policy on Contractors on the Battlefield, *supra* note 215; JP 4-0, *supra* note 5, at V-7.
[383] AFPAM 10-231, *supra* note 1, ¶¶ 1.5, 6.3.6, A4.16; Air Force Instruction 31-207, Arming and Use of Force by Air Force Personnel (Sep. 1, 1999).
[384] McHugh, *supra* note 51, Appendix C; Krejcarek Telephone Interview, *supra* note 69.

Otherwise, unless the mission involves buying back weapons from the civilians, the military will have little involvement in civilian wear of weapons.

5. Force Protection

Noncombatants require force protection resources.[385]

Noncombatants are only permitted to defend themselves, and even then they risk loss of their prisoner of war status if they are captured.[386] As a result, any civilians who live separate from the military, are not under the military's control, and are not trained in the proper use of force protection gear, present a concern to armed forces in the vicinity since these noncombatants may require force protection resources. Force protection involves the protection of service members, civilian employees, government contractors, family members, other U.S. citizens, as well as equipment and facilities.

For civilian employees as well as contractors, "[t]he government's responsibility for providing force protection derives from three factors: a legal responsibility to provide a safe workplace, a contractual responsibility which is stipulated in most contracts, and third, to enable the contractors to continue doing their job."[387] According to Joint Publication 3-11, "[t]he geographic combatant commander, or subordinate JFC, has the intrinsic responsibility to provide protection to U.S. civilians in the area of operations or joint operations area, consistent with capabilities and operational mission."[388] While it sounds easy, it is difficult to define exactly which persons must be protected and even more difficult to decide where the lines on force protection responsibilities are drawn. Depending upon the persons in question, the degree of hostilities or threat, and the location of the persons, force protection responsibilities may be with the chief of mission, a military commander, and/or the individual.

Effective force protection is only possible "through planned and integrated application of combating terrorism, physical security, operations security, personal protective services, supported by intelligence, counterintelligence and other security programs."[389] It involves the physical security of U.S. citizens and government contractors while not engaged in combat action. It includes a vast array of measures, which may involve

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[385] Major General Norman E. Williams and Jon M. Schandelmeier, *Contractors on the Battlefield*, ARMY MAGAZINE 32-35 (Jan. 1999).
[386] *See* "Civilian Use of Weapons" *infra* Part III.A.4.
[387] Dowling & Feck, *supra* note 45, at 69.
[388] JP 3-11, *supra* note 356, § 8 (emphasis omitted). This article will not address non-combatant evacuation operations as it assumes the civilians in issue will remain in theater when other U.S. citizens and designated aliens are evacuated. *See generally*, JP 3-07.5, *supra* note 25, at III-1; Dep't of Defense Directive 302.14, Protection and Evacuation of U.S. Citizens and Designated Aliens in Danger Areas Abroad (Nov. 5, 1990).
[389] Joint Publication 3-07.2, *Joint Tactics, Techniques and Procedures for Antiterrorism* (July 23, 1996). *See also*, Dep't of Defense Directive 2000.12, DOD Antiterrorism/Force Protection (AT/FP) Program (13 April 1999) [hereinafter DODD 2000.12].

requiring noncombatants to live on a military compound, guards and towers, NBC gear, arming, escorts, and operational security (OPSEC) to protect from many different threats.[390] Under policy, commanders must take protective measures to insulate their personnel from threats ranging from disease to terrorism.[391] Force protection can quickly drain a commander's scarce resources. So, there are limits to a commander's responsibility to persons other than the military within their area of responsibility.

a. Civilian Employees

Civilian DOD employees are part of the total force and the responsibility of the Unified Combatant Commander when located in the theater of operations.[392] As such, they must be "processed and supported in the same manner as military personnel of their employing Component," international agreements permitting.[393] Civilian employees must therefore be visible within a CINC's organization. To gain this visibility, civilian employees must be assigned or attached to a gaining activity unit identification code (UIC), which is stated on the employee's deployment temporary duty orders.[394]

The Unified Combatant Commander is responsible for establishing theater admission requirements for civilian employees.[395] The Chairman of the Joint Chiefs of Staff is responsible for incorporating theater admission requirements into Joint Operations Planning and Execution System.[396] It is the deploying Component's responsibility to ensure the theater admission requirements are administered and upheld.[397] For civilians already in theater, the responsibility for compliance is shifted to the in-theater unit where the employee is assigned or attached.[398]

The minimum theater admission requirements include, among other things, issuance of an identification card; prisoner of war training; law of war training; issuance of and training in uniforms and protective gear as required; immunizations; and cultural awareness training as provided to military

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[390] Of particular concern to commanders should be providing weapons or nuclear, biological and chemical gear to local contractors such as theater support contractors or subcontractors for external theater support, when they could be sympathizers with the enemy.
[391] *See* Dep't of Defense Instruction 2000.6, DOD Combating Terrorism Program Standards (Sept. 15, 1996); DODD 2000.12, *supra* note 389.
[392] Dep't of Defense Directive 1100.4, Guidance for Manpower Programs (Aug. 20, 1954); DODD 1400.31, *supra* note 10, ¶ D.4.
[393] *Id.*
[394] *Id.*
[395] *Id.* at D.5.
[396] DODD 1400.32, *supra* note 359, ¶ E.3a.
[397] DODD 1400.31, *supra* note 10, ¶ D.5.
[398] *Id.*

members in the theater of operations.[399] Passports, security clearances, procedures for casualty notification, "dog tags" and DNA sampling are also required.[400] Medical and dental examinations prior to entrance into the theater are required and medical care in-theater must be arranged.[401] They are also to be "furnished the opportunity and assistance with making wills and any necessary powers of attorney."[402]

b. Contractors

Force protection of contractors is primarily the responsibility of the contractor and of the Chief of Missions, usually the ambassador. The Department of Defense Antiterrorism/Force Protection Program requires defense contractors performing DOD contracts outside the U.S. to: affiliate with the Overseas Security Advisory Council; ensure their U.S. personnel register with the U.S. Embassy and third-country national personnel register with their government; comply with DOD regulations governing personnel overseas;[403] and provide antiterrorism and force protection awareness information to their personnel commensurate with the information DOD provides to its military, civilian and family members.[404] However, additional force protection from the military may still be required in times of crisis.

Ordinarily, responsibility for contractors falls to the Chief of Missions and not the military, although this issue is not settled in joint or service publications, and in reality, a commander will need to ensure the security of contractors whose services are essential to the operation.[405] When risk

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[399] DODD 1400.32, *supra* note 359, ¶ E.3.b.-e; AFPAM 10-231, *supra* note 1, ¶ 2.4. Air Force planning is directed by AFI 36-507, *supra* note 359. *See also* JP 3-11, *supra* note 356, ¶ 8.a.

[400] DODD 1400.32, *supra* note 359, ¶ E.3.f.-i.

[401] *Id.* at ¶ E.3.j-k.

[402] *Id.* at ¶ E.3.o.

[403] Dep't of Defense Directive 4500.54, Official Temporary Duty Travel Abroad (May 1, 1991), sets out specific antiterrorism requirements for visitors overseas and these are clearly made applicable to contractors through the DOD Antiterrorism/Force Protection Program. Generally, DOD requires the number of visits and visitors overseas should be minimal, and only when their purposes cannot be satisfied by other means. Visits should be arranged to require the minimum amount of an installation's equipment, facilities, time, services and personnel. If practicable, trips in the same general time and area should be consolidated. For more detail, refer to the directive.

[404] Dep't of Defense Directive 2000.12, DOD Antiterrorism/Force Protection, (AT/FP) Program ¶ 5.2.5 (Apr. 13, 1999).

[405] JP 4-0, *supra* note 5, at V-7; JP 1-04, *supra* note 5, at Q-3. *Cf.* FM 100-21, *supra* note 5, ¶ C-12, C-17 ("In an area of operation (AO), the senior military commander is responsible for accomplishing the mission and ensuring the safety of all deployed military, government civilians, and contractor employees" and "[w]hen contractors are deployed from their home stations, the Army will provide or make available force protection and support services commensurate with those provided to Department of Defense (DOD) civilian personnel and authorized by law.").

increases in a deployed environment, so too the cost of a contract increases.[406] If a contractor has to provide its own security escort or other high-level force protection, the cost of their services may become prohibitive. Accordingly, when contractually required, commanders assume the responsibility for the protection of U.S. contractors deployed in support of military operations.[407] Depending upon the contract requirements and the degree of danger in the area of operation, such high-level measures as armed escorts may be necessary in significant numbers. Nearly two infantry companies of Army soldiers were required every day to escort contractors on their daily distribution routes during Stabilization Force (SFOR) in Bosnia.[408] Operations in Somalia, likewise, required military escorts almost all of the time, where operations in Hungary required limited support.[409]

Not all contractors want the additional force protection. This also creates challenges for the commander. For example, contractors recently blatantly disregarded a commander's force-protection-driven directive that all personnel live in tents on the military compound.[410] The contractors instead moved into a local hotel, creating significant force protection, morale and contractor responsiveness concerns.[411] Judge advocates must be prepared to advise commanders on appropriate administrative actions as discussed above in command, control and influence of civilians.

It is the supported CINC's responsibility to ensure contractor visibility within his theater of operations.[412] This visibility is theoretically achieved through integrating systems support and external theater support contractors into the Time-Phased Force and Deployment Date (TPFDD).[413] However, lack of contractor personnel, material, and equipment visibility and control have been identified as concerns during wargames.[414] The Army has placed the responsibility to ensure accountability for U.S.-based contractors on the commanders of the Army Service Component Commands.[415] Units designated in-theater are responsible for administrative oversight and accountability, and for furnishing government materials as required by the contract, such as force protection, transportation, messing and billeting.[416]

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[406] FM 100-21, *supra* note 5, ¶ C-28.
[407] Army Policy on Contractors on the Battlefield, *supra* note 215; FM 100-10-2, *supra* note 5; DA Pam. 715-16, *supra* note 213, ¶ 5-3a; *see also* JP 4-0, *supra* note 5, at V-7.
[408] Palmer, *supra* note 36. *Cf* David L. Young, *Planning: The Key to Contractors on the Battlefield*, ARMY LOG. (May-June 1999) *available at* http://www.almc.army.mil/alog/may jun99/ms344.htm (on file with author).
[409] *Planning: The Key to Contractors on the Battlefield*, *supra* note 408.
[410] Hogan, *supra* note 410, at 15
[411] Hogan, *supra* note 410, at 15.
[412] JP 4-0, *supra* note 5, at V-3.
[413] *Id.* at V-4.
[414] Focused Logistics Wargame (FLOW 2010) Report of Results.
[415] AR 715-9, *supra* note 5, ¶ 1-5m(17).
[416] *Id.* ¶2-1a.

The contract should specify any requirement for a contractor to have weapons familiarization, immunizations, nuclear, biological, and chemical protective mask and clothing familiarization, and force protection training and measures.[417] If such a clause is in the contract, the government should ensure the personnel sent to fulfil the contract have the required training. Finally, regulatory requirements that contractors follow all theater entering and exiting procedures, and obey all general orders and force protection rules must be integrated into the contract to be enforceable as a contractual requirement.[418]

c. Non-Affiliated Persons

Members of the news media have been killed during combat and other high-intensity operations because they have chosen to place themselves close to military targets. A Japanese sniper killed the most famous U.S. World War II war correspondent, Ernie Pyle.[419] His distinctive, up-close and personal style of reporting made him famous but was only possible because he made invasions with the troops, dug his own foxhole on the frontlines and shared the "hardships of the soldiers he covered."[420] "In general it should not be forgotten that the appearance of a journalist on the battlefield is unlikely to have the effect of putting an end to the exchange of fire so that he can do his job. For that matter, Article 79 [of Protocol I] does not require this."[421]

The commander will be responsible for the protection of a media member that he allows to accompany the military.[422] However, when registering, the media member should sign a liability waiver that frees the military of responsibility if the media member is killed or injured during coverage of the operation.[423] Combatant commanders are required to assist the credentialed news media "in gaining access to military units and personnel conducting joint and multinational operations."[424] The U.S. takes the position that it will not exclude members of the news media from military operations solely to protect their personal safety.[425] Instead, the goal is that they should be allowed "to accompany the organizations during the conduct of their missions"[426] and the personal safety of the media "shall not be a factor in

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[417] JP 4-0, *supra* note 5, at V-3; AR 715-9, *supra* note 5, ¶ 2-1d; *See generally*, DA Pam. 715-16, *supra* note 213, ¶¶ 5-1, 5-2.
[418] *See* AR 715-9, *supra* note 5, ¶¶ 2-1e, 2-2e.
[419] William H. McMichael, *Honoring Ernie Pyle*, SOLDIERS (June 1995).
[420] *Id*.
[421] PILLOUD, *supra* note 60, at 922.
[422] JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS, *supra* note 8, at VIII-4.
[423] FM 3-61.1, *supra* note 247, § 4-46.
[424] JP 3-61, *supra* note 52, at II-5 (emphasis omitted). *See also*, DODD 5400.13, *supra* note 424, ¶ 4.4.2.
[425] JP 3-61, *supra* note 52, at II-4; DODD 5400.13, *supra* note 424, ¶ 3.2.
[426] JP 3-61, *supra* note 52, at II-4; DODD 5400.13, *supra* note 424, ¶ 4.4.2.

deciding the degree of access."[427] The media is adamant that their security is their own responsibility and they should not be denied access because of security concerns.[428] During the Operation Desert Storm ground offensive, war correspondents accompanied every combat division into battle.[429] Accordingly, it is evident that commanders will often be assisting the news media in placing themselves in harms way.

When the military operation permits open coverage, commanders are encouraged to allow the media to ride on military aircraft and vehicles whenever feasible.[430] Ground rules in addition to the credentialing rules may be established to media use of military transportation.[431] Commanders might be required to designate facilities for the news media.[432] If billeting and food is not available locally, the commander may also find himself providing these for the civilian news media.[433]

One option open to commanders to protect the media is to require the media representative to be escorted by a public affairs officer, as was required by the Operation Desert Shield guidelines for news media.[434] This, of course, is dependent upon the commander's manning and mission. Then Secretary of Defense Casper Weinberger made this point about the operation in Grenada, saying the military was "not able to guarantee any kind of safety to anyone. We just didn't have the conditions under which we would be able to detach enough people to protect all of the newsmen, cameramen, gripmen and all that."[435] In the end, media members are in a high-risk profession and must be prepared to ensure their own safety.

Commanders rarely have force protection obligations for other non-affiliated persons, and only when it is their assigned mission. For example, security has been provided to NGO and PVO personnel distributing humanitarian relief, such as the Somalia operations.[436] However, the demands for security by NGOs and PVOs cannot, and should not always be met. First-hand observers of the CMOC process have repeatedly witnessed demands made upon the military by NGOs and PVOs for support, supplies and security

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[427] DODD 5400.13, *supra* note 424, ¶ 3.2 (emphasis added).
[428] Media Day, Media Panel, Air Command and Staff College, Maxwell Air Force Base, Ala. (Apr. 26, 2001).
[429] JP 3-61, *supra* note 52, at II-7 (citing DOD Final Report to Congress, CONDUCT OF THE PERSIAN GULF WAR, Apr. 1992).
[430] JP 3-61, *supra* note 52, at III-4; DODD 5122.5, *supra* note 259, Encl. 3, ¶ 1.7; Dep't of Defense 4515.13-R, Air Transportation Eligibility, (Nov. 1994, through Ch. 3, Apr. 9, 1998); Air Force Instruction 35-101, Public Affairs Policies and Procedures (Dec. 1, 1999) at section G [hereinafter AFI 35-101].
[431] AFI 35-101, *supra* note 430 (also has example of the ground rules used in Operation Restore Hope at Fig. 6.4).
[432] JP 3-61, *supra* note 52, at IV-1.
[433] *Id.* at IV-2.
[434] McHugh, *supra* note 51, Appendix C.
[435] PETER YOUNG AND PETER JESSER, *supra* note 267, at 128.
[436] JP 3-08, *supra* note 76, at Vol. I, I-10.

that are unreasonable, unnecessary, and untenable in their effects upon the military mission.[437] Security for refugees, stateless persons and IDPs will only be an issue if such a person is on a U.S. vessel on the high seas, in U.S. territory seeking asylum, or is otherwise in U.S. control seeking temporary refuge, as discussed in Section III of this article.[438]

B. Under Control of the Enemy

> *Every person who falls into enemy hands must have some status under international law.* [439]

Close proximity to hostilities not only increases the likelihood of the civilian becoming an unlawful combatant, it increases the chances of capture by a hostile force. For example, in 1995, two U.S. citizens, hydraulic mechanic sub-contractors of McDonnell Douglas servicing a U.S. government contract and on loan to the Kuwaiti Air Force, accidentally went into Iraq where they were captured and held captive.[440] The U.S. negotiated with the Iraqi government to diplomatically seek their release after they were convicted by an Iraqi court for unlawful entry into Iraq and sentenced to eight years imprisonment.[441] Just days before their fourth month in captivity, they were released.[442] The increased presence of civilians in the battlespace, particularly contractors, requires judge advocates to be prepared to address this issue.

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[437] S*ee* CLAMO Haiti Lessons Learned, *supra* note 56, at 398, stating,

> NGO/PVO extremely concerned/almost hostile about lack of security provided to them by US. . . . Amazing what they expect from us—almost that we owe them. They hear we have 20,000 and expect that each one should be made available to them first for security; no regard whatsoever for our billions in equipment and thousands of soldiers also needing secured. No regard for our mission to stand up and secure a government. This piece needs to be briefed to these organizations during peacetime—what to expect, procedures for obtaining, etc. They have unreasonable expectations of the military.

[438] *See* "Refugees, Stateless Persons, and Internally Displaced Persons" *infra* Part III.B.13.

[439] Lieutenant Commander Stephen R. Sarnoski, *The Status Under International Law of Civilian Persons Serving with or Accompanying the Armed Forces in the Field*, THE ARMY LAWYER 31 (July 1994).

[440] Ann Devroy, *U.S. Seeks Release of 2 Held in Iraq*; *Civilians Are Said to Cross Border by Mistake*, WASH. POST, Mar. 18, 1995 at A19; *see also* Richard A. Serrano, *Families of 2 Held in Iraq Try to Suppress Anger, Fear*, LOS ANGELES TIMES, Mar. 29, 1995, at A1; Larry King, *David Daliberti Tells His Story*, LARRY KING LIVE, Transcript No. 1489-2 (Jul. 18, 1995).

[441] Larry King, *David Daliberti Tells His Story*, LARRY KING LIVE, Transcript No. 1489-2 (Jul. 18, 1995).

[442] Jamal Halaby, *Freed by Iraq, Two Americans Arrive in Jordan*, ASSOCIATED PRESS RELEASE (July 17, 1995).

The status of civilians who find themselves under the control of an opposition force is complex and depends upon a number of variables. Customary international law and a variety of treaties provide civilians with a range of protections. Which law applies to a given circumstance depends upon whether there was an armed conflict and whether that armed conflict was of an international or internal nature. The broadest and most developed protections apply to international armed conflict. Unfortunately, civilians and military alike have few protections in the types of missions the U.S. Armed Forces increasingly support: those not involving armed conflict, such as relief missions, or those not of an international character, such as encountered during peacekeeping missions revolving around sustained, organized insurrections or rebellions.[443]

1. Prisoner of War Status

The phrase "status upon capture" typically evokes visions of prisoners of war (POWs).[444] U.S. government civilian employees, contractors, and war correspondents who have "fallen into the power of the enemy" during the course of an *international armed conflict* and who are "persons who accompany the armed forces without being members thereof" are entitled to POW status.[445] This status requires release and return to the native government at the end of active hostilities unless the POW has criminal proceeding pending against him or he is serving criminal punishment.[446]

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[443] Unorganized or short-lived insurrection and criminal acts of banditry do not qualify as "armed conflict." Major John Embry Parkerson, Jr., *United States Compliance With Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 347, n. 30 (1991).

[444] Rules since the days of the Old Testament have found value in providing protections for prisoners taken during combat operations. When presented with such prisoners, the King of Israel asked the prophet Elisha,

> "'Shall I kill them, my father? Shall I kill them?' 'Do not kill them,' he answered. 'Would you kill men you have captured with your own sword or bow? Set food and water before them so that they may eat and drink and then go back to their master.' So he prepared a great feast for them, and after they had finished eating and drinking, he sent them away, and they returned to their master. So the bands from Aram stopped raiding Israel's territory."

2 Kings 6:21-23, New International Version.

[445] Geneva Convention III, art. 4A(4), *supra* note 2; Hague IV, art. 13, *supra* note 136. Although often referred to as "capture" the more correct phraseology is "fallen into the power of the enemy," a broader concept than capture, including for example, members of the armed forces who are under enemy control after surrender before repatriation. COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 50 (Jean S. Pictet ed., 1960).

[446] Geneva Convention III, arts. 118, 119, *supra* note 2.

During captivity, POWs are entitled to a number of protections.[447] They must be provided humane treatment to include adequate food, medical care, shelter, clothing, personal supplies and ability to conduct correspondence.[448] They may be interrogated but not tortured, threatened or coerced, nor may they be subject to public curiosity, insults, intimidation or violence.[449] POWs must be evacuated to a safe area.[450] They must be given opportunities for religious worship, recreational activities and study.[451] There are a variety of other protections and structures established in the Geneva Convention governing the treatment of POWs in international armed conflict.

To qualify as POWs, persons accompanying the armed forces must have "received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card."[452] Almost all DOD civilian employees, all war correspondents, and many contractors[453] will meet this requirement. For example, DOD requires that all "essential" contractors located overseas be issued identity cards.[454] Some contractors not authorized by the armed forces and not given identification cards will not receive these protections. For example, the theater support contractor and his employees who have been contracted to provide off base laundry service and whose sole association with the military is to pick-up and drop off cleaning will most likely not qualify as persons accompanying the armed forces.

Identification cards record the function for which the civilian accompanies the armed force.[455] The identification card does not itself create the legal status entitling a person to POW protections, but rather provides the civilian with a means to prove his status.[456] Each state has the right to determine by which criteria they will issue such identification cards.[457] The U.S. complies with these international law provisions ensuring the designated identity card is standard for all civilian personnel who accompany the armed

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[447] *See generally*, Geneva Convention III, *supra* note 2. If a person who accompanies the armed forces without being a member thereof comes under the control of enemy forces in an international armed conflict, and is wounded, sick or shipwrecked, he is protected under Geneva Convention I and II just as active duty military members. Geneva Convention I, art 13 (4), *supra* note 2; Geneva Convention II, art. 13(4), *supra* note 15. Wounded and sick persons must be treated humanely and on the same basis as non-prisoners and may not be subject to reprisals. Geneva Convention II, arts. 12, 46, *supra* note 15.

[448] Geneva Convention III, arts. 14-16, 25 – 28, 29 – 32, 71, *supra* note 2.

[449] *Id.* at arts. 13, 17.

[450] *Id.* at art. 19.

[451] *Id.* at arts. 34-38.

[452] *Id.* at art. 4A(4). See discussion *infra* note 459 for identification card requirements.

[453] Particularly systems support and external theater support contractors, and all those designated emergency- essential.

[454] DODI 3020.37, *supra* note 47, ¶ 6.3.

[455] IPSEN, *supra* note 133, at 95.

[456] COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 65, *supra* note 445; PILLOUD, *supra* note 60, at 923.

[457] *Id.*

forces.[458] All emergency-essential civilians, and those filling those positions are issued DOD identification cards.[459] The forms are issued before the civilian leaves the U.S. and are only issued to those who will enter regions of hostilities. They "must" be issued to civilians "accompanying the armed forces" prior to their deployment.[460] Civilian contractors that deploy into theater, such as systems support and external theater support contractors, are also issued DOD identifications cards.[461] Other civilians, such as some theater-support contractors, are under no international legal obligation to carry an identification card.[462]

Media members present special challenges in this area. Credentialed media members (war correspondents) were issued identification cards during Operations Desert Storm and Shield.[463] Although the cards were not like the military ID card, they did identify the media as DOD media accompanying the armed forces and entitled to O-4 (major) equivalent benefits when they complied with the ground rules and were with their assigned escort or unit.[464] Had the correspondent been captured while his unit was overrun, he would have been entitled to POW status.[465] One credentialed CBS news crew was captured in Iraq during the war while violating the credentials agreement. The media members decided to leave their media pool PA escort because they were not satisfied with the degree of news they were obtaining under the pool system.[466] Reporter Bob Simon and his three crewmembers, wearing desert BDUs, strayed into Iraqi hands when they improperly entered Iraqi-occupied Kuwait.[467] The Iraqis viewed them as possible spies because of their uniforms and equipment, and held them for forty-one days with part of the captivity sharing space with military POWs.[468] The U.S. did not claim the crewmembers were entitled to POW status and they were released only after Soviet President Mikhail Gorbachev and other world leaders pressured the

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[458] Dep't of Defense Instruction 1000.1, Identity Cards Required by the Geneva Conventions (June 5, 1991 Supp. through Ch. 2) [hereinafter DODI 1000.1].

[459] Dep't of Defense Directive 1000.22, Uniformed Services' Identification (ID) Cards (Oct. 8, 1997); Dep't of Defense Instruction 1000.23, DOD Civilian Identification Card (Dec. 1, 1998); Dep't of Defense Instruction 1000.13, Identification (ID) Cards for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals (Dec. 5, 1997); DODD 1404.10, *supra* note 18, ¶ 4.5.

[460] Air Force Instruction 36-3026 (Interservice), Identification Cards for Members of the Uniformed Services, Their Family Members, and Other Eligible Personnel ¶ 1.3.6 (July 14, 1998) [hereinafter AFI 36-3026]; AFPAM 10-231, *supra* note 1, ¶ 6.3.1.

[461] DODI 3020.37, *supra* note 47.

[462] *See* GASSER, HANDBOOK OF HUMANITARIAN LAW, *supra* note 60, at 210.

[463] Krejcarek Telephone Interview, *supra* note 69.

[464] *Id.*

[465] *Id.*

[466] Hall, *supra* note 274.

[467] *Id.*

[468] Mark Fineman, *Iraq Frees Captured CBS Crew; Network Credits Soviet Intervention*, LOS ANGELES TIMES A8c.1 (Mar. 3, 1991).

Iraqi government to release them.[469] The media did not want the crew to be viewed as POWs that could be lawfully held until the end of the conflict, but instead wanted their immediate release.[470]

Just as military members are accustomed to ensuring their identification card is always on their person, so too must civilians be sensitized to this requirement. Commanders, judge advocates, and contracting officers must consider which contractors should qualify for status as one "accompanying the armed forces without being a member thereof," and ensure identification cards are issued appropriately. POW treatment upon capture may depend upon it.

When doubt arises as to the status of an individual, he is presumed to be a POW until a competent tribunal determines his status.[471] He is to be given POW treatment if: he claims POW status; he appears to be entitled to such status; or a party to the conflict claims he is entitled to POW status on his behalf.[472] While being afforded POW treatment, his status is "detained person" until the tribunal determines his true status.[473] This situation may arise if a civilian accompanying the armed forces has lost their identity card.[474]

Civilians who accompany the armed forces and commit belligerent acts become unlawful combatants and are subject to trial, but do not lose their right to POW status.[475] Geneva Convention III, article 4A(4)'s definition of persons who accompany the armed forces without being members thereof establishes a certain category of civilians entitled to POW status. There is nothing in the Convention to further restrict the entitlement of POW status to those civilians who have not taken direct part in hostilities. Rather, "[p]risoners of war prosecuted under the law of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present

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[469] *See id.*

[470] Howard Kurtz, *CBS News Crew Held in Baghdad; Fate of Bob Simon, Others Now Up to Saddam*, THE WASH. POST, Style C1 (Feb. 16, 1991) (quoting CBS Vice President saying: "We are doing all we can to make clear to Iraq that they are not prisoners of war, that they are not spies. I am concerned Saddam Hussein understand that these four men are journalists and that they are non-combatants and that he make the decision to release them.") *Id.*

[471] Geneva Convention III, art. 5, *supra* note 2; Additional Protocol I, art. 45, *supra* note 2.

[472] Geneva Convention III, art. 5, *supra* note 2; Additional Protocol I, art. 45, *supra* note 2. The U.S. has objected to what it characterized as a relaxation of the POW treatment for irregular forces, but reasserted its support of POW treatment for combatants and entitlement to POW treatment until a tribunal has determined the prisoner's appropriate status. U.S. State Dep't Remarks, *supra* note 147.

[473] *See* ICRC INDEX OF INTERNATIONAL HUMANITARIAN LAW referencing Geneva Convention III, art. 5(2); Additional Protocol I, art. 45, *supra* note 2. The presumption that an individual who has committed a belligerent act is entitled to POW treatment does not conflict with the Additional Protocol I, art. 50, presumptions that individuals are civilians. Bothe et al., *supra* note 163, at 294-95 n.12; Sarnoski, *supra* note 439, at 31. Additional Protocol I, art. 50, presumption applies when a person is a target for attack and Geneva Convention III, art. 5, applies when one is in the custody of an adverse party.

[474] COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 77, *supra* note 445.

[475] *See* Geneva Convention III, arts. 4(A), 85, *supra* note 2.

Convention."[476] Provision of POW protections even to war criminals was a deliberate and considered application of the Convention and grew out of denial of such status and treatment during World War II.[477] As with other groups of persons entitled to POW status, they can still be tried for illegal acts in accordance with the provisions set forth in the Convention.[478]

Persons accompanying the armed forces without being members thereof are the only non-combatant civilians entitled to POW status.[479] Accordingly, NGO, PVO, journalists other than war correspondents, refugees, and IGO personnel, unless members of another armed force such as North Atlantic Treaty Organization (NATO) forces, are not entitled to POW status. However, the civilian may be entitled to other protections upon capture. What then are the protections afforded to civilians who do not qualify as POWs, either because the conflict is not an international armed conflict, or because they do not qualify as civilians accompanying the armed forces? Capturing parties may voluntarily afford them treatment comparable with that of a POW but international law requires less depending upon the nature of the operation and who the captured person is.[480]

2. Medical Personnel and Qualifying Aid Society Members

Certain personnel permanently assigned to a medical unit, and aid society members duly recognized and authorized by a governmental party are protected as "retained persons" if captured during *international armed conflict.*[481] This includes medical and hospital personnel assigned to ships other than a hospital ship.[482] Protected persons are afforded POW treatment at a minimum, although they do not have POW status.[483] They may be retained

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[476] Geneva Convention III, art. 85, *supra* note 2.

[477] COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 413-427, *supra* note 445.

[478] Geneva Convention III, arts. 82-90, *supra* note 2.

[479] IPSEN, *supra* note 133, at 95. The expansion of "combatant" in Additional Protocol I corresponds to POW protections being afforded to paramilitary or armed law enforcement agents. Additional Protocol I, arts. 43, 44, *supra* note 2. Recall that the U.S. objects to the redefinition of combatants.

[480] For example, the U.S. afforded POW treatment to detained persons during Operation Uphold Democracy in Haiti even though it was not an armed conflict triggering Geneva Convention III. *See* Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78 (1995); Memorandum of Agreement on Detention Facility between the Multinational Force and the Government of Haiti (Jan. 9, 1995) (reprinted in CLAMO Haiti Lessons Learned, *supra* note 56, at 295-296).

[481] Geneva Convention I, *supra* note 2; Geneva Convention II, *supra* note 15.

[482] Geneva Convention II, art. 37, *supra* note 15.

[483] Geneva Convention I, arts. 19, 30, *supra* note 2; Geneva Convention III, art. 33, *supra* note 2. Military members trained in medical auxiliary support such as auxiliary nurses, hospital orderlies and stretcher-bearers are classified separately from the groups listed in the text

"only in so far as the state of health, the spiritual needs and the number of prisoners of war require."[484] Should their retention not be "indispensable" for those listed reasons, they must be returned to their government as soon as transportation infrastructure allows and military requirements permit.[485] In addition, they are assured the right to continue providing medical treatment for other captured personnel unless the enemy has otherwise provided medical care for the wounded and sick.[486] They may not be compelled to perform other forms of work.[487]

Protected personnel include doctors, nurses, technicians, orderlies, and any medical personnel "exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, [and] staff exclusively engaged in the administration of medical units and establishments."[488] Protected personnel also include "[t]he staff of National Red Cross Societies and that of other Voluntary Aid Societies, duly recognized and authorized by their Governments" engaged in activities listed above when those personnel are "subject to military laws and regulations."[489] Parties to the conflict must notify each other of the names of such qualifying organizations.[490]

Medical and hospital personnel, and crews of a hospital ship have additional protections.[491] They are immune from capture while on the ship, even if there are no wounded or sick aboard.[492] This immunity from capture includes officially recognized relief societies, National Red Cross Societies, and private persons who are under the control of a party to the conflict with their own government's consent and when the opposing state to the conflict has been notified of their involvement.[493]

National Red Cross and voluntary aid societies of a neutral country may also qualify for protections if the neutral government and the government of the party to the conflict assent to the societies' aid and the personnel of the

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accompanying this footnote. Auxiliary personnel are afforded POW status when captured. Geneva Convention I, arts. 25, 29, *supra* note 2.

[484] Geneva Convention I, art. 28, *supra* note 2.

[485] *Id.* at art. 30.

[486] *Id.* at arts. 19, 28; Geneva Convention II, art. 37, *supra* note 15; Geneva Convention III, art. 33, *supra* note 2.

[487] Geneva Convention III, art. 33, *supra* note 2; Additional Protocol I, art. 16, *supra* note 2.

[488] Geneva Convention I, art. 24, *supra* note 2. That these personnel could be civilians was recognized as early as 1863 in the Resolutions of the Geneva International Conference (the founding Conference of the ICRC) Geneva, arts. 5-7 (Oct. 26-29, 1863) (reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 275, *supra* note 2).

[489] Geneva Convention I, art. 26, *supra* note 2.

[490] *Id.*

[491] Geneva Convention II, *supra* note 15.

[492] *Id.* at art. 36.

[493] *Id.* at art. 25.

societies are placed under the control of the party to the conflict.[494] The opposing party to the conflict must be notified of this arrangement.[495] They may not be detained, but must be returned to their country or to the state where they were of service as soon as transportation and military concerns allow.[496] Pending their release, they should also be allowed to care for sick and wounded, preferably of the party to the conflict they were serving prior to capture.[497]

As with civilians accompanying the armed forces, medical personnel protected under Geneva Convention I and II must also be provided identity cards by their home government.[498] They have the additional requirement of wearing, affixed to the left arm, a water resistant armlet bearing a distinctive emblem so they can easily be identified as medical protected personnel.[499] If medical or relief personnel commit acts harmful to the enemy, they lose their civilian status protections although not the status itself.[500]

During armed conflict *not of an international nature*, medical personnel are protected under Additional Protocol II.[501] Additional Protocol II does not directly discuss detaining such persons. However, medical persons are to be respected, protected, and helped with their duties.[502] They may not be forced to work in ways not compatible with their medical role nor prevented from performing their medical duties to any wounded or sick.[503] The doctor-patient privilege is recognized and they must not be required to provide information on those under their care.[504]

3. United Nations and Associated Personnel

If a civilian qualifies as "United Nations personnel" or "associated personnel" in a qualifying U.N. mission and he does not qualify for protections under one of the four Geneva Conventions, he may be afforded additional significant protections by the Convention on the Safety of United Nations and Associated Personnel.[505] U.N and associated personnel, when detained in the

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[494] Geneva Convention I, art. 27, *supra* note 2.
[495] *Id*.
[496] *Id*, at art. 32.
[497] *Id.*
[498] Geneva Convention I, arts. 27, 40, *supra* note 2; Geneva Convention II, art. 42, *supra* note 15; Additional Protocol I, art. 18, *supra* note 2.
[499] Geneva Convention I, art. 40, *supra* note 2; Geneva Convention II, art. 42, *supra* note 15.
[500] Additional Protocol I, art. 13, *supra* note 2.
[501] Additional Protocol II, art. 9-11, *supra* note 152.
[502] *Id.* at art. 9.
[503] *Id.* at arts. 9, 10.
[504] *Id.* at art. 10.
[505] Safety of U. N. and Associated Personnel Convention, art. 2, *supra* note 97. The Convention entered into force on Jan. 15, 1999 for approximately 27 states that have ratified or acceded to it. The U.S. has signed, but not ratified, the convention although it has been ratified by some of our allies such as the United Kingdom and Germany. Article 20 of the Convention

performance of their duties on qualifying missions, may not be interrogated and must be promptly released and returned to the U.N. or appropriate authorities.[506] Pending their release, they must be provided treatment "in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949."[507] The expansive protections of these provisions grew up out of the dramatic increase during the 1990s in deliberate killings of U.N. personnel while on peacekeeping missions.[508]

Qualifying operations are those established by the "competent organ of the U.N. in accordance with the Charter and conducted under U.N. authority and control." [509] Operations authorized under Chapter VII of the U.N. Charter, where any such personnel are "engaged as combatants against organized armed forces and to which the international law of armed conflict applies," do not qualify as operations triggering the Convention's protections.[510] All other operations authorized by the Security Council and operations authorized by the General Assembly to maintain or restore international peace and security trigger the Convention.[511] Additionally, the Convention applies when the General Assembly or Security Council have declared "there exists an exceptional risk to the safety of the personnel participating in the operation" whether or not the operation is conducted under U.N. command and control.[512]

U.N. personnel are the military and the civilian component of a U.N. operation deployed or engaged by the U.N. Secretary-General, and who are present in an official capacity in the area where a U.N. operation is being conducted.[513] These are the "blue-hats," such as those supporting U.N. Protection Force in the former Yugoslavia (UNPROFOR) and U.N. Mission in

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details that this Convention supplements, rather than overrides, international humanitarian law and universally recognized standards of human rights, such as Common Article 3 protections.

[506] Safety of U.N. and Associated Personnel Convention, art. 8, *supra* note 505.

[507] *Id.*

[508] *See* Note by Secretary-General, U.N. Doc. A/AC.242/1 (1994). *See also* Antoine Bouvier, Convention on the Safety of United Nations and Associated Personnel, International Review of the Red Cross, Dec. 31, 1995, No. 309, at 638-666.

[509] Safety of U.N. and Associated Personnel Convention, art. 1, *supra* note 505.

[510] *Id.* at art. 2(2). The Convention will protect those who act in self-defense in other than sustained combat in actions authorized outside of Chapter VII. *See* Bloom, *supra* note 97, at 626. There is an argument to be made that similar to the "law of the flag," when the U.N. conducts a forcible mission under Chapter VII, the associated forces are immune from the authority of the receiving state. *See* U.N. PEACE OPERATIONS, *supra* note 93, Chap. 5, Introduction. Alternatively, the troops and associated personnel are protected by the law of the flag of their nation, rather than under the auspices of the U.N. Either of these approaches will not confer protections or a status upon those captured, rather protect forces from customs, taxes, criminal jurisdiction and the like. Operation Desert Storm is an example of a peace enforcement action authorized under Chapter VII of the U.N. Charter, *supra* note 81. Operation Provide Relief in Somalia was authorized under Chapter VI of the Charter.

[511] Safety of U.N. and Associated Personnel Convention, arts. 1, 2, *supra* note 505.

[512] *Id.*

[513] *Id.* at art. 1(a).

Haiti (UNMIH).[514] "Associated personnel" includes persons assigned by a government with the agreement of the competent organ of the U.N. [515] IGO personnel such as NATO forces assisting with UNPROFOR, and U.S. forces and associated civilians supporting the Unified Task Force in Somalia (UNITAF), but not under U.N. command and control would qualify as "associated personnel."[516] "Associated personnel" also includes, among others, NGO personnel contractually linked to the U.N. by an agreement with the Secretary-General.[517] An NGO is not incorporated into the U.N. system through mere association or registration with the U.N. Department of Public Information, and therefore, such NGOs and their personnel are not automatically entitled to any immunities, privileges or special status afforded to U.N. and associated personnel.[518]

As with Geneva Convention III, this Convention requires qualifying individuals to carry identification documents.[519] These documents need not be issued by the U.N. but do identify the individual with the U.N. or the authorized operation. Wear of a U.N. designator on the clothing is not required.[520]

4. Expert on Mission Status

Certain experts engaged by the U.N. are protected under the Convention on Privileges and Immunities of the United Nations.[521] Such an

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[514] Bloom, *supra* note 510, at 622.
[515] Safety of U.N. and Associated Personnel Convention, art. 1(b), *supra* note 505.
[516] Bloom, *supra* note 510, at 623.
[517] *Id.* Many NGOs, governments and U.N. agencies argued the convention should be more expansive to cover all employees in the field rather than limiting coverage to designated operations. However, the prevailing view was to retain focus on U.N. and associated personnel involved in peacekeeping. *Id.* at 624.
[518] Department of Public Information, Non-governmental Organizations Section, *NGOs and the Department of Public Information: Some Questions and Answers*, *supra* note 89.
[519] Safety of U.N. and Associated Personnel Convention, art. 3, *supra* note 97.
[520] *Id.*
[521] Convention on Privileges and Immunities of the United Nations, Feb. 13, 1946, art. VI, 21 U.S.T. 1418, T.I.A.S. No. 6900, 1 U.N.T.S. 15, T.S. 993 (entered into force on Apr. 29, 1970). Through an outgrowth of article 105 of the U.N. Charter, the U.N. "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes" and U.N. representatives shall have such privileges and immunities "as are necessary for the independent exercise of their function." U.N. property, funds and assets are also protected in Article II; communications in Article III; member representatives in Article IV; and U.N. officials in Article V. U.N. Charter, *supra* note 81.

The protections for experts under the 1946 Convention on Privileges and Immunities of the U.N. is broader in scope than the 1994 Safety of U.N. and Associated Personnel Convention. The 1946 Convention protects persons on U.N. missions authorized under Chapter VII of the U.N. Charter while the 1994 Convention specifically excludes its coverage from such missions. *See* U.N. Charter, *supra* note 81.

individual is referred to as in "expert on mission status" and is an individual performing missions for the U.N. and not qualifying as a U.N. official.[522] Experts on mission are designated by the Secretary-General of the U.N.[523] and are afforded immunity from arrest or detention and immunity from seizure of their personal baggage and treatment of such baggage equivalent to diplomatic envoys.[524] These privileges and immunities apply while traveling to and from their mission, as well as the time of their actual U.N. mission.[525]

For example, U.S. Army Chief Warrant Officer Michael Durant was captured on October 3, 1993, in Mogadishu, Somalia, during Operation Restore Hope. The U.N. and U.S. position on his status was that he was an expert on mission rather than a prisoner of war.[526] After a great deal of diplomatic negotiation, CWO Durant was released to the Red Cross 11 days after capture, and to the U.S. the next day.[527] U.S. aircrews flying in the former Yugoslavia in support of U.N. Protective Force (UNPROFOR) were also considered experts on missions.[528]

5. Universal Declaration of Human Rights

Civilians "accompanying the armed forces" captured during international armed conflict who carry U.S. identification cards, medical personnel, and civilians captured while under the auspices of U.N and associate personnel receive significant protections as long as they do not commit acts hostile to a party to the conflict. Protections for other individuals are much more limited. Requirements to turn individuals over to their state's government at the conclusion of hostilities, to evacuate them from combat zones, to limit their criminal liability, and a variety of other protections are conspicuously missing from customary law and most treaties.

Basic humane treatment as set forth in the Universal Declaration of Human Rights has the most expansive applicability of all international law by providing guarantees for all people at *all times* and in all locations.[529] Many

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The Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, does not refer to experts but does provide immunity for administrative and technical staff of the mission in arts. 1 & 37.

[522] *Id.*

[523] *See* U.N. PEACE OPERATIONS, *supra* note 93, at 224.

[524] Convention on Privileges and Immunities of the United Nations, art. VI, § 22, *supra* note 521. They are also afforded legal immunity for their spoken or written acts; inviolability of their documents and papers as well as the right to use coded and sealed communications with the U.N.; and "the same facilities in respect of currency or exchange restrictions as are accorded to representative of foreign governments on temporary official missions."

[525] *Id.*

[526] MARK BOWDEN, BLACK HAWK DOWN: A STORY OF MODERN WAR (1999).

[527] *Id.*

[528] U.N. PEACE OPERATIONS, *supra* note 93, at 224.

[529] Universal Declaration of Human Rights 71, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter Universal Declaration].

provisions of the Universal Declaration, which is not, itself, a legally binding document, reflect customary international law on basic human rights for all mankind. These protections exist for everyone during international and internal actions, as well as during times when actions do not rise to the level of "armed conflict."

Individuals are not protected from being detained, but are protected from arbitrary and capricious treatment. The Universal Declaration does not specifically address the status of or protections to be afforded people who find themselves in the hands of opposition forces. Relevant minimum protections reflected in the Universal Declaration include the right to "life, liberty and security of person."[530] Freedom from torture and cruel or inhuman treatment or punishment is guaranteed.[531] Individuals have a right to freedom from arbitrary arrest and detention and to fair and just trial by an impartial tribunal.[532]

6. Common Article 3

Civilians who fall into enemy hands during *armed conflict* who "tak[e] no active part in the hostilities" qualify for protections found in an article common to each of the four Geneva Conventions.[533] Common Article 3 has been held to apply during international and non-international armed conflict.[534] It does not protect civilians when there is no armed conflict, such as during some forms of military operations other than war. Like the Universal Declaration, Common Article 3 is very general and primarily provides that persons must be treated humanely and may not be murdered, treated cruelly, tortured, taken hostage, or be subject to outrages on their personal treatment, or be criminally sentenced or executed without previous judgments pronounced by a regularly constituted court. They must also be afforded judicial guarantees recognized by civilized persons.[535]

7. Additional Protocol II

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[530] *Id.* at art. 3.
[531] *Id.* at art. 5.
[532] *Id.* at arts. 7-11.
[533] Geneva Conventions I – IV, art. 3, *supra* notes 2 and 15 [hereinafter Common Article 3].
[534] The article states it applies to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." High Contracting Parties are the state signatories to the U.N. Charter. The protections of Common Article 3 have also been recognized as customary international law applicable to any armed conflict. Prosecutor v. Dusko Tadic A/K/A/ "Dule," Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No. IT-94-1-AR72 (Oct. 2, 1995); Nicaragua v. United States of America, Judgment, I.C.J. (June 27, 1986) at ¶ 218.
[535] Common Article 3, *supra* note 533.

The 1977 Additional Protocol II to the 1949 Geneva Conventions was specifically designed to expand the humanitarian provisions afforded in Common Article 3.[536] Additional Protocol II provides protections for civilians during most *non-international armed conflicts*.[537] While the U.S. has signed Additional Protocol II, the Senate has not ratified it. However, much of Protocol II is arguably reflective of customary international law and the U.S. asserts that it should apply to all armed conflicts covered by Common Article 3.[538] In other words, it would apply to all non-international armed conflicts except "internal disturbances, riots and sporadic acts of violence."[539]

All civilians "who do not take a direct part or who have ceased to take part in hostilities" must be treated humanely and may not be made victim of torture, murder, mutilation, corporal punishment, collective punishment, terrorism, humiliation, rape, degrading treatment, indecent assault, enforced prostitution, slavery, pillage, other violence to live or mental health, or outrages on personal dignity, be taken hostage or be threatened with any such actions.[540] Additional Protocol II adds detail to these fundamental guarantees setting forth basic treatment for detainees. Minimum protections include the right to food, potable water, health and hygiene protections, receive relief, practice of religion and spiritual assistance, and work conditions similar to the civilian population.[541] Due process rights are also guaranteed.[542] Interned or detained persons should also be provided, to the extent possible, medical examinations and care consistent with the standard of care afforded non-

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[536] Letter from Secretary of State to President Ronald Reagan, *supra* note 137; *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AM. J. INT'L L. 910 (1987) (reprinting Letter of Transmittal of Protocol II Additional to the Geneva Conventions of 12 August 1949 from the President of the United States, to the United States Senate).

[537] Additional Protocol II, art.1, *supra* note 152; Additional Protocol II purports to exclude from its coverage: (1) international armed conflict between states as recognized in the four Geneva Conventions; (2) armed conflicts termed wars of "national liberation" in Article 1(4) of the Protocol; (3) non-international armed conflict not covered by any of the Geneva Conventions, except article 3, such as "guerrilla conflicts in which insurgent groups do not control substantial territory on a permanent basis or conduct sustained and concerted regular military operations"; and (4) internal violence not rising to the level of "armed conflict" such as riots and sporadic terrorist acts. The U.S. supports the exclusion of the first and fourth types of conflicts from the protections of Additional Protocol II, but disagrees with the exclusion of "liberation wars" as set forth in the second exception, and guerilla wars and insurgent conflicts where the insurgents do not hold territory and conduct regular, sustained military operations as defined in the third exception. Letter from Secretary of State to President Ronald Reagan, *supra* note 137.

[538] Letter from Secretary of State to President Ronald Reagan, *supra* note 137 (objecting to the limited types of internal conflicts Additional Protocol II covers).

[539] Letter from Secretary of State to President Ronald Reagan, *supra* note 137.

[540] Additional Protocol II, art. 4, *supra* note 152.

[541] Additional Protocol II, arts. 2, 4, 5, *supra* note 152; Letter from Secretary of State to President Ronald Reagan, *supra* note 137.

[542] Additional Protocol II, art. 6, *supra* note 152.

detained civilians—including confinement away from hostilities, accommodation and supervision by one of the same gender unless they are lodged together as a family, and the ability to send and receive a reasonable number of letters and cards.[543] Wounded and sick civilians, whether they acted as belligerents or not, are protected with humane and medical treatment.[544] Children have additional protections such as education, including moral and religious education in accordance with their parents' desires.[545]

8. Additional Protocol I

Additional Protocol I provides expanded fundamental protections during *international armed conflict*. Similar to Common Article 3, it requires humane treatment for all persons in the power of a state party to the conflict.[546] Its protections extend even to unlawful combatants.[547] The physical and mental health of such persons may not "be endangered by any unjustified act or omission."[548] These persons are afforded protections from "violence to life, health, physical or well-being," "outrages to personal dignity," punishment that is not individualized and convictions by other than "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure."[549] Women and children are afforded additional recognition and respect to protect their bodies from sexual crimes and to limit their separation from each other.[550] For example, pregnant women and those with dependent children receive priority in examination and satisfaction of cases against them that result in their arrest, detention or internment.[551] As another example, children under the age of fifteen who directly participate in hostilities even as members of an armed force receive special protections beyond those afforded to other POWs.[552]

9. Geneva Convention IV

Geneva Convention IV generally protects civilians during *international armed conflict*, when the civilian is in the hands of a state of which they are not nationals and of which their state has no normal diplomatic ties. [553] Geneva IV

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[543] *Id.* at art. 5.
[544] *Id.* at art. 7.
[545] *Id.* at art. 4.
[546] Additional Protocol I, arts. 11, 45(3), 75, *supra* note 2. The U.S. has not objected to this provision as it represents customary international law. *See supra* note 147.
[547] *See* COMMENTARY, ADDITIONAL PROTOCOLS, *supra* note 109, at 837.
[548] Additional Protocol I, art. 11, *supra* note 2.
[549] *Id.* at art. 75.
[550] *Id.* at arts. 76-77.
[551] *Id.* at art. 76.
[552] *Id.* at art. 77.
[553] Geneva Convention IV, art. 4, *supra* note 2.

protections for refugees and stateless persons are more extensive and are discussed below. Citizens of states with diplomatic ties (such as states neutral to the conflict, or co-belligerent states), except refugees, must look elsewhere for protection.[554] Geneva Convention IV does not protect civilians who qualify for protection as POWs, or other protections afforded by the Geneva Conventions, such as to medical personnel.[555] Civilians who have, or are definitely suspected to have directly participated in hostilities against the party in whose hands they find themselves will not enjoy protection of those portions of the Convention prejudicial to the security of that state.[556] Unlawful combatants only retain due process and basic humane treatment protections of the Convention.[557]

The provisions of Geneva Convention IV regarding seized persons will not protect civilian employees and contractors who are "civilians accompanying the armed forces" since they are protected under the POW protections. Thus, the Convention provisions on captured civilians will likely only protect theater support or external theater support contractor third-country national employees who are citizens of states that do not have diplomatic ties with the detaining power, and non-affiliated persons other than war correspondents from countries that have no normal diplomatic relations with the capturing state. For example, British personnel manning a British mission who were seized by Iraqi forces during the 1990 invasion of Kuwait were protected under the Convention.[558]

Civilians protected under Geneva Convention IV are entitled to humane treatment, respect for their person, homes, honor, family rights, religious convictions and practices, and protected against threats or acts of violence, insults, and public curiosity.[559] States may, however, institute necessary control and security measures.[560] Protected persons may, under limited cases,

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[554] *Id.* However, the provisions protecting civilians from the consequences of war as set forth in Part II of the Convention are much broader in application and protect the entire civilian population residing in the territory of any party to the conflict. *Id.* at art. 13. The discussion of Geneva Convention IV will not delve into rules governing occupied territories, even though the Convention has several provisions relating to occupations.

[555] *Id.* at art. 4.

[556] *Id.* at art. 5. While not further developed in the Convention, the commentary states, "what is meant is probably above all espionage, sabotage and intelligence with the enemy Government or enemy nationals. The clause cannot refer to a political attitude towards the States, so long as that attitude is not translated into action." COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 56 (Jean S. Pictet ed., 1958).

[557] Geneva Convention IV, art. 4, *supra* note 2.

[558] HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 270 (1992).

[559] Geneva Convention IV, art. 27, *supra* note 2.

[560] *Id.*

be "arrested," "detained" or ultimately "interned."[561] "Internment is a drastic restriction of personal freedom" and may only be accomplished in one of two instances: "it is necessary for imperative reasons of security" or "as a penalty to be imposed on civilians."[562] Established procedures for interning civilians afforded treatment substantially corresponding to POWs, although they must be housed separately from POWs.[563] Civilians may be interned no longer than necessary for security reasons, with the exception of those interned in relationship to a criminal proceeding or sentence.[564] Accordingly, at the end of hostilities, internees not awaiting criminal trial or serving a sentence shall be repatriated or returned to their last place of residence.[565]

10. Journalists Engaged in a Dangerous Profession

As mentioned above, media members that qualify as war correspondents and have identification cards are persons accompanying the armed forces and entitled to POW status. Journalists who are not war correspondents, such as those from a country not party to hostilities and freelance journalists, are protected as ordinary civilians and will not qualify for POW status.[566] Civilian "journalists engaged in dangerous professional missions in areas of armed conflict" were specifically recognized in Additional Protocol I, although not afforded a special status.[567]

Because journalists are at times in areas of danger comparable to that encountered by combatants, and higher than that of other civilians, Additional Protocol I sets them out as a special category of civilian.[568] Prior to Additional Protocol I, and other than protections for war correspondents, there were no special recognition of the media.[569] Additional Protocol I does not provide protections to the media beyond that of ordinary civilians, rather it only clarifies that such journalist are civilians.[570] This clarification is important when examining in what activities media members engage. For example, they

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[561] Internment can include being put into a camp and guarded. *See* Geneva Convention IV, arts. 41-3, 68, 78p, ¶ 1, *supra* note 2; GASSER, HANDBOOK OF HUMANITARIAN LAW, *supra* note 60, at 288. Although these provisions are only binding in international armed conflict, the U.S. has adopted the policy of applying it in all armed conflict.

[562] Geneva Convention IV, arts. 41-3, 68, 78p, ¶ 1, *supra* note 2; GASSER, HANDBOOK OF HUMANITARIAN LAW, *supra* note 60, at 288.

[563] Geneva Convention IV, arts. 79–141, *supra* note 2.

[564] *Id.* at art. 134.

[565] *Id.* at arts. 133, 134; GASSER, HANDBOOK OF HUMANITARIAN LAW, *supra* note 60, at 291.

[566] *See* Additional Protocol I, art. 79, *supra* note 2. *See also* PILLOUD, *supra* note 60, at 918. It is interesting to note that journalists of any state are protected as civilians, while other protections referenced for civilians are linked to whether they are linked to a party to the hostilities. Gasser, *Protection of Journalists*, *supra* note 58, at 3-18.

[567] Additional Protocol I, art. 79, *supra* note 2.

[568] *See* PILLOUD, *supra* note 60, at 918.

[569] *Id*.

[570] *Id.* at 920.

may physically accompany an armed force into an area of hostilities, rely upon military logistics, and transmit information on enemy activities out of theater. Such activities do not result in the loss of civilian protections.[571] However, there are limits to the activities the media may engage in. Their protections are contingent upon their taking no "action adversely affecting their status as civilians."[572] In other words, just as other civilians, they may not "take direct part in hostilities."[573]

A credentialed media representative should be issued an identification card attesting to his status as a journalist.[574] As with civilian employees and associated contractors, the identification card does not itself create the legal status of the journalist, but rather provides him with a means to prove his status.[575] Freelance journalists may also be issued identification cards.[576] A state government provides this card.[577] Each state has the right to determine by which criteria they will issue such identification cards and credentials.[578] Ordinarily, the identity card "should be issued by the authorities either of his own State or the State of residence or the State where the press agency or organization employing him is situated."[579] The U.S. complies with these international law provisions ensuring the designated identity card that complies with Annex II of Protocol I,[580] such as Defense Department Form 489, and is standard for all civilian personnel who accompany the armed forces.[581] The form is issued before the civilian leaves the U.S. and is only issued to those who will enter regions of hostilities.[582]

A journalist, other than a war correspondent, taken in enemy territory may be "prosecuted if he has committed an offence, or interned if necessary for the security of the detaining power. If not, he must be released."[583]

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[571] *See id.*
[572] Additional Protocol I, art. 79, *supra* note 2.
[573] Geneva Convention III, art. 4A(4), *supra* note 2; Additional Protocol I, art. 51, *supra* note 2; GASSER, HANDBOOK OF HUMANITARIAN LAW, *supra* note 60, at 210, 232, 233; AFPAM 10-231, *supra* note 1, ¶ 6.3.3.
[574] GASSER, HANDBOOK OF HUMANITARIAN LAW, *supra* note 60, at 228. Geneva Convention III, art. 4A(4), Annex IV, *supra* note 2, has an example of such an identity card.
[575] PILLOUD, *supra* note 60, at 923.
[576] Additional Protocol I, art. 79, *supra* note 2.
[577] *Id.*
[578] PILLOUD, *supra* note 60, at 923.
[579] *Id.*
[580] Because the identity card provided in the Conventions is only a model, "[s]tates have some degree of latitude as regards the lay-out of their identity cards. However, there are limitations. It seems clear that a card issued by a national authority must contain, in one form or another, all the information specified in the model. Other information may be added where necessary." PILLOUD, *supra* note 60, at 923.
[581] DODI 1000.1, *supra* note 458.
[582] AFI 36-3026, *supra* note 460, ¶ 1.3.6.
[583] Geneva Convention III, art. 4A(4), *supra* note 2; Additional Protocol I, art. 79, *supra* note 2; Gasser, *Protection of Journalists*, *supra* note 58, at 3-18.

Journalists who are nationals of a third, non-belligerent state and are captured by a party to the conflict benefit from normal peacetime legislation. They may be interned if the detaining power has sufficient charges against them. If not, they too must be released.[584]

11. Miscellaneous Additional Protections

There are a few additional protections afforded to particular and limited groups of civilians. Some of these protections may apply to IGO, NGO or PVO personnel. For example, although the U.S. has signed but not ratified the Convention for the Protection of Cultural Property in the Event of Armed Conflict, nations such as Australia, Brazil, Germany, Egypt, France, Mexico, Turkey and additional nations that may participate with the U.S. in allied and coalition operations have ratified the Convention and will be bound thereby. Civilians engaged in safeguarding and ensuring respect for cultural property must be allowed to carry on the performance of their duties protecting cultural property that has fallen to the enemy.[585] These persons may wear distinctive armlets as referenced in the convention and must carry an identification card.[586]

12. U.S. Operations and a Hypothetical Situation

The U.S. Armed Forces has properly and appropriately held civilians in custody during a variety of operations. Civilians, even during operations other than war, may be interrogated in accordance with reasonable criteria that respects human dignity and is for appropriate command purposes, as was the case in Haiti during Operation Restore Democracy where the ICRC praised U.S.-supervised detention facilities.[587] Detained civilians were placed in a temporary detention facility where they enjoyed a high standard of humane treatment and due process while they awaited interrogation and transfer to Haitian facilities. The ICRC carefully and thoroughly monitored the facility and "became strong supporters of the [Joint Detention Facility] when criticism arose from the media and several detainee family members."[588] In fact, the facility "became one of the most conspicuous successes of Uphold Democracy."[589]

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[584] *Id.*
[585] Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention), arts. 1-4, 15, May 14, 1954 (entered into force Aug. 7, 1956) *available at* http://exchanges.state.gov/education/ culprop/ hague.html (last visited Nov. 14, 2001) (on file with the Air Force Law Review).
[586] *Id.* at art. 21.
[587] CLAMO Haiti Lessons Learned, *supra* note 56, at 60.
[588] *Id.*at 64.
[589] *Id.*

Interservice Instruction AFJI 31-304 details procedures for treatment of POWs, Retained and Interned persons, and other detainees.[590] Combatant commanders, JTF commanders, and other Task Force Commanders are responsible for these programs.[591] The U.S. Army has military police units specifically organized and trained to operate facilities in accordance with AFJI 31-304, and they are ordinarily given such responsibility as soon as practical.[592]

The discussion of status on capture is concluded with a final demonstration of the significant gaps of protection for civilians when held in custody by nations that do not voluntarily apply POW protections in all circumstances practicable. This hypothetical is facilitated by changing CWO Durant, the U.S. Army helicopter pilot captured during Operation Restore Hope, from a military member to John Doe, a civilian accompanying the armed forces captured while properly performing a similar U.N. mission. Since Operation Restore Hope was a Chapter VII mission, civilian John Doe would not have qualified for protection under the Safety of U.N. and Associated Personnel Convention, even if it had been in force at the time. He could not qualify as a POW under Geneva Convention III since there was no interstate conflict, as there was no government in Somalia. He could not qualify for protections under Geneva Convention IV or Additional Protocol I for the same reason. If the conflict were classified as an internal conflict, but not an internal disturbance, riot or sporadic act of violence, Additional Protocol II protections would apply. However, no state has recognized Additional Protocol II as applicable to hostilities in their country, not even Russia regarding the fighting in Chechnya. Therefore, Additional Protocol II would probably not help. Like CWO Durant, he may qualify for expert on mission status if he had been designated appropriately by the U.N. If not, or if this was a military operation other than war that was not in support of a U.N. mission, he would only be entitled to humane treatment in accordance with the Universal Declaration of Human Rights and Common Article 3.

Given the number of deployments in which U.S. civilians and contractors are involved that do not qualify for international armed conflict protections upon capture, and the proximity of civilians to hostilities, the U.S. may be exposing civilians to significant threats. The U.S. must inform civilian employees and contractors of these risks and be vigilant in limiting civilian employment in areas at high-risk for capture. The U.S. must also take the lead

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[590] Air Force Instruction (Interservice) 31-304, Army Regulation 190-8, OPNAVINST 3461.6, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (Oct. 1, 1997) [hereinafter AFJI 31-304]. (implementing Dep't of Defense Directive 2310.1, DOD Program for Enemy of War and Other Detainees (Aug. 18, 1994)). *See also* Army Field Manual 19-40, Enemy Prisoners of War, Civilian Internees, and Detained Persons (Feb. 27, 1976).

[591] AFJI 31-304, *supra* note 659, ¶ 1-4g.

[592] *Id.*

in the international community to expand protections for civilians captured during other than international armed conflict. The law must address this issue more thoroughly so that the U.S. is not relegated to a final appeal for mercy through diplomatic channels.

13. Refugees, Stateless Persons, and Internally Displaced Persons[593]

The first portion of this section introduces the primary international legal agreements, and basic rights and protections afforded thereunder regarding refugees, stateless persons and IDPs. Such knowledge is useful for judge advocates working at the strategic and operational levels because the rights accorded protected persons by international law may partially influence the treatment of those trying to come to U.S. shores. For example, as with Haitian migrants in the mid-1990s,[594] the government may decide to intercept persons fleeing their country, provide temporary refuge outside the U.S. or the high seas, and return them to another state. If access by refugees is allowed to the U.S. or high seas, treaty law, as discussed below, requires provision of several rights and protections. Cuban refugees at various times in our history would be an example. The second portion of this section provides a more detailed discussion of requests for asylum and temporary refuge, a relatively straightforward process. The focus of that section is on DOD and service regulations governing commanders when they receive such requests.

General protections afforded a civilian population apply to refugees, stateless persons, and IDPs. For example, they are entitled to humane treatment, due process, and fundamental guarantees.[595] They are protected against the effects of conflict, precautions in attack, protection of women and children, right to know the fate of their families, and right to relief actions and satisfaction of their basic needs.[596] Additionally, states take on a number of specific obligations related to refugees.

Refugees and stateless persons have additional fundamental basic guarantees of protection when in the hands of a party to the conflict. If the person qualifies for more than one category of protections, the more specific protections take precedence.[597] The primary international law for dealing with

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[593] Although this is a subsection of "Under Control of the Enemy," this issue is more accurately entitled "Treatment of Persons in the Power of a Party to the Conflict."

[594] For U.S. policy on the United States' interception and treatment of Haitian refugees, *see* Exec. Order No. 12,324, 3 C.F.R. 180 (1982), *reprinted as amended as* 8 U.S.C. § 1182 (1987); Agreement on Interdiction of Haitian Immigration to the U.S., U.S.-Haiti, 33 U.S.T. 3559 (Sept. 23, 1981); Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992).

[595] Additional Protocol I, art. 75, *supra* note 2.

[596] Geneva Convention IV, arts. 16, 17, 23-26, 55, 59-62, 108-11, 140, 142, *supra* note 2; Additional Protocol I, arts. 32, 48, 51, 57, 58, 69, 70, 74, 76-78, *supra* note 2.

[597] Additional Protocol I, art. 75, *supra* note 2. For example, if the person also qualifies for POW status. If a refugee is hired by a state as a civilian employee or a contractor they may

international refugees is the U.N. Refugee Convention and Refugee Protocol I.[598] The U.S. interprets the U.N. Refugee Convention and its Additional Protocol broadly, protecting individuals from state persecution as well as persecution by forces the state cannot or will not control.[599]

Refugees and stateless persons, regardless of when they are without protection, and regardless of what state they were nationals, also receive protections under Geneva Convention IV, as extended by Additional Protocol I.[600] Under the plain language of Geneva Convention IV, refugees qualifying as aliens in the territory of a party to an international armed conflict, whose native state does not have regular diplomatic ties with the host state, are afforded protection as aliens in Parts I and III of the Convention.[601] The Convention specifically references refugees in article 44.[602] Additional Protocol I expands Geneva Convention IV protections to stateless persons.[603] Additional Protocol I also alters the second paragraph of Geneva Convention IV, article 4, by extending the protections to refugees coming from states who maintain diplomatic relations with the receiving state.[604] The language of Additional Protocol I, article 73 restricts its protections to refugees and stateless persons, as so defined under international or domestic law, if they were refugees or stateless prior to start of hostilities.[605] However, the ICRC Commentary on Additional Protocol I asserts that such a limitation is inconsistent with the expansive design of the article and should not be regarded as limiting Geneva Convention IV protections from refugees and stateless persons, no matter when in the conflict they become without the protection of a state.[606] Several of our allies, such as the United Kingdom and Germany owe obligations to stateless persons under the Convention Relating to the Status of Stateless Persons,[607] and the Convention on the Reduction of Statelessness.[608]

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benefit from the protections of Geneva Convention III as discussed under "Prisoner of War Status" *infra* Part III.B.1.

[598] U.N. Refugee Convention, *supra* note 105; Refugee Protocol I, *supra* note 105.

[599] *See* JAMES C. HATHAWAY, THE LAW OF REFUGEES 132 (1991).

[600] COMMENTARY, ADDITIONAL PROTOCOLS, *supra* note 109, at 854-855.

[601] Geneva Convention IV, arts. 1-12, 27-46, *supra* note 2.

[602] *Id.*, art 73. This Convention does not define "refugee," instead focusing on "protected persons," discussed *supra* note 2 and accompanying text.

[603] *Id*.

[604] COMMENTARY, ADDITIONAL PROTOCOLS, *supra* note 109, at 854-855.

[605] Additional Protocol I, art. 73, *supra* note 2.

[606] The commentary asserts that although the language of Additional Protocol I, art. 73, appears to limit these protections, when combined with art. 4 of Geneva Convention IV, there is no such limitation. COMMENTARY, ADDITIONAL PROTOCOLS, *supra* note 109, at 854.

[607] 1954 Convention on Stateless Persons, *supra* note 110. The U.S. is not a party to this agreement. *See also* Convention Relating to the Status of Stateless Persons—Schedule (Sept. 23, 1954) *available at* http://www.unhcr.ch/refworld/refworld/legal/instrume/stateles/sched_e.htm (on file with author).

[608] 1961 Convention on Stateless Persons, Aug. 30, 1961, 989 U.N.T.S. 175. The U.S. is not a party to this agreement.

Some examples of the rights enjoyed by refugees and stateless persons are provided. Refugees and stateless persons may not be treated as enemy aliens based solely on their native home.[609] Protected persons retain the right to leave the territory unless such departure is "contrary to the national interests of the State."[610] They are protected from inhumane treatment, and entitled to respect for their persons, honor, manners and customs, religious customs, and family rights.[611] Corporal punishment or torture may not be used to punish them.[612] They may not be used as "human shields" for military targets.[613] The detention and internment rules discussed earlier protect them as well.[614] States are charged with encouraging relief organizations in this work as long as the NGOs and PVOs comply with the state's security restrictions.[615] State parties to an international armed conflict are required to ease and assist in the reunification of families who have been dispersed due to the armed conflict.[616] Children receive special protections and may not be moved to another country except temporarily when necessitated by reasons associated with health and safety.[617] Written consent of parents and legal guardians who are known is required prior to transportation of children.[618] The child must continue to be educated according to his parents' desires, including religious and moral education. Detailed identity cards are also required for children.[619] As soon as possible, but at minimum at the end of active hostilities, parties have an obligation to search for persons reported missing by an opposition party.[620] There are a variety of additional rules addressing protections afforded to civilians in non-defended localities and demilitarized zones.[621] Even if safe and demilitarized zones are not established, state parties to an international armed conflict have an obligation to attempt to remove civilians "under their control from the vicinity of military objectives" to the maximum extent feasible.[622]

Additionally, the receiving states must provide refugees qualifying under the U.N. Refugee Convention with access to a variety of services. For example, the right of free association with non-political groups, trade unions, non-profit associations, free access to the judicial system, elementary

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[609] Geneva Convention IV, art. 44, *supra* note 2.
[610] *Id.* at art. 35.
[611] *Id.* at art. 27.
[612] *Id.* at art. 32.
[613] *Id.* at art. 28.
[614] *See supra* note 553, and accompanying text.
[615] Geneva Convention IV, art. 30, *supra* note 2; Additional Protocol I, art. 74, *supra* note 2.
[616] Additional Protocol I, art. 74, *supra* note 2.
[617] *Id*, at art. 78.
[618] *Id*.
[619] *Id*.
[620] *Id*, at art. 33.
[621] *See id*. at arts. 59, 60 (safe zones will not be addressed in this article).
[622] *Id.* at art. 58.

education, public relief, as well as certain labor and social security benefits must be provided to qualifying refugees lawfully in the receiving state to the same level as the state provides to their nationals.[623] Qualifying refugees must be given the right to wage-earning employment and self-employment, right to movable and stationary property, housing and freedom of movement to the same level as accorded to aliens in the same circumstances.[624] In OAU states, qualifying refugees must also be settled reasonably far from the border of the country they departed.[625]

Qualifying refugees unlawfully in the receiving country receive basic protection from penalties if their entrance is because their life or freedom was threatened, as long as they notify the receiving state authorities as soon as possible and "show good cause for their illegal entry or presence."[626] Finally, yet very significantly, refugees may not be forced to return to their native home when they fear persecution for political or religious beliefs.[627] This article will next discuss IDPs and then turn to the practical consequences of refugee access to U.S. territory or U.S. vessels on the high seas and requests for asylum and/or temporary refuge.

Presently, there are no treaties specifically addressing the problems of IDPs, rather they are protected as part of the civilian population as a whole. Since the early 1990s, there has been a controversial movement to provide special recognition to the plight of IDPs.[628] The first U.N. Secretary-General's Representative on IDPs, Francis Deng, was appointed in 1992.[629] Between 1996 and 1998, the U.N. undertook the drafting of the Guiding Principles on Internal Displacement (hereinafter Guiding Principles). The Guiding Principles were in response to a perceived deficiency in IDP protection.[630] The Commission on Human Rights and the U.N. General Assembly recognized the Guiding Principles in 1998.[631] IDPs are defined in the Guiding Principles as:

> Persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.[632]

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[623] U.N. Refugee Convention, arts. 15, 16, 22-24, *supra* note 105.
[624] *Id.* at arts. 13, 17, 18, 21, 26.
[625] OAU Refugee Convention, art. 2, *supra* note 106.
[626] U.N. Refugee Convention, art. 31, *supra* note 105.
[627] Also called non-refoulment. Geneva Convention IV, art. 44, *supra* note 4.
[628] The ICRC does not support this movement. Lavoyer, *supra* note 112.
[629] *Id.*
[630] *Id.* The deficiencies were revealed by an examination on the law applicable to IDPs in the United Nations "*Compilation and Analysis of Legal Norms*," U.N. Doc. E/CN.4/1996/52/Add.2.
[631] Guiding Principles, *supra* note 115.
[632] *Id.* at Intro. ¶ 2.

The Guiding Principles reemphasize rights of the civilian populace that specifically apply to IDPs and assert the extension of some refugee protections to IDPs.[633] They remind states and others of protections such as protection from violence or the threat thereof, right to liberty and freedom of movement, medical attention, restoring family ties, provisions of relief to civilian populations, voluntary repatriation and protection from non-refoulment.[634] Because the Guiding Principles themselves emphasize they do not modify or replace law,[635] it is helpful to be reminded of some examples of binding law as applicable to IDPs.

A variety of international laws apply to IDPs. For example, during international armed conflict, Hague IV protects civilian populations from punishment, arguably a protection against forced migration.[636] Other civilian population protections apply during international armed conflict, even to civilians within their own territory.[637] There is an argument to be made that Additional Protocol I's application of Geneva Convention IV to refugees and stateless persons also applies the protections of the Protocol and Geneva Convention IV to IDPs.[638] The Convention on the Prevention and Punishment of the Crime of Genocide provides protections to groups being targeted for partial or total physical destruction,[639] often a reason compelling displacement and migration. Common Article 3 applies in international and internal armed conflict, protecting IDPs from inhuman and degrading treatment by states.[640] During internal armed conflict, the civilian populace is protected from forced displacement without "imperative" military necessity or the need for security for the civilians.[641] Any justified forced movement must not remove the civilians from their own territory and must be done with all possible means to facilitate satisfactory shelter, hygiene, safety, nutrition, and health

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[633] *Id.* at Intro. ¶ 3.
[634] *Id.* at 13-17, 24-30.
[635] *Id.* at Principle 2.
[636] Hague (IV) Annex, art. 50, *supra* note 136 ("No general penalty, pecuniary or otherwise, shall be inflicted upon the population.").
[637] *See supra* note 596, and accompanying text.
[638] One commentator for the ICRC advocates an interpretation of the phrase "in the power of" when referencing a person under control of a party to the hostilities as including persons who are nationals or citizens of the party under which they are controlled. However, the commentator acknowledges that this is not a settled interpretation and that the U.S. does not advocate this position. COMMENTARY, ADDITIONAL PROTOCOLS, art. 78, *supra* note 109, at 838.
[639] Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948) (entered into force on Jan. 12, 1951); *c.f.*, Michael P. Roch, *Forced Displacement in the Former Yugoslavia: A Crime Under International Law?* 14 DICK. J. INT'L L. 1, 20 (Fall 1995).
[640] For a discussion of Common Article 3, *see* "Common Article 3" *infra* Part III.B.6.
[641] Additional Protocol II, art. 17, *supra* note 152; GREEN, *supra* note 16, at 311-312.

conditions.[642] The Universal Declaration on Human Rights protects all people at all times.[643] Additionally, if IDPs encounter U.S. military personnel in foreign territory, they may enjoy the right to temporary refuge, and certain limited circumstances, the right to asylum.

Requests for Asylum and Temporary Refuge: The right to immigrate is, in most circumstances, determined by the receiving state. The U.N. Refugee Convention encouraged states to assimilate and naturalize refugees, thereby recognizing the right to emigrate, but it did not establish a right to immigrate.[644] Likewise, the Universal Declaration of Human Rights recognized a right to emigrate, while withholding recognition of a right to immigrate.[645] Allowing immigration, specifically granting asylum, is considered a humanitarian and peaceable act.[646] Some regional arrangements charge states with using their best efforts to receive refugees and secure the resettlement of those unwilling or unable to return home.[647]

Persons qualifying as refugees under the OAU Refugee Convention must be admitted by those member states, even if only temporarily while awaiting resettlement by the receiving state after it has appealed to other member states to share the burden of the refugee flows.[648] The refugee may not, in any case, be forced to return to the state they departed, but may voluntarily return.[649] Otherwise, where such a right exists, the law of that particular country creates it, and the request is evaluated against the receiving state's laws.[650]

Once in a state party to the U.N. Refugee Convention, or on the high seas and under the control of such a state, qualifying refugees may only be expelled for reasons of public order or national security, and only after due process of law which includes a reasonable period in which the refugee can attempt to obtain admission rights into another state.[651] In any case, the

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[642] Additional Protocol II, art. 17, *supra* note 152. These provisions are an extension of Geneva Convention IV, art. 49, *supra* note 2. COMMENTARY, ADDITIONAL PROTOCOLS, *supra* note 109, at 1473.
[643] Universal Declaration, arts. 13, 14, *supra* note 529.
[644] U.N. Refugee Convention, art. 34, *supra* note 105.
[645] Universal Declaration, art. 14, *supra* note 529.
[646] *Id.* at art. 13; OAU Refugee Convention, art. 2, *supra* note 106.
[647] *See, e.g.*, OAU Refugee Convention, art. 2, *supra* note 106.
[648] *Id.* at arts. 1, 2, 4. Satisfying the definition of refugee laid out *supra* note 106 is not enough to be entitled to the protection of the Convention. There are a variety of provisions in the Convention that will eliminate protections to a refugee. For example, refugees who voluntarily regain their nationality, commit serious crimes of a non-political nature in the receiving state, war criminals, and others will not be entitled to the protections of the Convention. Arts. 1-3, *supra* note 106.
[649] OAU Refugee Convention, art. 5, *supra* note 106.
[650] United Nations Declaration on Territorial Asylum, art. 1, Nov. 21, 1959, U.N. Doc. G/A1400 (XIV), *available at* http://www.unhcr.ch/refworld/refworld/legal/instrume/asylum /terrasyl.htm (on file with author).
[651] U.N. Refugee Convention, art. 32, *supra* note 105.

refugee may not be returned to the location in which his life or freedom was threatened due to his nationality, membership in a social group, public opinion, race or religion unless he is a danger to the security of the receiving country, or the community of the receiving country which is demonstrated by a final conviction of a serious crime.[652] These treaty provisions do not protect persons requesting asylum of U.S. persons or at a U.S. installation located in a foreign government or within foreign territorial waters.[653] The host nation has the primary obligation in these instances, although some states, including the U.S., have instituted the protection of temporary refuge for these individuals.

The U.S. recognizes political asylum and temporary refuge in national law.[654] Asylum seekers who gain access to U.S. territory or a U.S. vessel on the high seas are, by national policy, accorded full opportunity to have their case heard and considered with due process.[655] Requests for asylum in foreign territories or other than on the high seas are normally not granted in accordance with the U.S. policy holding the host nation the responsible party.[656] The State Department is the lead agency in this area and is the only agency with the authority to grant asylum.[657] However, commanders and, consequently their judge advocates, deal with this issue in a variety of forms. Judge advocates should be prepared to receive these requests from non-U.S. citizen contractor employees and other non-affiliated persons.

The U.S. Armed Forces establishes specific procedures for handling requests for asylum and temporary refuge. The DOD defines political asylum and temporary refuge as:

> Political Asylum. Protection and sanctuary granted by the United States Government within its territorial jurisdiction or on the high seas to a foreign national who applies for such protection because of persecution or fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.
>
> Temporary Refuge. Protection afforded for humanitarian reasons to a foreign national in a Department of Defense shore installation, facility, or

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[652] *Id.* at art. 33. Parties to the U.N. Refugee Convention are not prohibited during "war or other grave and exceptional circumstances" from taking provisional steps regarding a particular individual that the party believes are essential to national security while the party determines whether the person in question is a qualifying refugee and what, if any, measures are necessary for national security. Art. 9, *supra* note 105.

[653] Dep't of Defense Directive 2000.11, Procedures for Handling Requests for Political Asylum and Temporary Refuge, ¶ 3.1.1 (Mar 3, 1972, Supp. Ch.1 May 17, 1973) [hereinafter DODD 2000.11].

[654] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in various sections of 8 U.S.C.).

[655] DODD 2000.11, *supra* note 653, ¶ 3.1.2; Air Force Policy Directive 51-7, International Law, ¶ 14 (Oct. 1, 1995) [hereinafter AFPD 51-7].

[656] DODD 2000.11, *supra* note 653, ¶ 3.1.3.

[657] *See* Department of State Regulation, Request by Foreign National for Political Asylum (Jan. 4, 1972).

> military vessel within the territorial jurisdiction of a foreign nation or on the high seas, under conditions of urgency in order to secure the life or safety of that person against imminent danger, such as pursuit by a mob.[658]

U.S. military personnel may not grant asylum, although they may receive such requests in U.S. jurisdiction or on the high seas.[659] When a member of the armed forces receives a request, the asylum-seeker will be afforded reasonable care and protections appropriate under the circumstances.[660] Immediate notification through the chain of command to the service Judge Advocate General is required.[661] Air Force personnel are required to notify the servicing Office of Special Investigations.[662] Immediate notification must also be made to the closest U.S. Immigration and Naturalization Service (INS) Office.[663] Transfer of the asylum seeker to the INS is accomplished as soon as feasible.[664] The seeker may only be surrendered to foreign authorities upon direction by the service Secretary.[665] Coordination with local, state or federal law enforcement officials may be required for protection of the individual if foreign authorities or others attempt to harm or kidnap the seeker.[666]

When a request for asylum is received in the territory of a foreign government, even when onboard a military aircraft or vessel or in a DOD facility, commanders are charged with referring the civilian to the nearest U.S. embassy or consulate.[667] Requests for temporary refuge may be granted by the senior military official on scene for humanitarian reasons if it appears the individual "need[s] protection from imminent danger to life or safety."[668] Requests for asylum that also meet the criteria for requests for temporary refuge will be treated, in the Army, as a request for refuge, alleviating the need

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[658] DODD 2000.11, *supra* note 653, ¶ 2.1, 2.2; Air Force Instruction 51-704, Handling Requests for Political Asylum and Temporary Refuge, Atch. 1 (July 19, 1994) [hereinafter AFI 51-704]; Army Regulation 550-1, Procedures for Handling Requests for Political Asylum and Temporary Refuge, ¶ 3 (Oct. 1, 1981) [hereinafter AR 550-1].

[659] AFPD 51-7, *supra* note 655, ¶ 15; AFI 51-704, *supra* note 658, ¶ 1.

[660] DODD 2000.11, *supra* note 653, ¶ 4.1.2; AFI 51-704, *supra* note 658, ¶ 1.1; AR 550-1, *supra* note 658, ¶ 6a. Members of diplomatic missions, such as Marine Corps security guards, follow rules established by the Chief of Mission. *Id.* ¶ 4.2.1.3.

[661] DODD 2000.11, *supra* note 653, ¶ 4.1.1.2; AFI 51-704, *supra* note 658, ¶ 1.1.

[662] AFI 51-704, *supra* note 658, ¶ 1.1.

[663] DODD 2000.11, *supra* note 653, ¶ 4.1.3; AFI 51-704, *supra* note 658, ¶ 1.1; AR 550-1, *supra* note 658, ¶ 7.

[664] DODD 2000.11, *supra* note 653, ¶ 4.1.3.2; AR 550-1, *supra* note 658, ¶ 6a.

[665] DODD 2000.11, *supra* note 653, ¶ 4.1.1.2; AFPD 51-7, *supra* note 659, ¶ 15.1; *see* AFI 51-704, *supra* note 658, ¶ 1; AR 550-1, *supra* note 658, ¶ 6a.

[666] DODD 2000.11, *supra* note 653, ¶ 4.1.4; *see* AFI 51-704, *supra* note 658, ¶ 1.1; AR 550-1, *supra* note 658, ¶ 6a.

[667] DODD 2000.11, *supra* note 653, ¶ 4.2.1.2; AFI 51-704, *supra* note 658, ¶ 1.2; AR 550-1, *supra* note 658, ¶ 6b.

[668] AFPD 51-7, *supra* note 659, ¶ 15; DODD 2000.11, *supra* note 653, ¶¶ 2.2, 4.4.5.1, 4.2.2; AFI 51-704, *supra* note 658, ¶ 2; AR 550-1, *supra* note 658, ¶¶ 3, 6b.

to say any "magic words."[669] Refuge cannot be granted to individuals fleeing law enforcement.[670] People making asylum or temporary refuge requests will not be turned over to foreign authorities against their will until their request has been appropriately considered and directions for transfer of custody are received from the service Secretary or director of the defense agency concerned.[671] Like asylum requests, military personnel must immediately notify the chain of command, the OSI, the U.S. Embassy, and the servicing Judge Advocate General of the requests for refuge.[672] It is only with the approval of the Assistant Secretary for Public Affairs that information about requests for asylum or refuge may be released to the public or media.[673]

C. Status of Forces Agreements

Expect to Practice Law without the Benefit of a SOFA[674]

When preparing to deploy outside of the U.S., a judge advocate must consider what, if any, international agreements address the status of civilians serving alongside the military forces. Unless civilians are granted special status under a treaty or by the host nation, they are subject to all applicable host nation laws and jurisdiction and treated essentially like tourists or any other businessmen.[675] Persons who accompany the armed forces without being members thereof are protected under international law with POW status when captured during armed conflict.[676] For all other purposes, these civilians are subject to and protected by the laws that govern the civilian populace.[677]

A SOFA is an international agreement that establishes the status of foreign forces serving and sets forth standard legal treatment applicable to their presence in the host nation.[678] It does not authorize the presence or activities

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[669] *See* AR 550-1, *supra* note 658, ¶ 6b(1)(a).
[670] AFPD 51-7, *supra* note 659, ¶ 15; AFI 51-704, *supra* note 658, ¶ 2.
[671] DODD 2000.11, *supra* note 653, ¶ 4.1.5; AFPD 51-7, *supra* note 659, ¶ 15; *see* AFI 51-704, *supra* note 658, ¶ 2.2; AR 550-1, *supra* note 658, ¶¶ 6b, 7.
[672] DODD 2000.11, *supra* note 653, ¶ 4.1.5.2; AFPD 51-7, *supra* note 659, ¶ 15; AFI 51-704, *supra* note 658, ¶ 1.2, 3; AR 550-1, *supra* note 658, ¶ 7.
[673] DODD 2000.11, *supra* note 653, ¶ 4.2.3; AFPD 51-7, *supra* note 659, ¶ 15; AFI 51-704, *supra* note 658, ¶ 5; AR 550-1, *supra* note 658, ¶ 7.
[674] CLAMO Haiti Lessons Learned, *supra* note 56, at 50.
[675] *See* JP 4-0, *supra* note 5, at V-5; LAZAREFF, *supra* note 117, at 102. This is generally the case. However there are a few rare instances where U.S. forces and accompanying civilians may not be covered by the host nation law, even without SOFA protection; for example, if the U.S. is operating in the country during a full-scale conflict, or if there is no discernable local law due to local governmental collapse.
[676] *See* discussion under "Under Control of the Enemy" *infra* Part III.B.
[677] Sarnoski, *supra* note 439, at 29.
[678] LAZAREFF, *supra* note 117, at 3; Lieutenant Colonel Arthur C. Bredemeyer, *International Agreements: A Primer for the Deploying Judge Advocate*, 42 A.F.L. Rev. 105 (1997).

of U.S. forces.[679] SOFA is the oft-used term to refer to such international agreements, although there are three forms of status agreements, whether treaties or executive agreements: Administrative & Technical Status (A&T); mini-SOFA; and SOFA.[680] Currently, the U.S. is a party to 108 SOFAs.[681] Typical SOFA provisions address criminal jurisdiction, customs and tax exemptions, settlement of damages caused by the forces of the sending states, immigration, carrying weapons, and driving licenses.

While civilian employees are most often partially covered by SOFAs, other civilians are very rarely covered. And while SOFA coverage of contractors is limited, it is almost non-existent for non-affiliated persons, subjecting them to all host nation laws and jurisdiction. Unless some such NGOs and PVOs have a recognized status under a status of forces agreement or some agreement with the host nation, U.N., and/or the belligerents, their status is basically that of tourists.[682] Even the notable exceptions such as the German Supplementary Agreement to the NATO SOFA, which recognizes the American Red Cross as supporting the armed forces, restrict the SOFA provisions for this group beyond that afforded to the civilian component.[683] Commanders should expect that non-uniformed journalists, NGOs, PVOs, and other non-affiliated persons would be fully subject to host nation laws.

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[679] Colonel Richard J. Erickson USAF, (Ret.), *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. Rev. 137, 139 (1994).

[680] Bredemeyer, *supra* note 678, at 105; *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, *supra* note 679, at 141. A&T (administrative and technical staff) status under the Vienna Convention on Diplomatic Relations, *supra* note 521, is the simplest form of the three forms and can be established through just an exchange of diplomatic notes, such as between a U.S. and another state's embassy. The A&T grants U.S. forces complete protection from the host nation's criminal jurisdiction, and from civil jurisdiction as it relates to acts performed in furtherance of official duty. The mini-SOFA addresses more issues than the A&T. Issues covered range from criminal jurisdiction (although not necessarily complete protection from jurisdiction of the host nation) to civil jurisdiction; local procurement; customs; claims to carrying of arms. A SOFA addresses the most expansive range of issues and is typified by the North Atlantic Treaty Organization Status of Forces Agreement, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 [hereinafter NATO SOFA]. *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, *supra* note 679, at 141-144.

681 *Status of Forces Agreements: A Formal SOFA List*, Headquarters, United States Air Force, International and Operations Law Division (HQ USAF/JAI), 2 Oct 2001, at http://www.afjai.hq.af.mil/ilaw/sofa_data/jai_sofa_list.pdf (last visited Nov. 26, 2001). "Although there are 108 formal SOFAs, they have been concluded with 104 countries. . . . Regional distribution of SOFA coverage is as follows: for Africa 41.18% (21 out of 51 states); for Asia-Pacific 47.37% (18 of 38 states); for Europe 75.93% (41 of 54 states); for Latin America 40% (14 of 35 states); and for the Middle East 83.33% (10 of 12 states). The worldwide coverage is 54.74% (104 of 190)." *Id*.

[682] Major Jeffrey Walker, Headquarters USAF, International and Operations Law (JAI), Staff Study: The Status of Contractor Personnel in Air Force Operations—An International Legal Analysis 5.a. (Apr. 2000) (unpublished document, on file with HQ AF/JAI).

[683] German Supplementary Agreement to the NATO SOFA, Aug. 3, 1959, T.I.A.S. No. 5351 (effective July 1, 1963), to the NATO SOFA, *supra* note 680, § 8 at 71.

To qualify as part of a "civilian component" of an armed force, the employee may have to satisfy certain conditions. For example, under the NATO SOFA "civilian component" means the "civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any state which is not a Party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the state in which the force is located."[684] Contracting Party in this context is a state party to the treaty. Many SOFAs do not separately designate a "civilian component," instead including them in the definition of U.S. personnel covered by the agreement.[685]

Some provisions may not apply equally between the military and designated civilian employees.[686] For example, civilian employees often do not receive the same customs and tax exemptions enjoyed by military members.[687]

"The supported CINC is responsible for determining restrictions imposed by applicable international agreements on the status of contractor personnel operating in the CINC's [area of responsibility]."[688] This task is not very difficult given that fewer than ten percent of the U.S. SOFAs currently address the status of civilian contractors in any significant manner.[689] No

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[684] NATO SOFA, art. I, 1 a(b), *supra* note 681.

[685] *See, e.g.,* Agreement Between the Government of the United States of America and the Government of the Kingdom of Tonga Concerning the Status of Members of the United States Armed Forces in the Kingdom of Tonga, U.S.-Tonga, Jul. 20, 1992, T.I.A.S. No. 12523 ("As used in this Agreement, 'United States Personnel' means military and civilian personnel of the United States Armed Forces temporarily present in Tonga, as authorized by Tonga."); Agreement on Military Exchanges and Visits Between the Government of the United States of America and the Government of Mongolia, Jun. 26, 1996, U.S.-Mongolia, (on file with HQ AF/JAI) ("Personnel – The two sides understand this to refer to the military and civilian persons of Mongolia and the United States who are carrying out this Agreement.").

[686] *E.g.*, in the Republic of Korea military members, but not members of the "civilian component," are exempt from passport and visa laws and regulations. However, "[m]embers of the United States armed forces, the civilian component, and their dependents shall be exempt from laws and regulations of the Republic of Korea on the registration and control of aliens, but shall not be considered as acquiring any right to permanent residence or domicile in the territory of the Republic of Korea." Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, U.S.-R.O.K., art. VIII, T.I.A.S. No. 6127, 17 U.S.T. 1677, 674 U.N.T.S. 163 (entered into force Feb. 9, 1967).

[687] NATO SOFA, *supra* note 681.

[688] JP 4-0, *supra* note 5, at V-5; Headquarters USAF, International and Operations Law (JAI), Staff Study: SOFA Coverage of Contractors and Their Personnel (undated) (unpublished document, on file with HQ AF/JAI) [hereinafter SOFA Coverage of Contractors and Their Personnel].

[689] *See* W. Darrell Phillips, "Civilians in Operations" Lecture Outline, Air Force Judge Advocate General School, Maxwell Air Force Base, Ala., Apr. 2000; Squadron Leader Linda-Anne Griffiths, Rights and Obligations of Contractors Under Current Status of Forces Agreements to Which the United States is a Party, International and Operations Law Division,

SOFAs categorize contractors as part of the "civilian component" of the armed forces, however, at least one supplement to the NATO SOFA provides this designation to contractors.[690]

Even those SOFAs that address contractor personnel do not consistently define or categorize contractors. Some SOFAs exclude all individuals except those who are nationals or residents of the U.S. and not normally residents of the host nation.[691] Some agreements do not require U.S. citizenship or residence and govern anyone hired by a U.S. contractor if not ordinarily residents of the host nation and present in the host nation solely for the purposes authorized in the agreement.[692] Some agreements require U.S. governmental designation of the contractor after consultation with the host government.[693] A variety of other definitions and conditions for coverage by the SOFA are laid out in these agreements.[694]

Most agreements that address contractors exclude local civilians who are recruited or hired in the host nation and are residents of the host nation

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Office of the Judge Advocate General, USAF (July 1997) (unpublished manuscript on file with W. Darrell Phillips, Chief, International and Operations Law, Air Force Judge Advocate General School).

[690] Greek SOFA, *supra* note 35, ¶ C4(a), states:

> The term 'civilian component' as defined in Article I, ¶ l(b), of the NATO [SOFA], which may include dependents, shall also mean employees of a non-Greek and non-commercial organization who are nationals of or ordinarily resident in the United States and who, solely for the purpose of contributing to the welfare, morale or education of the force, are accompanying those forces in Greece, and non-Greek persons employed by United States contractors directly serving the United States forces in Greece.

See also SOFA Coverage of Contractors and Their Personnel, *supra* note 688.

[691] *See, e.g.*, Status of Forces Agreement with the Bahamas (Defense Facilities), Apr. 5, 1984, U.S.-Bahamas, T.I.A.S. No. 11,058, at art. 1, Definitions ¶(g); Greek SOFA, *supra* note 35, (in Greece, these members fall under the category of "civilian component" as defined in art. 1 ¶ 1(b) of the NATO SOFA, *supra* note 680).

[692] *See, e.g.*, Agreement Between the Government of the United States of America and the Government of Antigua Regarding United States Defence Areas and Facilities in Antigua, Dec. 14, 1977, T.I.A.S. No. 9054, 29 U.S.T. 4183 (entered into force Jan. 1, 1978) at art. 1, Definitions; Exchange of Notes (Availability of Certain Indian Ocean Islands for Defense Purposes (Diego Garcia and the Remainder of the Chagos Archipelago**,** Islands of Aldabra**,** Farquhar, and Desroches Constituting the British Indian Ocean Territory), Dec. 30, 1966, ¶ (10)(a), T.I.A.S. No. 6196, 18 U.S.T. 28.

[693] Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Facilities and Areas, and Status of Forces, Jan. 19, 1960, U.S.-Japan, ¶ 1, T.I.A.S. No. 4510 (effective Jun. 23, 1960); Agreement under Article IV of the Mutual Defense Treaty (Facilities and Areas and Status of Forces), Feb. 9, 1967, U.S.-ROK, ¶ 1, T.I.A.S. No. 6127.

[694] *See* "Civilians in Operations," *supra* note 689; Griffiths, *supra* note 689.

from the protection of the agreement.[695] Theater support contractors and some external theater support contractor employees will fall into this category. Even if the SOFA includes local hires under its provisions, the SOFA may specifically except most protections from extending to local hires.[696]

The lack of SOFA coverage for contractors has been a significant and costly issue. Some contractors may not be able to perform without a relevant international agreement and those that can perform may find costs prohibitive.[697] Systems support and external theater support contractors may find entry into the host nation difficult, costly, or impossible. They may be taxed, subject to local restrictions on imports and labor, and customs and duties.[698] On at least two occasions, the U.S. government was unexpectedly billed millions of dollars by contractors who, unlike the deployed military members, were not exempt from host nation taxes.[699] Labor problems also arise, such as during Operation Joint Endeavor, where external theater support contractors were prohibited from bringing employees into Hungary until they were assured the LOGCAP contractor would employ many Hungarians.[700] "[W]ith increasing numbers of contractor personnel accompanying our forces to nations in which we have hitherto not had a significant presence, coupled with increasing host nation scrutiny since the end of the Cold War, the gaps in most SOFAs concerning contractors will almost certainly become a more salient problem."[701]

It is easy to conclude that the simple solution to this problem is to negotiate new international agreements. However, there are several questions to answer and practical problems to encounter along the way. As much as possible, the U.S. works to negotiate SOFA coverage of its civilian component.[702] What should be the U.S. position as to the definition of civilian

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[695] *See, e.g.*, Status of Forces Agreement Between the United States and the Federated States of Micronesia and the Marshall Islands Concluded Pursuant to Section 323 of the Compact of Free Association, May 24, 1982 & Oct. 1, 1982, art. I, ¶ 2(b), T.I.A.S. No. 11,671.

[696] *See, e.g.*, Agreement Between the United States of America and Israel on the Status of United States Personnel, Jan. 22, 1991, art. XII (on file with HQ AF/JAI).

[697] AR 715-9, *supra* note 5, ¶ 3-1g; FM 100-10-2, *supra* note 5.

[698] AR 715-9, *supra* note 5, ¶ 3-1g.

[699] A contractor paid $18 million to the Hungarian government in value added tax for plywood the contractor flew into the country in fulfillment of its contract with the U.S. government. This amount was subsequently passed on to the U.S. in the contractor's invoice. The Army commander involved reportedly did not know about the importation of the plywood until the tax had already been assessed. *Contingency Operations: Opportunities to Improve the Logistics Civil Augmentation Program* (General Accounting Office, Washington D.C.) Feb. 11, 1997, GAO/NSIAD-97-63, at 8. The U.S. government challenged the Hungarian government to reimburse the funds, which it eventually did. *Planning: The Key to Contractors on the Battlefield*, *supra* note 408. In another instance, a contractor was taxed $5 million, which it passed on to the U.S. Government. Griffiths, *supra* note 689.

[700] Dowling & Feck, *supra* note 45, at 63.

[701] SOFA Coverage of Contractors and Their Personnel, *supra* note 688.

[702] LAZAREFF, *supra* note 117, at 90, 92.

component? Should we expand our past boundaries beyond that of the civilian component to include all "civilians accompanying the armed forces" as that phrase is used in the Geneva Conventions? Or should we only expand the protections to some group of contractors, whether limited to U.S. nationals, or system support or external theater support contractors? Should the civilian component remain restricted and negotiations focus instead on expanding specific protections for contractors? If so, what protections do we want extended? For example, are we as concerned about having foreign criminal jurisdiction protections for contractors and their employees as we are about having tax and customs protections for the same group of civilians?

Joint doctrine directs that "[a]ny requirements to include provisions for contractor personnel should be raised to the CINC and Chief of Mission or Department of State for possible relief during negotiations occurring at execution."[703] New joint doctrine states that during negotiations of international agreements, it is U.S. policy to request contractors be afforded the same status as DOD civilian employees when the contractors are providing non-peacetime support to the U.S. military.[704] However, what might appear simple in theory is not simple from a practical perspective. Other nations may not be interested in granting members of the U.S. labor force special protections such as custom and tax exemptions. They may view such actions as harmful to their own labor force that could otherwise be hired by the U.S. military.[705] They may find untenable the idea of explaining to their own public why certain groups receive special treatment that their own public does not receive. The difficulty of negotiating for protected status for contractors is reflected in the absence of protections for contractors in recently negotiated agreements.

While the lack of SOFA coverage is not the optimal situation, the reality of today's high operations tempo, combined with a variety of other reasons results in occasions where even active duty military members deploy without the benefit of a SOFA, or without a detailed agreement, such as during Operation Uphold Democracy and other operations in the Republic of Haiti during 1994 and 1995.[706] There was no SOFA covering operations in Somalia

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[703] JP 4-0, *supra* note 5, at V-6.

[704] *Id.*

[705] For example, the U.S. and Germany concluded lengthy negotiations in 1998 that resulted in narrowing the definition of technical experts – contractors requiring U.S. security clearances and/or with special skills not otherwise available in Germany. "Technical experts are given special customs, tax, and other privileges. Germany, like many other countries with high domestic unemployment, was interested in protecting their local labor force by not granting U.S. contractor personnel special privileges and benefits." SOFA Coverage of Contractors and Their Personnel, *supra* note 688.

[706] CLAMO Haiti Lessons Learned, *supra* note 56, at 51-52, states:

> [M]odern operations other than war often make the rapid conclusion of a comprehensive and detailed status of forces agreement difficult. First, the

or Rwanda, either.[707] An appreciation and understanding of the host nation laws becomes particularly important on these occasions.[708] Commanders and judge advocates have learned to appropriately handle such situations, as they will continue to do so for civilians not covered adequately by SOFAs.[709]

Foreign Criminal Jurisdiction and Associate U.S. Responsibilities: When the issue of foreign criminal jurisdiction (FCJ) is addressed, the status of civilians accompanying the armed forces becomes particularly complex because of the interrelationship between international and U.S domestic law. In many instances, the host nation has exclusive criminal jurisdiction, although they do not always exercise that prerogative.[710] The applicable SOFA provisions or the absence of such provisions must be carefully examined.

International agreements usually address foreign criminal jurisdiction in their provisions although civilians are not usually covered by the agreements. While civilian employees are addressed in some agreements, contractor personnel are rarely protected.[711] Even when an agreement includes civilian employees or other civilians under the protections of the agreement, the lack of U.S. military criminal jurisdiction over civilians complicates the matter. None of the SOFAs currently in existence with the U.S. extend foreign

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> hope that the deployment will be short in duration and the presence of many other pressing demands on diplomatic resources tend to make the conclusion of a SOFA a less-than-urgent priority. Second, the host nation—if it has a functioning government at all—often may have no well-developed or efficient apparatus with authority to negotiate and conclude agreements. Third, even if the host nation is ready, willing, and able to become party to a SOFA, our own laws and regulations place significant though understandable constraints on who may negotiate and conclude international agreements with foreign states and on how that process must occur. Fourth, United States forces may be present in [the host nation] representing either the nation or a variety of multinational entities, creating a need for bilateral as well as multilateral instruments.

[707] HQ AF/JAI, Status of Forces Agreements *available at* https://aflsa.jag.af.mil/GROUPS/ AIR_FORCE/JA-O/ Intnlmain.htm (last visited Nov. 14, 2001) (on file with the Air Force Law Review).

[708] Air Force Instruction (Interservice) 51-706, Army Regulation 27-50, SECNAVINST 5820.4G, *Status of Forces Policies, Procedures, and Law* ¶ 1-4, 1-6, App. B (Dec. 15, 1989) [hereinafter AFJI 51-706].

[709] CLAMO Haiti Lessons Learned, *supra* note 56 (an outstanding resource for deploying without a SOFA).

[710] There are a few rare instances where U.S. forces and accompanying civilians may not be covered by the host nation law, even without SOFA protection. *See supra* note 675.

[711] *See* Richard J. Erickson, A Study and Comparison of Custody Provisions in Current Status of Forces Agreements, With Texts and Commentaries, International and Operations Law Division, Office of The Judge Advocate General (Sept. 22, 1995) *available at* https://aflsa.jag.af.mil/GROUPS/AIR_FORCE/JA-O/ Custody%20Study%20(1995).DOC (an outstanding comparison of SOFA provisions).

criminal jurisdiction protections to contractors.[712] Lack of coverage means a civilian is fully accountable under the host nation criminal legal system.

As an example of the complexity of this issue, we will examine the NATO SOFA. Whether civilian employees are protected in the same manner as military members under the NATO SOFA is a matter of debate.[713] A brief summary of the provisions in question is useful at this point. Clearly, for military members, the NATO SOFA grants exclusive criminal jurisdiction to the U.S. when the offense is in violation of U.S. laws but not the laws of the host nation.[714] Exclusive jurisdiction by the host nation is maintained when the individual violates a host nation law that is not a violation of U.S. law.[715] Concurrent jurisdiction exists in the remaining cases with primary jurisdiction resting in the U.S. when the offense was committed in the performance of official duties, was directed solely against the property or security of the U.S., or was directed solely against the person or property of other U.S. personnel or their dependents.[716] In all other cases, the host nation has primary concurrent jurisdiction, although they may decline to exercise that jurisdiction.[717]

Recall that civilian employees usually come within the NATO SOFA definition of "civilian component."[718] The NATO SOFA is also a reciprocal agreement. With that in mind, we start the foreign criminal jurisdiction analysis by examining the two parts of the agreement. Article VII, section 1(a), of the SOFA states: "the *military authorities* of the sending State shall have the right to exercise within the receiving State all *criminal and disciplinary jurisdiction* conferred on them by the law of the sending State

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[712] Telephone Interview with Dr. Richard J. Erickson, Deputy Chief, International and Operations Law Division, Headquarters, USAF, International and Operations Law Division (Apr. 19, 2001) [hereinafter Erickson Telephone Interview].

[713] This issue is occasionally discussed in academic and "real world" environments, although it has not been developed in scholarly publications. There are a number of excellent scholarly articles on SOFAs focusing primarily on military issues. *See, e.g., Status of Forces Agreements: A Sharing of Sovereign Prerogative*, *supra* note 679; Major Steven J. Lepper, *A Primer On Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169 (1994); Keith Highet, et al., *Jurisdiction—NATO Status of Forces Agreement—U.S. Servicemen Charge with Criminal Offenses Overseas—European Convention on Human Rights*, 85 AM. J. INT'L L. 698 (1991); J. Holmes Armstead, Jr., *Crossroads: Jurisdictional Problems for Armed Service Members Overseas, Present and Future*, 12 S.U. L. REV. 1 (1985); Captain Mark E. Eichelman, *International Criminal Jurisdiction Issues for the United States Military*, 2000 ARMY LAW. 23 (2000). As for information focused on civilian issues, there is a three-page memorandum on FLITE Subj: Official Duty Assertions for Civilian Component Personnel In Italy (Sept. 16, 1999) (but no further identifying information) addressing this issue as presented in this section.

[714] NATO SOFA, art. VII, *supra* note 681.

[715] *Id.*

[716] *Id.*

[717] *Id.*

[718] *See* "Status of Forces Agreements" *infra* Part III.C. Civilians that are nationals or ordinarily residents in the host nation will be subject to the exclusive jurisdiction of the host nation and not protected under the NATO SOFA. NATO SOFA, art. VII 4, *supra* note 681.

over all persons subject to the *military law* of that State."[719] Likewise, Article VII sec. 2a, states: "The *military authorities* of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the *military law* of that State with respect to offenses, including offenses relating to its security, punishable by the law of the sending State, but not by the law of the receiving State."[720] "Military law" is not defined in the SOFA.

The SOFA was concluded in 1949 when the U.S. military had criminal jurisdiction over U.S. civilians. However, there was not a method under U.S. law to exercise this jurisdiction after a line of cases starting in the 1950s overturned attempts to court-martial U.S. civilians.[721] As a result of this contextual change, an argument can be made that civilian employees no longer have the protection of the jurisdictional provisions applicable to military members. The more logical position, however, is that the foreign criminal jurisdiction provisions of the SOFA still apply in full force to the civilian component. The later position has been successfully argued before other NATO countries.[722] There are several layers to this position.

First, article VII, section 1.a. arguably, does not apply to the exercise of foreign criminal jurisdiction by the host nation, instead only affecting the right of a sending state to exercise their own punitive and disciplinary authority on host nation soil. Second, although civilian employees are not subject to the UCMJ except in time of declared war, the articles are broader than the application of the UCMJ. Rather, "military law" should and has been interpreted to include all the law members of the force and civilian component are subject to while overseas. This includes The Military Extraterritorial Jurisdiction Act of 2000 and other extraterritorial criminal statutes that apply much of U.S. federal criminal law to persons accompanying the armed forces overseas.[723] Additionally, it includes administrative law, to which civilian employees are subject. Therefore, when the Supreme Court ended the application of the UCMJ to civilians except in time of declared war, it had no effect on the SOFA.

Third, as negotiated, the SOFA was never intended to only apply to countries with military codes like the UCMJ. In fact, many other nations do not have criminal codes exclusive to their armed forces, instead trying their military in civil criminal courts.[724] Some states do not have criminal codes, civil or military, that apply extraterritorially. Since the NATO SOFA

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[719] *Id.* (emphasis added).
[720] *Id.*
[721] Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); and McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); United States v. Averette, 41 C.M.R. 363 (C.M.A. 1970).
[722] Erickson Telephone Interview, *supra* note 712.
[723] For a discussion of The Extraterritorial Jurisdiction Act of 2000, *see* "U.S. Extraterritorial Jurisdiction" *infra* Part III.A.2.c.
[724] Erickson Telephone Interview, *supra* note 712.

provisions are reciprocal, when their military and civilian component enters the U.S., these states had an interest in ensuring that the FCJ provisions applied to them and not only the U.S. on their soil. If the SOFA articles quoted above are interpreted not to apply to the U.S. civilian component after the Supreme Court decisions, then they never applied to either the military or civilian component of some other NATO countries like Germany. Such a position would be untenable for these states. Thousands of military and civilian component personnel from NATO allies enter and execute military duties in the U.S. each year.[725] This position would leave them all entirely at the mercy of U.S. law with no FCJ SOFA protections, even for official duty acts.

Although entitled to do so, host nations do not always exercise criminal jurisdiction over U.S. civilians who commit criminal offenses in their territory, particularly if the offense is against another U.S. citizen or against property owned by a U.S. citizen or the U.S. government.[726] For example, during 1998, sixteen percent of the civilian employee and dependent misconduct cases were released to the U.S. for alternate disposition. [727] Additionally, every year, U.S. citizens abroad go unpunished for crimes as serious as rape, arson, and robbery because of host nation failure to exercise criminal jurisdiction.[728]

In those instances when a foreign government does exercise criminal jurisdiction, DOD policy is to maximize the protections of U.S. personnel, including any U.S. nationals "serving with, employed by, or accompanying the Armed Forces of the United States" who are subject to foreign criminal jurisdiction and imprisonment.[729] There are a variety of procedures the U.S. government employs to protect personnel. Unfortunately, the broad terminology of the proposed defense instruction applying the policies and procedures to U.S. nationals "serving with, employed by, or accompanying the Armed Forces" is not used consistently in the instruction, and is not adopted in the implementing Interservice Instruction, AFJI 51-506. "Civilian personnel" is not defined, but in practice has been interpreted as only including civilian employees.[730] This approach is supported by the AFJI 51-506 substitution of the more restrictive language of "civilian employees and [military] dependents." This substitution is repeated throughout the interservice instruction. Other civilians accompanying the armed forces, such as some contractors and media members are not referenced in these or other instructions. The result is that while U.S. citizen civilian employees receive a

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[725] *Id.*
[726] H. R. REP NO. 106-778, 106th Cong., 2d Sess., pt. 1, at 7 (2000).
[727] Report of the Judge Advocate General of the Army 7 (Oct. 1, 1998–Sept. 30, 1999) (discussing waiver of concurrent jurisdiction cases involving civilian component) *available at* http://www.armfor.uscourts.gov/annual/ FY99/FY99ArmyReport.pdf (last visited Nov. 14, 2001) (on file with the Air Force Law Review).
[728] H. R. REP NO. 106-778, 106th Cong., 2d Sess., pt. 1, at 7 (2000).
[729] Dep't of Defense Directive 5525.1, *Status of Forces Policy and Information* ¶1.3 (Aug. 7, 1979, Supp. through Ch. 2) [hereinafter DODD 5525.1].
[730] Erickson Telephone Interview, *supra* note 712.

variety of protections, contractors and media members who accompany the armed forces are not so entitled except in one limited circumstance discussed below. The following discussion assumes these instructions apply only to civilian employees, unless otherwise noted.

Commanders associated with U.S. citizens who are serving with, employed by, or accompanying the military are encouraged to advocate on behalf of these persons in specific ways in accordance with the Senate Resolution accompanying ratification of the NATO SOFA.[731] Where practicable, these same procedures should be implemented in non-NATO SOFA countries.[732] Judge advocates should be prepared to determine whether any of these standard provisions are inconsistent with any relevant international agreements for the host nation. The provisions only apply to individuals covered by the applicable SOFA.[733] Judge advocates should also contact their functional chain of command for direction and work to assist their commander in contacting the proper U.S. diplomatic personnel when appropriate in an attempt to provide this support to civilians.[734]

DOD cooperates with the appropriate diplomatic mission to ensure civilian employees who are in custody of a foreign government receive treatment commensurate with that extended to members of the U.S. Armed Forces similarly situated.[735] It is also DOD policy to ensure military members are treated fairly and as they would be in a U.S. military facility.[736] The implementing interservice instruction restates this policy and focuses on ensuring designated civilians are treated fairly and the same as or similar to persons confined in U.S. military facilities.[737]

It is DOD policy to attempt to obtain the release of any U.S. personnel charged with violation of a foreign criminal offense from host nation custody.[738] Air Force policy mirrors the DOD policy in attempting to obtain the release of Air Force personnel.[739] "Air Force personnel" is not defined in the applicable instruction, however the instruction references military members, civilian employees, and family members.[740] It does not reference contractors or other civilians. The policy appears to apply to civilian employees as well as military members because it is not directed exclusively at military members, as are other protections afforded in the instruction.[741]

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[731] DODD 5525.1, *supra* note 729, ¶ 4.1.
[732] *Id.*
[733] Erickson Telephone Interview, *supra* note 712.
[734] *See* AFJI 51-706, *supra* note 737, ¶ 3-7b.
[735] DODD 5525.1, *supra* note 729, ¶ 4.10.6.
[736] *Id.*
[737] AFJI 51-706, *supra* note 737, ¶ 3-1.
[738] DODD 5525.1, *supra* note 729, ¶ 3 ("United States personnel" is not defined).
[739] Air Force Instruction 51-703, Foreign Criminal Jurisdiction ¶ 1 (May 6, 1994) [hereinafter AFI 51-703].
[740] *Id.* ¶¶ 4.2.1-4.2.3.
[741] *See id.* ¶ 5.

When it appears a foreign government may exercise criminal jurisdiction over "civilian personnel," the judge advocate and commander must assess whether or not there will be a way to exercise U.S. criminal or appropriate administrative jurisdiction over the civilian.[742] Judge advocates must be heavily involved in this process and functional channels notified. When the local commander determines "suitable corrective action can be taken under existing administrative regulation, the commander may request the local foreign authorities to refrain from exercising their criminal jurisdiction."[743] This assessment should particularly consider whether the civilian employee is a national of the host nation.[744]

International hold procedures must be established by commanders to "ensure that Air Force personnel subject to foreign criminal jurisdiction do not depart the country before the final disposition of charges" without approval of Headquarters, USAF International Law Division, and either the country representative or the designated commander.[745] For civilian employees, that entails obtaining written acknowledgement by the employee "that they will not be transferred, reassigned, or allowed to use any type of U.S.-funded transportation to leave the host country until they are properly released."[746]

If the host nation intends to exercise criminal jurisdiction over the civilian, the determination must be made as to whether it appears the civilian may receive a fair trial.[747] If it does not appear the civilian may be fairly tried, the General Courts-Martial Convening Authority (GCMCA) of the command in which the civilian is located contacts the designated commanding officer that is responsible for implementing policies and procedures governing U.S. personnel subject to foreign jurisdiction in the foreign country in question.[748] The GCMCA reports the facts of the case and provides the designated commanding officer with recommendations.[749] The service Judge Advocate General is also notified through channels and the designated commanding officer or Judge Advocate General determines whether "there is a substantial possibility that the accused will not receive a fair trial."[750] Such a determination requires a designated commanding officer to consult with the Chief of the Diplomatic Mission to assess whether a diplomatic request to the host nation should be made, either asking for waiver of their jurisdiction, or assurance of a fair trial.[751] If such a request is deemed appropriate, the

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[742] *See* DODD 5525.1, *supra* note 729, ¶ 4.6; AFJI 51-706, *supra* note 737, ¶ 1-7b.
[743] DODD 5525.1, *supra* note 729, ¶ 4.6.1; *see also* AFJI 51-706, *supra* note 737, ¶ 1-7b(1).
[744] AFJI 51-706, *supra* note 737, ¶ 1-7b(1).
[745] AFI 51-703, *supra* note 739, ¶ 4.2.2.
[746] *Id.*
[747] *See* DODD 5525.1, *supra* note 729, ¶ 4.6.2; AFJI 51-706, *supra* note 737, ¶ 1-7b(2).
[748] DODD 5525.1, *supra* note 729, ¶ 4.6.2; AFJI 51-706, *supra* note 737, ¶¶ 1-5, 1-7b(2).
[749] DODD 5525.1, *supra* note 729, ¶ 4.6.2; AFJI 51-706, *supra* note 737, ¶ 1-7b(2).
[750] AFJI 51-706, *supra* note 737, ¶¶ 1-7b(2), 1-7b(3); *see also* DODD 5525.1, *supra* note 729, ¶¶ 4.6.3, 4.6.4.
[751] AFJI 51-706, *supra* note 737, ¶ 1-7b(4).

designated commanding officer submits the recommendation for the request through the unified commander and the service Judge Advocate General to the Office of the Secretary of Defense who will forward the matter.[752]

Except in cases involving minor offenses, an appropriately designated trial observer who is an attorney will attend the trial and all proceedings associated with the trial, preparing a report of his observations and forwarding them through functional and command channels as appropriate.[753] The procedures for trial observers are the same whether the accused is a military member or a civilian employee. Unlike military members, civilian employees are not entitled to a military legal advisor.[754]

While a civilian employee is in foreign custody, the designated commanding officer implemented policies for safeguarding U.S. personnel apply to them, similar to military members.[755] Interestingly, this provision of DODI 5525.1 reuses the broad language of "nationals of the United States serving with, employed by or accompanying the armed forces" although the Air Force Joint Instruction still only references civilian employees.[756] As an example of these policies, within the forty-eight hours before the U.S. surrenders a civilian employee to foreign authorities for confinement, a physical examination must be conducted.[757] If the exam was not possible within that time, the exam must be conducted as soon as possible.[758] As with confined military members, civilian employees must receive regular visits at least every thirty days and the chaplain and a medical officer should visit when necessary and feasible.[759] Other protections are established by the designated commanding officer and service regulations.

Civilian employees, contractors, and media members "accompanying the armed forces" are statutorily authorized to enjoy a very valuable set of protections, although the services have not extended these protections to contractors or the media. A 1985 amendment to the United States Code expanded the application of U.S. employment of counsel for a designated civilian, and payment of counsel fees, bail, court costs, and other expenses. It now states:

> Under regulations to be prescribed by him, the Secretary concerned may employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation, before the judicial tribunals and administrative agencies of any foreign nation, of persons subject to the Uniform Code of Military Justice and of persons not subject to the Uniform Code of Military

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[752] DODD 5525.1, *supra* note 729, ¶ 4.7; AFJI 51-706, *supra* note 737, ¶ 1-7b(4).
[753] AFJI 51-706, *supra* note 737, ¶ 1-8.
[754] AFI 51-703, *supra* note 739, ¶ 5.
[755] AFJI 51-706, *supra* note 737, ¶¶ 3-1-3-9; *see also* DODD 5525.1, *supra* note 729, ¶ 4.10.
[756] DODD 5525.1, *supra* note 729, ¶ 4.10.6.
[757] AFJI 51-706, *supra* note 737, ¶ 3-4a.
[758] *Id.*
[759] *Id.* at ¶ 3-4b.

> Justice who are employed by or accompanying the armed forces in an area outside the United States.[760]

AFJI 51-706 uses the same expansive language stating: "necessary and reasonable expenses incident to representation before foreign courts and foreign administrative agencies" are authorized for "persons not subject to the UCMJ who are employed by or accompanying the U.S. Armed Forces in an area outside the United Sates and the territories and possessions of the United Sates, the Northern Mariana Islands, and the Commonwealth of Puerto Rico."[761] However, AFJI 51-706 goes on to state: "Funds under 10 U.S.C. 1037 will not be used to provide legal representation to indirect hire and contractor employees."[762] AFJI 51-706 also specifically authorizes other civilians not otherwise eligible for the funds to request this support in exceptional cases by submitting their request though service channels to the service secretary or designee.[763] There are a variety of procedures for requesting these funds and criteria for providing them as laid out in the interservice regulation.[764] Contractors and war correspondents have not enjoyed these privileges to date.[765]

Judge advocates confronted with an issue regarding a civilian who has been taken into custody during a deployment, or who is otherwise subject to host nation FCJ, have a number of issues and positions to address. Judge advocates handling this type of matter must carefully consult regulations and coordinate their approach with their functional chain of command. Thought on the matter before a deployment will aid the judge advocate significantly.

D. Support

Judge advocates also grapple with issues involving the day-to-day support provided to deployed civilians. Additional forms of support of civilians, more comparable to that provided to military members, may be necessary in some circumstance. For example, life support such as lodging, postal, or mortuary services will be required for civilian employees in most cases, for contractors if the contract requires the support, and rarely, if ever, for non-affiliated persons. For thoroughness, a discussion of two major support services, medical and legal assistance, will conclude this article.[766]

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[760] 10 U.S.C. §1037 (as amended).
[761] AFJI 51-706, *supra* note 737, ¶¶ 2-1, 2-2; DODD 5525.1, *supra* note 729, ¶ 4.9 (discussing counsel fees for persons not subject to the UCMJ and in cases "of exceptional interest to the services concerned").
[762] AFJI 51-706, *supra* note 737, ¶ 2-2c.
[763] *Id.* at ¶ 2-2d.
[764] *Id.* at ¶ 2-1-2-11.
[765] Erickson Telephone Interview, *supra* note 712.
[766] For information on other support issues not addressed herein, examine the references cited on civilian employees, contractors, and the media. Many policies and procedures on such

1. Medical

a. Civilian Employees

Civilian employees preparing for deployment should have medical and dental examinations prior to entrance into the theater.[767] Additionally, commanders must plan for in-theater medical care for deployed civilian employees.[768] Care of injuries sustained overseas shall be provided by the DOD Military Health Services System and will be equivalent to that received by active duty military personnel.[769] The civilian employee supervisor identifies any physical requirements on a Standard Form 78, Certificate of Medical Examination, to ensure the employee is physically capable of performing his or her positional tasks while in the deployed environment.

b. Contractors

Theater admission requirements should ensure compliance with DOD instructions requiring "civilian contractors in a theater of operations [receive] the same medical care as military personnel."[770] This policy covers contractors who deploy into the theater of operations, such as systems support and external theater support contractors, but not theater support contractors. Army policy is to provide, or make available on a reimbursable basis, medical and dental care for contract employees to the same extent as available to civilian employees and not prohibited by law.[771] However, this usually does not include routine care unless required by the contract.[772]

The Army medical community is entitled to care for "persons outside the United States who are otherwise ineligible when a major overseas commander determines the care to be in the best interest of the United States."[773] In Operation Uphold Democracy, the commander authorized care

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things as lodging are laid out therein. For example, systems support and external theater support contractors and media are usually provided lodging equivalent to officers.

[767] DODD 1400.32, *supra* note 359, ¶ E.3.j.k.

[768] *Id.*

[769] AFPAM 10-231, *supra* note 1, ¶ 7.3.3.

[770] DODI 3020.37, *supra* note 47, ¶ E3.1.1.9.

[771] Army Policy on Contractors on the Battlefield, *supra* note 215; DA Pam. 715-16, *supra* note 213, ¶ 8-1. While the U.S. may be required to provide care, it is not necessarily required to provide care free of charge, so most civilian employees and contractors purchase insurance to cover the cost of care.

[772] DA Pam. 715-16, *supra* note 213, ¶ 8-1.

[773] Army Regulation 40-3, *Medical, Dental, and Veterinary Care* ¶ 4-25 (July 30, 1999) [hereinafter AR 40-3].

for all members of the multi-national U.N. force, UNMIH personnel, supporting DOD contractors, and the International Police Monitors.[774]

Generally, at remote locations the Air Force does not provide medical treatment for family members, retirees, contract personnel, or personnel who are not authorized to receive medical service at government expense unless it is an emergency, and then only to preserve life or limb.[775] However, care for contractors and civilian employees during contingencies may be made available. With Air Force Major Command Surgeon General approval, medical care for contractors and civilian employees during short-term contingency operations can be made available when care is not otherwise available.[776] Medical care for contractors related to their duty performance is not uncommon. For example, contractors were provided inoculations against Japanese Encephalitis during INTERFET in East Timor.[777]

Unless there is a specific agreement otherwise, non-affiliated persons will usually not be entitled to medical care by the U.S. except in emergency situations when necessary to preserve life or limb.[778] These persons may be allowed routine blood pressure checks and assistance with preventative programs when the host medical treatment facility determines it is appropriate.[779] If additional care is then needed, the person should be transferred to civilian facilities as soon as possible.[780]

2. Legal Assistance and Notary Services

a. Civilian Employees

Air Force legal offices must provide mission-related legal assistance for civilian employees *stationed* overseas.[781] Mission-related legal assistance for the civilian employee and active duty member are identical and include, but is not limited to, wills, powers of attorney, notary services, landlord-tenant and lease issues, and Soldiers and Sailors Civil Relief Act counseling.[782] The legal

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[774] CLAMO Haiti Lessons Learned, *supra* note 56, at 130.

[775] Air Force Instruction 44-103, *The Air Force Independent Duty Medical Technician Program and Medical Support for Mobile Medical Units/Remote Sites* ¶ 2.7 (Jan. 1, 1999) [hereinafter AFI 44-103].

[776] *Id.*

[777] Interviews, Lieutenant Colonel Andy Smith, Logistics Civil Augmentation Program, U.S. Army Materiel Command, Washington D.C., May 9-11, 2000 (LTC Smith was the Army LOGCAP coordinator for this operation).

[778] *See* AFI 44-103, *supra* note 776, ¶ 2.7; AR 40-3, *supra* note 773.

[779] *See* AFI 44-103, *supra* note 776, ¶ 2.7.3.

[780] Army Field Manual 4-02.10, Theater Hospitalization ¶ L-2.g. (Dec. 29, 2000).

[781] Air Force Instruction 51-504, Legal Assistance, Notary, and Preventive Law Programs ¶ 1.3 (May 1, 1996) [hereinafter AFI 51-504].

[782] *Id.* at ¶ 1.3.1; Army Regulation 27-3, The Army Legal Assistance Program ¶ 2-5a(6)(b) (Feb. 22 1996) [hereinafter AR 27-3].

office may provide additional, non-mission-related legal assistance to overseas civilian employees as expertise and resources permit.[783]

During a deployment, legal assistance will be available to the deployed civilian employee.[784] Services to civilian employees prior to and in preparation for a deployment for deployment-related matters should also be provided. The Army specifically authorizes these services but they are not specified by the Air Force.[785] While AFI 51-504 defines civilians stationed overseas as eligible legal assistance beneficiaries, it does not mention civilians preparing to deploy. The Army grants benefits to civilians who have accepted employment outside the U.S., who are mission-essential or emergency-essential civilians, and those civilians who, while neither mission-essential or emergency-essential, have been notified they are to deploy outside the U.S.[786] Both a DOD directive and an Air Force Pamphlet entitles civilian employees and their families to legal assistance related to a deployment.[787]

Legal assistance for those preparing to deploy is limited to matters related to their deployment, typically assistance with wills and any necessary powers of attorney.[788] The home-installation legal office is responsible for this service and determining what is deployment-related assistance.[789]

b. Contractors and Non-Affiliated Persons

All other civilians, whether contractors or non-affiliated persons, will generally not be entitled to military legal assistance. However, a contractor employee who is also a retired military member will be eligible when the staff judge advocate has established non-mission related legal assistance is available for retirees.[790] However, the deployed judge advocate must be certain to ensure host nation law and status of forces agreements do not limit legal assistance to civilians who would otherwise be eligible for benefits.[791] Non-eligible civilians may be referred to other agencies or attorneys.[792]

Contractors who accompany the armed forces may be entitled to legal assistance at Army legal offices when the contract obligates DOD to provide

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[783] AFI 51-504, *supra* note 784, ¶ 1.4.
[784] AFPAM 10-231, *supra* note 1 ¶ 7.1; AFI 51-504, *supra* note 784; AR 27-3, *supra* note 782.
[785] AFI 51-504, *supra* note 784; AR 27-3, *supra* note 784, ¶ 2-5a(6)(c)-(e).
[786] AR 27-3, *supra* note 784, ¶ 2-5a(6).
[787] DODD 1400.32, *supra* note 359, ¶ E.3.o; AFPAM 10-231, *supra* note 1, ¶ 7.1.
[788] DODD 1400.32, *supra* note 359, ¶ E.3.o; AFPAM 10-231, *supra* note 1, ¶ 7.1; AR 27-3, *supra* note 784, ¶ 2-5a(6).
[789] AFPAM 10-231, *supra* note 1, ¶ 7.1; AR 27-3, *supra* note 784, ¶ 2-5a(6).
[790] AFI 51-504, *supra* note 784, ¶ 1.4. A staff judge advocate may also authorize non-mission related legal assistance for someone who is not otherwise an eligible beneficiary when the civilian has a legal problem related to a past, present or future military obligation, *e.g.*, the next-of-kin of someone killed on active duty. *Id.* ¶ 1.4.2.
[791] *See* AR 27-3, *supra* note 784, ¶ 2-5c.
[792] AFI 51-504, *supra* note 784, ¶¶ 1.7, 1.8.

this assistance and host nation laws and international agreements do not prohibit the services.[793] These services are limited to ministerial services such as notaries, legal counseling and document preparation and referral to civilian lawyers.[794] The Army discourages these contractual provisions.[795]

Notary services are available for a broader group of individuals. In addition to those who are eligible for legal assistance, "persons serving with, employed by, or accompanying the armed forces outside the U.S." and its territories may receive notary services.[796] This language authorizes the Air Force to provide notary services to contractors and war correspondents but not other civilians.

IV. CONCLUSION

Deployed commanders and their judge advocates continually deal with civilians across the conflict spectrum. Increasingly, a commander's very ability to accomplish the mission is integrally involved with civilian support. However, only recently have policy makers begun to recognize the numbers and seriousness of the issues raised by the change in the way the U.S. conducts its operations. Ten years after the employment of thousands of civilians in the Gulf War, joint and service doctrine on logistics is finally addressing contractors' roles in deployed operations. Even today, the services are struggling with defining and taking a stance on several civilian-related issues, such as their authorized nexus to combat operations, uniforms, and weapons. It is no doubt that new issues will continue to arise.

The United States' use of civilians in operations continues to thrust them further from the shaft and closer to the tip of the spear. How close are we to civilian employees and contractors actually or being perceived to cross the line into combatant activities? If we haven't already crossed the line, we are very close to doing so. Certainly civilians that work close to hostilities, such as the JSTAR and TOW/ITAS contractors who also wear uniforms and carry arms openly, will likely appear to opposition forces to be combatants. Policy makers need to be concerned, not only about the economic impact of their decisions, but the overarching impact they may have on the life or death of those civilians at the tip of the spear.

Commanders and Judge Advocates will not be able to prevent civilians' presence in the battlespace because it is not now possible to conduct operations without them. However, they should be prepared to deal with issues that arise because of the civilians' presence such as proper roles for those civilians, theater admission requirements, command and control, force protection and services. They must also be prepared to quickly and effectively deal with other

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[793] AR 27-3, *supra* note 784, ¶ 2-5a(7); DA Pam. 715-16, *supra* note 213, ¶ 2-2c(1).
[794] AR 27-3, *supra* note 784, ¶ 2-5a(7).
[795] *Id.*
[796] AFI 51-504, *supra* note 784, ¶ 2.1.5.

civilians they will encounter such as the media and other non-affiliated personnel. It is only through smoothly integrating DOD civilian employees and contractors into operations planning and execution that commanders can effectively wage war in this new century.

CIVILIANIZING THE FORCE: IS THE UNITED STATES CROSSING THE RUBICON[1]?

MAJOR MICHAEL E. GUILLORY*

I. INTRODUCTION

The end of the cold war has brought about dramatic changes in the United States military. As the nation has sought to beat its swords into plowshares, privatization through outsourcing and the revolution in military affairs pertaining to technology have been seen as the means of reducing forces, and in turn costs, while still maintaining military might. As a result, from 1989 to 1999 the active duty force size was reduced from 2,174,200 to 1,385,700.[2] This tradeoff has not come without consequences. The drawdown of military personnel and reliance on sophisticated equipment have made the armed forces dependent on civilian specialists, be they government employees or contractor technicians.[3] Although the United States military has always relied on civilian support in time of war,[4] as operational tempo has increased, more and more specialists are having to deploy. For example, during the Gulf War one out of thirty-six deployed personnel was a civilian.[5] By 1996, the ratio of civilians to military in Bosnia was one out of ten.[6] Presently, in

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**Major Guillory (B.A,. Louisiana State University, J.D., Tulane University) is a reservist assigned to the International and Operations Law Division at the Air Force Judge Advocate General School, Maxwell AFB AL. He is a member of the Florida State Bar.*

[1] A river in Northern Italy that formed a line the Roman legions were not allowed to cross for fear they would be used against the civilian government in Rome.

[2] UNDER SECRETARY OF DEFENSE FOR PERSONNEL & READINESS, U.S. DEP'T OF DEFENSE, DEFENSE MANPOWER REQUIREMENTS REPORT, FISCAL YEAR 2001 (May 2000).

[3] OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF DEFENSE, REPORT NO. 91-105, CIVILIAN CONTRACTOR OVERSEAS SUPPORT DURING HOSTILITIES (Jun. 26, 1991).

[4] For an excellent history of civilian contractors serving in the military, *see* Major Brian H. Brady, *Notice Provisions for United States Citizen Contractor Employees Serving With the Armed Forces of the United States in the Field: Time to Reflect their Assimilated Status in Government Contracts?* 147 Mil. L. Rev. 1 (1995) [hereinafter Brady].

[5] The Government Accounting Office (GAO) estimated that during the Gulf War approximately 500,000 military personnel and 14,391 civilians deployed with U.S. forces. GOVERNMENT ACCOUNTING OFFICE, Pub. GAO/NSIAD-95-5, DOD FORCE MIX ISSUES: GREATER RELIANCE ON CIVILIANS IN SUPPORT ROLES COULD PROVIDE SIGNIFICANT BENEFITS, (Oct. 19, 1994).

[6] Kathryn McIntire Peters, *Civilians at War*, Government Executive, Jul. 1996 [hereinafter Peters]. At one point in Bosnia, 6,000 uniformed Army personnel were supported by 5,900 civilians. Gordon L. Campbell, *Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm's Way and Requiring Soldiers to Depend Upon Them* (Jan. 27-28, 2000) (paper prepared for presentation to the Joint Services Conference on Professional Ethics 2000),

Colombia as many as one out of every five Americans working on the drug suppression effort may be civilians.[7]

Not only has participation increased, but the tasks have changed as well. In times past, civilians served in support positions primarily behind the lines, safely away from the fighting.[8] Today, many civilian technicians are working alongside the troops at the frontline.[9] Of course, with the introduction of long range strike capability and the concept of the battlespace[10] such distinctions are becoming less noteworthy.[11] All deployed personnel now face greater risk of injury, death, or capture.[12]

Placing civilians in harm's way has domestic as well as international implications. This article will focus on the international legal issues--namely whether civilianizing the forces violates the law of armed conflict.[13] First, it will review the basic differentiation between combatants and noncombatants. Next, it will analyze the limitations placed upon the conduct of the individuals within the respective groups. Then, the restrictions will be applied to the two main categories of civilians: government employees and contractors, and an attempt will be made to draw a clear line as to the types of activities that can be

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available at http://www.usafa.af.mil/jscope/JCOPE00/Campbell00.html (on file with the Air Force Law Review) [hereinafter Campbell].

[7] Juan O. Tamayo, *Privatizing War: U.S. Civilians Taking Risks in Colombia Drug Mission*, WILMINGTON MORNING STAR, Feb. 26, 2001, at A1 [hereinafter Tamayo]. At least six U.S. firms now work with Colombian security forces, either hired directly by the Colombian government or under contracts with the United States Departments of State and Defense. *Id.*

[8] Colonel Steven J. Zamparelli, *Contractors on the Battlefield—What have we Signed up For?* A. F. J. OF LOGISTICS, Fall 1999, at 11 [hereinafter Zamparelli].

[9] Major Kim M. Nelson, Contractors on the Battlefield—Force Multipliers or Force Dividers? 4-6 (Apr. 2000) (unpublished research report, Air Command & Staff College) (on file at Air University Library, AU/ACSC/130/2000-04) [hereinafter Nelson].

[10] Battlespace is defined as the environment, factors, and conditions that must be understood to successfully apply combat power, protect the force, or complete the mission. This includes the air, land, sea, space, and the included enemy and friendly forces, facilities, weather, terrain, the electromagnetic spectrum, and information environment within the operational areas and areas of interest. U.S. DEP'T OF DEFENSE, JOINT PUB. 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS (12 Apr. 2001, as amended through 15 Oct. 2001), *available at* DODD Dictionary of Military Terms (visited Nov. 5, 2001) http://www.dtic.mil/doctrine/jel/new_pubs/ip1.01.pdf [hereinafter JOINT PUB 1-02] (on file with the Air Force Law Review).

[11] *See* Major James E. Althouse, *Contractors on the Battlefield: What Doctrine Says, and Doesn't Say*, ARMY LOGISTICIAN, Nov.-Dec. 1998, at 14 [hereinafter Althouse].

[12] "The single deadliest incident during the Persian Gulf War occurred when an Iraqi scud missile hit barracks housing Army Reservists who were providing water purification support far from the front." Zamparelli, s*upra* note 8, at 17.

[13] The law of armed conflict, or LOAC, is also called "the law of war," "humanitarian law," and "international humanitarian law." Adams Roberts, Richard Guelff, *1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts Prefatory Note, in* DOCUMENTS ON THE LAWS OF WAR 419 (3rd ed., Oxford University Press 2000).

performed. Finally, to the extent the United States is in danger of crossing this line, possible solutions and alternatives will be discussed.

II. CIVILIANS UNDER THE LAW OF ARMED CONFLICT

Before analyzing the role of civilians under the laws of armed conflict, it should be noted that the Geneva Conventions are applicable only during international conflicts or during partial or total occupation of territory by one state of another.[14] However, the United States has taken the position that it "will comply with the law of war during all armed conflicts; however, such conflicts are characterized and, unless otherwise directed by competent authorities, will comply with the principles and spirit of the law of war during all other operations."[15] In keeping with this expanded application, discussions in this article will include all military operations unless otherwise specified.

At its core, the law of armed conflict distinguishes between combatants and noncombatants.[16] Combatants are "those persons who have the right under international law to participate directly in armed conflict during hostilities."[17] Members of the armed forces of a party to a conflict are combatants.[18] This

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[14] Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 2, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 2, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Geneva Convention IV].

[15] CHAIRMAN, JOINT CHIEFS OF STAFF, U.S. DEP'T OF DEFENSE, CJCSI 5810.01A, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM, 5a (27 Aug. 1999) [hereinafter CJCSI 5810.01A]. All other operations encompass military operations other than war, namely, "the use of military capabilities across the range of military operations short of war. These military actions can be applied to complement any combination of the other instruments of national power and occur before, during, and after war." JOINT PUB 1-02, s*upra* note 10.

[16] Knut Ipsen, *Combatants and Non-combatants, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 65, 65-104 (Dieter Fleck ed., 1995) (hereinafter Ipsen).

[17] THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, 73 INTERNATIONAL LAW STUDIES, 296 (A.R. Thomas and James C. Duncan eds., supp., 1999) [hereinafter Supplement to Commander's Handbook].

[18] Ipsen, s*upra* note 16, at 65. This does not include medical personnel, chaplains, civil defense personnel, and those who have acquired civil defense status. Supplement to Commander's Handbook, s*upra* note 17, at 296. The Geneva Conventions of 12 August 1949, Additional Protocols of 8 June 1977 and Relating to the Protection of Victims of International Armed Conflicts, art. 43, §2, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] provides, "Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities." Although Additional Protocol I was never ratified by the United States, this provision reflects customary

includes integrated militias, reservists, and voluntary corps.[19] Traditionally, to be a member of an armed force, a person must comply with the following:

a) Be commanded by a person responsible for his subordinates;
b) Have a fixed distinctive emblem recognizable at a distance;
c) Carry arms openly; and
d) Conduct operations in accordance with the laws and customs of war.[20]

The requirement for distinctive emblems (most often a uniform) and carrying arms openly exists to distinguish combatants from non-combatants. Having a responsible command and conducting operations in accordance with the laws and customs of war ensure compliance with international law. This is critical because, while combatants may be targeted by opposing forces during an armed conflict, they cannot be punished for hostile acts committed pursuant to the law of armed conflict.[21] Instead, if captured, a combatant who has complied with international law is entitled to be treated as a prisoner of war.[22] Noncombatants, or unlawful combatants if directly taking part in hostile acts, are not extended this benefit.

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international law. George H. Aldrich, *The Laws of War on Land*, 94 A.J.I.L. 42, 46 (2000) [hereinafter Aldrich].

[19] Ipsen, s*upra* note 16, at 70.

[20] 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18 1907, art. 1, regulations, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV]; Geneva Convention I, s*upra* note 14, art. 13(2); Geneva Convention II, s*upra* note 14, art. 13(2); Geneva Convention III, s*upra* note 14, art. 4A(2). Additional Protocol I words the definition differently:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

Aldrich, *supra* note 18, at art. 43, §1. This change results from the attempt to relax the rules about wearing a distinctive uniform and carrying arms openly, which will be discussed *infra*.

[21] Ipsen, s*upra* note 16, at 68. "Pursuant to the law of armed conflict" means complying with the restrictions on means and methods of warfare. Breaches of these restrictions are war crimes. War Crimes Act, 18 U.S.C. § 2441(c) (1996) [hereinafter War Crimes Act]. A combatant who has committed such crimes can be prosecuted by his or her own country and/or capturing forces. Ipsen, s*upra* note 16, at 81.

[22] *See* Geneva Convention III, s*upra* note 14, articles 5, 13, 99; R.C. HINGORANI, PRISONERS OF WAR 2 (2ed. 1982).

Noncombatants are generally synonymous with civilians.[23] However, they also comprise former combatants who become *hors de combat* (i.e., prisoners of war, wounded, shipwrecked, and sick, medical personnel, chaplains, and civilians accompanying the armed forces.)[24] Civilians accompanying the armed forces include civilian government employees, civilian members of military aircraft crews, supply contractor personnel, contractor technical representatives, war correspondents, and members of labor units or civilian services responsible for the welfare of armed forces.[25] They are different from other civilians because their proximity to the fighting places them at greater risk of injury, death, and capture. They are also different in that they must receive authorization from the armed forces that they accompany, and have been provided with an identity card.[26] As a result, as with *hors de combat* and surrendering combatants, if captured they are entitled to prisoner of war treatment.[27]

Because of their unique treatment, some commentators have argued that civilians accompanying the force should be considered quasi-combatants.[28] Remarkably, a Joint Publication of the Department of Defense

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[23] Supplement to Commander's Handbook, s*upra* note 17, at 297.

[24] *Id.* at 297. Article 4A(4) of Geneva Convention III describes persons who accompany the armed forces without actually being members thereof as "civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces." Geneva Convention III, s*upra* note 14, art 4A(4).

[25] Supplement to Commander's Handbook, s*upra* note 17, at 482. Although now obsolete, U.S. DEP'T OF THE AIR FORCE, PAM. 110-31, JUDGE ADVOCATE GENERAL ACTIVITIES, INTERNATIONAL LAW THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, concurs with this listing at paragraph 3-4b (18 Nov. 1976) [hereinafter AFP 110-31].

[26] Most notably the Geneva Conventions Card. Geneva Convention III, s*upra* note 14, art. 4. For those accompanying U.S. forces, the identity card was to have been the DD Form 2764, United States DoD/Uniformed Services Civilian Geneva Conventions Identification Card, which was to have been phased in over a 5-year period, replacing the DD Form 489, Geneva Conventions Card for Civilians Who Accompany the Armed Forces. U.S. DEP'T OF THE AIR FORCE, PAM. 10-231, FEDERAL CIVILIAN DEPLOYMENT GUIDE, para. 3.7 (1 Apr. 1999) [hereinafter AFPAM 10-231]. The Common Access Card, which is undergoing review, is to replace both the DD Form 489 and the DD Form 2764. Memorandum, Office of the Secretary of Defense, subject: Common Access Card (16 Jan. 2001).

[27] Hague IV, s*upra* note 20, art 13; Geneva Convention III, s*upra* note 14, art 4A(4).

[28] J.M. Spaight, *Non-Combatants and Air Attack*, 9 AIR L. REV. 372, 375 (1938); Hays Parks, *Air War and the Law of War*, 32 A.F.L. REV. 1, 116-135 (1990). Addressing the issue from the standpoint of legitimate targeting, both commentators would extend quasi-combatant status to civilian workers directly supporting the war effort, i.e., munitions workers, critical scientists, etc., no matter where they are located. Under the principle of discrimination, a customary aspect of the law of armed conflict, civilians cannot be the subject of a direct attack, but could be wounded or killed in an attack if they were co-located with a lawful military target. Spaight foresaw the problem prior to the Second World War with armament workers, whom he correctly asserted would be exposed to attack at their factories, and argued that to protect ordinary civilians the former should be designated quasi-combatants. Spaight, *supra*. Parks' analysis came as a result of Additional Protocol I, s*upra* note 18, which limits the principle of

states that "US and foreign contractors accompanying the armed forces … are considered civilians accompanying the force and are neither combatants or noncombatants."[29] Under international law, this assertion is clearly wrong.[30]

Civilians are not authorized to participate directly in hostile actions.[31] If they do, they are considered unlawful combatants or belligerents and may be prosecuted as criminals.[32] Further refining this general prohibition, hostile acts

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discrimination by preventing attacks against civilians unless they are taking a direct part in hostilities (Article 51) and makes such attacks a grave breach (Article 85). Parks, *supra*. The precise meaning of "direct part in hostilities", which is the same terminology used in describing what combatants may do, will be discussed *infra*.

[29] JOINT CHIEFS OF STAFF, JOINT PUB. 4-0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS, Ch. V, 12a (6 Apr. 2000) [hereinafter JOINT PUB 4-0].

[30] Under international law, civilians accompanying the armed forces are regarded as noncombatants "[O]nly members of the armed forces are combatants. This should therefore dispense with the concept of 'quasi-combatants' . . . ." International Committee of the Red Cross Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 515 (Y. Sandoz, C. Swinarski, B. Zimmerman, eds, Geneva, 1957) [hereinafter Additional Protocols Commentary].

[31] Supplement to Commander's Handbook, s*upra* note 17, at 297; Article 51(3) of the Additional Protocols, *supra* note 18.

[32] Ipsen, s*upra* note 16, at 68; AFP 110-31, s*upra* note 25, at n. 23. The United States Supreme Court addressed this issue in Ex Parte Quirin, 317 U.S. 1 (1942):

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations, and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but, in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

Id. at 30-31. A capturing party may treat unlawful combatants as marauders or bandits, LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 105 (1993). Unlawful combatants can also be charged with war crimes. The United States Military Tribunal at Nuremberg in The Hostages Trial of 8 July 1947-19 Feb. 1948, held that:

> [T]he rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the law of wars. Fighting is legitimate only for the combatant personnel of a country. It is only his group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender.

Law Reports of Trials of War Criminals, United Nations Wartime Commission, Vol. XV, 111 (London, 1947-49) [hereinafter War Trial Reports]. Prior to being tried as a criminal, any captured person is entitled to a hearing before a competent tribunal to determine status. Geneva Convention III, s*upra* note 14, art. 5; Additional Protocol I, s*upra* note 18, art. 45. If the tribunal determines that the person unlawfully took part in hostilities, that person might then be tried for the crimes and, if convicted, could be executed. Additional Protocols Commentary, *supra* note 30, at 551.

"should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces,"[33] while direct participation is described as "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[34] "Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place."[35]

Traditional civilian activities are not direct participation. "There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees."[36] Accordingly, participation in activities such as arms production, military engineering, and military transport, although ultimately harmful to an enemy, are not hostile acts.[37] Likewise, according to an International Committee of the Red Cross (ICRC) Commentary to the 1977 Protocols to the Geneva Conventions, direct participation does not include acts such as "gathering and transmission of military information, transportation of arms and munitions, provision of supplies, etc."[38]

The United States military is not so relaxed in its definition of direct participation in hostile acts. Not only does it take the position that tasks such as serving as lookouts or guards is direct participation,[39] but the Navy and Air Force seem to disagree with the ICRC Commentary as they have asserted that being an intelligence agent may constitute direct participation.[40] The Air

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[33] Additional Protocols Commentary, s*upra* note 30, at 618.

[34] *Id.* at 619. The prohibition against direct participation in hostilities applies to all civilians, regardless of location. Legally, there is no difference between a civilian accompanying the force directly causing harm to the enemy and a civilian doing so from a thousand miles away. For example, most, if not all, countries would consider a computer network attack (CNA) against their infrastructures by another government to be the equivalent of an armed attack. WALTER G. SHARP, SR., CYBERSPACE AND THE USE OF FORCE, 133 (Aegis Research Corp. 1999). If a civilian programmer working on behalf of his or her government launched the CNA, that person would be an unlawful combatant, no matter where he or she initiated the attack. The only distinction between the civilian accompanying the force and other civilians is that if captured the former is granted prisoner of war status. This status, however, would not protect the person from being prosecuted as an unlawful belligerent. *See* note 32, s*upra*.

[35] *Id.* at 516.

[36] *Id.* at 619.

[37] A.P.V. ROGERS, LAW ON THE BATTLEFIELD 8 (1996).

[38] Additional Protocols Commentary, s*upra* note 30, at 901.

[39] Supplement to Commander's Handbook, s*upra* note 17, at 484; U.S. DEP'T OF THE ARMY, ARMY MATERIAL COMMAND, REG. 690-11, CIVILIAN PERSONNEL MOBILIZATION PLANNING AND MANAGEMENT 21-1 (10 Feb. 1997). At least this was the Air Force's position in 1980. U.S. DEP'T OF THE AIR FORCE, PAM. 110-34, JUDGE ADVOCATE GENERAL: COMMANDER'S HANDBOOK ON THE LAW OF ARMED CONFLICT, para. 2-8 (25 Jul. 1980) (now obsolete) [hereinafter AFP 110-34].

[40] Supplement to Commander's Handbook, s*upra* note 17, at 484. This conclusion is based on the assumption that an intelligence agent gathers and transmits military information. If so, the

Force also took the position that direct participation included "being a member of a weapon crew, or …a crewman on a military aircraft in combat."[41] At least one commentator apparently supports such expansive viewpoints by arguing that specific combatant-like activity includes "the gathering of intelligence," as well as logistical support for combatant forces, or acts of violence.[42] This commentator is not alone in his belief that providing logistical support for combatant forces constitutes taking direct part in hostilities. A. P. V. Rogers, a noted legal expert, asserts that a strong argument could be made that a civilian driving an ammunition truck in a combat zone could be included in this category.[43]

Little historical guidance exists to help define what constitutes direct participation in hostilities. During the Second World War, the United States put uniforms on its civilian scientists, issued them cards identifying them as expert consultant noncombatants who, if captured, were to be treated as POWs, and sent them to the front lines for operational research.[44] The British did the same, and one poor soul was even training to parachute behind Japanese lines when the war ended.[45] It is fortunate that these scientists were not captured as they may have been serving in combatant roles while on the missions.[46]

Less fortunate were civilian contractors hired by the Naval Civil Engineering Corps to build military installations in the South Pacific.[47] In

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inclusion of intelligence agents brings into question the thousands of civilians working for the various U.S. intelligence agencies. (The U.S. Intelligence Community is defined by the Fiscal Year 1996 Intelligence Authorization Act [P.L. 104-93], which lists the following agencies and organizations that conduct intelligence and intelligence-related activities: Central Intelligence Agency [CIA], Department of Defense, Defense Intelligence Agency [DIA], National Security Agency [NSA], National Reconnaissance Office [NRO], Departments of the Army, Navy, Air Force, Department of State, Department of the Treasury, Department of Energy, Federal Bureau of Investigation, Drug Enforcement Administration, and Central Imagery Office). To the extent that these civilians "clandestinely or on false pretenses obtain or endeavor to obtain information in the zone of operations of a belligerent", they are spies. Hague IV, s*upra* note 20, art. 29. Spying or espionage, while illegal under most state's domestic laws, is not unlawful under the law of armed conflict. Additional Protocols Commentary, s*upra* note 30, at 540. Does this then mean that civilians who gather intelligence clandestinely are both spies and unlawful combatants, and that those who do so openly, while not spies, are nevertheless unlawful combatants?

[41] AFP 110-34, *supra* note 39, at 2-8. This also includes rescuing downed airmen. "Civilians engaged in the rescue and return of enemy aircraft are therefore subject to attack. This would include, for example, members of a civilian air auxiliary, such as the U.S. Civil Air Patrol, who engage in military search and rescue activity in wartime." *Id*. at 2-8(b).

[42] Parks, s*upra* note 28, at 118.

[43] Rogers, *supra* note 37, at 8.

[44] LINCOLN R. THIESMEYER & JOHN E. BURCHARD, COMBAT SCIENTISTS 5 (1947).

[45] BRITISH AIR MINISTRY, AIR PUB. 3368, THE ORIGINS AND DEVELOPMENT OF OPERATIONAL RESEARCH IN THE ROYAL AIR FORCE XVII 174 (London, 1963).

[46] Parks, s*upra* note 28, at 130.

[47] Brady, *supra* note 4, at 14, citing WILLIAM B. HUIE, CAN DO! THE STORY OF THE SEABEES 66 (1945).

1941, when the Japanese invaded, the unarmed civilian contractor employees surrendered along with the military defenders.[48] The Japanese accorded the contractor employees prisoner of war status,[49] but treated them harshly. This harsh treatment of civilians was a motivating factor in the creation of the "Fighting Seabees" Construction Battalions.[50] In the same theater, acknowledging that morale and welfare support does not rise to a combat activity, American forces granted prisoner of war status to prostitutes accompanying the Japanese Army in Burma.[51]

The lack of consistent, historical guidance has left this area fertile for varied interpretations. The Australian Defense Force at first appears to offer a more narrow view of direct participation than the United States' by referring to it as "activities directly involved in the delivery of violence and protecting personnel, infrastructure and materiel."[52] Even so, this definition is broadened by a subsequent suggestion that civilians should not be involved in frontline units responsible for the delivery of violence.[53] Exactly what "involved" means is not made clear. In a similarly murky vein, one commentator has asserted that direct participation includes the use of a "weapons-system in an indispensable function."[54] As with the Australians, he provides neither further definition nor an example of what an indispensable function would be. With so many varied opinions, it is not surprising that during discussions on drafting the Additional Protocols to the Geneva Conventions, the experts could not agree on what constitutes combatant activity.[55]

It is apparent that formulating a definitive answer as to what amounts to direct participation is not easy.[56] Obviously, only combatants may kill, injure,

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[48] Brady, *supra* note 4, at 14.
[49] *Id.*
[50] *Id.* citing HUGH B. CAVE, WE BUILD, WE FIGHT! THE STORY OF THE SEABEES 2 (New York 1944).
[51] Green, *supra* note 32, at 117.
[52] DIRECTORATE OF INDUSTRY ENGAGEMENT NATIONAL SUPPORT DIVISION, AUSTRALIAN DEFENCE FORCE HEADQUARTERS, THE DEPLOYMENT OF CIVILIAN CONTRACTORS IN SUPPORT OF AUSTRALIAN DEFENCE FORCE OPERATIONS, para 7.21 (Deployment of Civilian Contractors [DOCC] Project Paper 1999) [hereinafter ADF Project Paper].
[53] *Id.* at 7.35.
[54] Ipsen, s*upra* note 16, at 67.
[55] *Position of the International Committee of the Red Cross on Optional Protocol to the Convention on the Rights of the Child Concerning Involvement of Children in Armed Conflicts*, International Review of the Red Cross, No. 322, 107-125, at § 30 (31 Mar. 1998). One representative declared it would be a good idea to cite specific examples after the reference to "direct participation," such as spying, recruitment, propaganda, and the transport of arms and of military personnel. Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Report on the Work of the Conference*, Vol. I, ICRC, Geneva, at 143 (1972). Others rejected the idea. *Id*.
[56] "Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad." Additional Protocols Commentary, *supra* note 30, at 516.

or capture enemy forces or destroy enemy property.[57] Just as obvious, working on a factory floor far from the front lines is noncombatant participation. But what of the many activities taking place in between? Part of the confusion is that the duties now being filled by civilians have been traditionally performed by military members who, while not necessarily in combat billets, could be called upon to fight the enemy if needed.[58] Another part of the confusion is that the legal regime, conceived before the advent of computer electronics, did not foresee weapons systems that would require cradle-to-grave support by specialists. Still, while universal consensus on every activity may be impossible the need for clearer guidance is evident.

III. GOVERNMENT EMPLOYEES

Government employees are civilians, be they United States citizens or foreign nationals, hired directly or indirectly to work for the Department of Defense.[59] Only those employees designated as emergency-essential, or E-E, are supposed to accompany the forces during a deployment.[60] When they

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[57] Supplement to Commander's Handbook, s*upra* note 17, at 484.

[58] Eric A. Orsini and Lieutenant Colonel Gary T. Bublitz, *Contractors on the Battlefield: Risks on the Road Ahead?* ARMY LOGISTICIAN, Jan.-Feb. 1999, at 130 [hereinafter Orsini]. "Most military personnel are classified as combatants and can be relied upon to assist and augment the fighting force, as well as to provide self-protection and defend equipment and terrain. This was demonstrated time and time again in World War II, the Korean War, and the Vietnam War. History shows us how, in World War II, clerks and technicians replaced infantry who were killed and combat service support personnel were reclassified to combat arms to make up for casualties." *Id*. at 130-132.

[59] Dep't of Defense Instruction 1400.31, DoD Civilian Work Force Contingency and Emergency Planning and Execution, C.1 (28 Apr. 1995).

[60] Dep't of Defense Directive 1404.10, Emergency-Essential (E-E) DoD U.S. Citizen Civilian Employees, C.1 (10 Apr. 1992). Emergency-Essential (E-E) Civilian Employees fill positions outside the United States or "that would be transferred overseas during a crisis situation or which requires the incumbent to deploy or to perform temporary duty assignments overseas during a crisis in support of a military operation." *Id*. The position must meet three Congressionally established criteria:

> (1) It is the duty of the employee to provide immediate and continuing support for combat operations or to support maintenance and repair of combat essential systems of the armed forces;
> (2) It is necessary for the employee to perform that duty in a combat zone after the evacuation of nonessential personnel, including any dependents of members of the armed forces, from the zone in connection with a war, a national emergency declared by Congress or the President, or the commencement of combat operations of the armed forces in the zone;
> (3) It is impracticable to convert the employee's position to a position authorized to be filled by a member of the armed forces because of a necessity for that duty to be performed without interruption.

deploy, they function primarily in traditional logistics and engineering support roles.[61] Because of this, the bulk of government employees deploying for the Army are assigned to the Logistics Support Element (LSE).[62] The LSE consists of the traditional depot divisions of supply, maintenance, ammunition, and supporting offices along with sections to support field requirements for oil analysis, Test, Measurement and Diagnostic Equipment, and Field Science and Technology.[63] An cursory Internet search found emergency-essential designations in property management, language specialists, aircraft maintenance, fire fighting, and in an historian position.[64] Government employees may also serve as public affairs representatives, safety and recreation specialists, technicians, and aircrew members of AWACS and J-STARS aircraft.[65]

Recently, the Army established Electronic Sustainment Support Centers (ESSCs) for command, control, communications, computer, and intelligence and electronic warfare maintenance.[66] During contingencies, an

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Emergency Essential Employees: Designation, 10 U.S.C. § 1580 (1999). Volunteers are solicited to fill these positions because E-E personnel are not evacuated along with other civilians during non-combatant evacuation operations. Non-volunteers may be used in the event of unforeseen contingencies. However, it is Air Force policy only to deploy employees who have agreed to fill E-E positions. AFPAM 10-231, s*upra* note 26, at 1.2.1. "All civilian employees deploying to combat operations/crisis situations are considered E-E, regardless of volunteer status or the signing of the E-E position agreement .... The employee will be in an E-E status for the duration of the assignment." *Id.* at 1.3.3; U.S. DEP'T OF THE ARMY, PAM. 690-47, DA CIVILIAN EMPLOYEE DEPLOYMENT GUIDE, 1-3 (1 Nov. 1995) [hereinafter DA PAM 690-47].

[61] Army Link News, *More civilians will deploy along with soldiers*, (Nov. 1996) *available at* http://www.dtic.mil/armylink/news/Nov1996/a19961107civdeps.html (on file with the Air Force Law Review) (visited Feb. 22, 2001).

[62] U.S. Army Materiel Command, *Civilian Deployment Guide*, Logistics Support Element Chapter (Sept. 1999) [hereinafter AMC Civilian Guide]. "The LSE is a multi-faceted organization which supports military operations. It is largely a civilian organization which deploys at the request of the supported operational commander to perform missions within the area of operations. Its mission is to enhance unit/weapon system readiness by bringing U.S.-based technical capabilities and resources to deployed units. It has a military command structure similar to other units, but consists of a flexible combination of military, DA civilians and contractor personnel that can be tailored to suit the needs of a particular contingency." U.S. DEP'T OF THE ARMY, PAM. 715-16, CONTRACTOR DEPLOYMENT GUIDE, 2-1b (27 Feb. 1998) [hereinafter DA PAM 715-16]. During Operation Desert Storm in the Gulf, the LSE comprised 665 Military personnel, 1164 DoD Civilians and 1168 Contractors. The LSE Commander's team performed aviation maintenance, supported high technology weapon systems and upgraded the M1 tank to the more powerful and protected MA1 configuration. ADF Project Paper, s*upra* note 52, at 69-70.

[63] AMC Civilian Guide, s*upra* note 62, at Logistics Support Element Chapter.

[64] Data obtained on April 11, 2001 via Google search engine.

[65] Use and Status of Civilians, Vol. I, Part 3, Tab 15, Operation Law Deployment Deskbook, International and Operations Law Division, Office of The Judge Advocate General, Headquarters United States Air Force (HQ USAF/JAI) (Proposed Draft 1998).

[66] Kathleen A. Bannister, *One-Stop Shopping at CECOM*, ARMY LOGISTICIAN, Jan. – Feb. 1999, at 140.

ESSC team comprised of government employees and contractors deploys with the LSE to provide forward engineering, management, logistics and technical services.[67] As an example, one such team of six Army civilians and twenty-two contractors deployed to Bosnia/Kosovo to support fourteen weapons systems and/or programs.[68]

Government employees performing traditional support functions should be in no danger of jeopardizing their noncombatant status, but can the same be said for emergency-essential ESSC weapons system team members providing technical support at the frontline? Or the J-STARS aircrew members flying missions alongside military operators? Arguably, the weapons system technicians are "involved in the delivery of violence" or serving an "indispensable function**"** with the weapons systems. After all, by definition, they are essential personnel, which means that the weapons systems need them to function. As for the J-STARS crewmembers, they are crewmen on a military aircraft that is used in combat control as well as in essential elements of the intelligence-gathering missions. Even if a case can be made that these activities do not fall within the more literal interpretations of direct participation,[69] the deciding factor, at least for the opposition, may be that these employees not only work alongside military members, but they wear military uniforms[70]and can be armed.[71] In short, they *appear* to be combatants.[72]

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[67] John Sieni, AMC CECOM Electronic Sustainment Support Center (ESSC) Briefing, Apr. 2000, *available at* http://lrc1.monmouth.army.mil/internet/pie.nsf/a6300ed473bc85e58525692 \e0053381e/ 45b3c13e20610ad1852569bc0044c351. In preparation for deployment, the ESSC is developing a deployable "Fly-Away" package [(trailer mounted maintenance vans and High Mobility Multipurpose Wheeled Vehicles (HMMWV)-mounted maintenance shelters)] stored and maintained at Tobyhanna Army Depot and/or pre-positioned forward. During deployment, ESSC cells will fully integrate into the LSE. As part of the LSE, ESSC cells will centralize management of contractors performing maintenance and repair on electronics systems and equipment at locations within the area of operations. *Id.*

[68] *Id.*

[69] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 provides: The increasingly perfected character of modern weapons, which have spread throughout the world at an ever-increasing rate, requires the presence of such specialists (foreign advisers and military technicians), either for the selection of military personnel, their training or the correct maintenance of the weapons. As long as these experts do not take any direct part in the hostilities, they are neither combatants nor mercenaries, but civilians who do not participate in combat. Additional Protocols Commentary, s*upra* note 30, at 579.

[70] U.S. DEP'T OF THE AIR FORCE, INSTR. 36-801, PERSONNEL, UNIFORMS FOR CIVILIAN EMPLOYEES, 6.7 (29 Apr. 1994) [hereinafter AFI 36-801]; DA PAM 690-47, s*upra* note 60, at 1-13: "Organization Clothing and Individual Equipment (OCIE) will be issued to emergency-essential personnel and other civilians who may be deployed in support of military operations. If required, civilian employees will be provided protective clothing and equipment, including some Nuclear, Biological, Chemical (NBC) defensive equipment. This equipment will be issued only as necessary to perform assigned duties during hostilities, conditions of war, or other crisis situations. The protective mask and chemical protective clothing to include training sets will be issued to civilian emergency essential or deploying personnel. Kevlar

Without going through every position, it is impossible to know how many civilians are in jeopardy of becoming unlawful belligerents. It appears, however, that at least some may be going too far. Before drawing a conclusion, though, government contractors should also be examined to determine if similar problems exist.

IV. CONTRACTORS

Contractor personnel are civilians, but unlike government employees, they are employed by third parties under contract to the United States.[73] Contractors generally consist of three groups:[74]

> "Systems Contractors: support specific systems throughout their system's lifecycle (including spare parts and maintenance) across the range of military operations. These systems include, but are not limited to, vehicles, weapons systems, aircraft, command and control infrastructure and communications equipment."[75]

> "External Support Contractors: work under contracts awarded by contracting officers serving under the command and procurement

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Helmets, load bearing equipment, and chemical defensive equipment will be worn in a tactical environment in accordance with supported unit procedures." To distinguish the civilians from military personnel, they wear an olive green triangular patch with "US" in the center on their left shoulder. AFI 36-801, *supra* at 6.7.

[71] AMC Civilian Guide, s*upra* note 62, at Weapons and Training. "Since civilians accompanying the armed forces are at risk in an enemy's attack of a military objective, DOD civilians may be issued sidearms for their personal self-defense. Sidearms for this purpose is [sic] limited to 9MM and standard government issued ammunition." *See also* AFPAM 10-231, s*upra* note 26, at 2.3. For the most part, commanders seem reluctant to issue arms to civilians. For example, weapons were not authorized during operations in Haiti or Bosnia. Peters, *supra* note 6.

[72] "Civilians deployed to the operational area may be regarded by the enemy as combatants." U.S. DEP'T OF DEFENSE, JOINT PUB. 1-0, JOINT DOCTRINE FOR PERSONNEL SUPPORT TO JOINT OPERATIONS, Appendix 0-2 (19 Nov. 1998). And, "while most civilians are considered noncombatants, their jobs in support of U.S. weapon systems may be seen as active involvement in hostilities, which may make them subject to direct or indirect attack." Althouse, s*upra* note 11, at 14. The training that some government employees receive at the Army's Combat Maneuver Training Center in Hohenfels, Germany, before deploying only enhances their combatant image. "You're out there just like the troops-poking in the ground looking for mines, reacting to hostile situations with the platoon leader. We'd hit the deck and crawl in the mud with [the soldiers]." Peters, *supra* note 5 (quoting Gary Higgins, a deployed civilian employee).

[73] This distinction can lead to significant differences in treatment depending on the terms of any applicable Status of Forces Agreements and the laws of the host nation. This paper will not delve into such areas.

[74] JP 4-0, s*upra* note 29, at Ch. V, 2.

[75] U.S. DEP'T OF THE ARMY, FIELD MANUAL 100-21, CONTRACTORS ON THE BATTLEFIELD, Chapter 1, 1-8 (Mar. 2000) [hereinafter FM 100-21].

> authority of supporting headquarters outside the theater".[76] "The services provided by these types of contracts include but are not limited to building roads, airfields, dredging, stevedoring, transportation services, mortuary services, billeting and food services, prison facilities, utilities, and decontamination."[77]
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> "Theater Support Contractors: usually from the local vendor base, provide goods, services, and minor construction to meet the immediate needs of operational commanders."[78]

External and theater support contractors, for the most part, perform the traditional civilians support roles. Therefore, while their location during deployments may place them in danger, their activities should pose no problem under the law of armed conflict. The same cannot be said for systems contractors, however.[79] "As systems become more sophisticated, the need for technicians to be close by has never been greater. This puts civilian contractors at far greater risk of direct involvement in conflict."[80] Evidence of this was seen in Operation Desert Storm where "some contractor field service representatives and contact teams … went into Iraq and Kuwait with combat elements."[81]

Today, there are numerous "systems that cannot be operated without frontline contractor support. J-STARS and Rivet Joint aircraft, two vital collection platforms, fit this description."[82] As recently as 1999, contractor

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[76] Campbell, s*upra* note 6.

[77] JP 4-0, s*upra* note 29, at Ch. V, 2b. External support contractors may be U.S. or third country businesses and vendors. Examples include the Army's Logistics Civil Augmentation Program (LOGCAP), the Air Force's Civil Augmentation Program (AFCAP), the Navy's Emergency Construction Capabilities Program Contract (CONCAP), Civil Reserve Air Fleet (CRAF) contracts, and war reserve materiel (WRM) contracts. U.S. DEP'T OF THE ARMY, FIELD MANUAL 100-10-2, CONTRACTING SUPPORT ON THE BATTLEFIELD (15 Apr. 1999). Title 10, section 129a, of the U.S. Code authorizes the Secretary of Defense to use civilian contracting if it is financially beneficial and consistent with military requirements. CRAF was established by Congress to enable civilian airlines to provide airlift for the Department of Defense. 10 U.S.C. § 9511-9514 (1993).

[78] Campbell, s*upra* note 6.

[79] Systems contracts involve design, manufacture, and support of major items of equipment and weapon systems. The majority of systems contracts on the battlefield involve maintenance and technical assistance. LGEN Paul J. Kern, *Contractors on the Battlefield*, Briefing presented to the AUSA Winter Symposium (16 Feb. 1999) at slide 6, *available at* http://www.cascom.army.mil/Rock_Drill/c_Contractors_on_the_Battlefield/AUSA_Symposium/SARDA_Briefing/tsld001.htm (on file with the Air Force Law Review) [hereinafter Kern briefing].

[80] Althouse, s*upra* note 11, at 14.

[81] Orsini, s*upra* note 58, at 130-132.

[82] Nelson, *supra* note 9, at 29.

personnel manned J-STARS stations in support of UN peacekeeping efforts over Bosnia.[83]

Recognizing this dependence, the United States Army has implemented the "habitual relationship"[84] concept for its systems contractors. Under this program, one to two technical representatives train, deploy, and serve on the battlefield with the unit.[85] One example is the AH-64 Apache attack helicopter "Prime Vendor Support" program, which "suggests that contractor support will be available from the factory to the foxhole."[86] The Javelin antitank weapon system is another instance.[87] Interim contractor support (ICS) for the Javelin includes field trainers and pre-positioned maintenance trailers or "war wagons" for deployment.[88] The Patriot and TOW missile systems are two more illustrations of "habitual relationships."[89]

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[83] Operation Joint Endeavor. *Id*. at 4.

[84]

> A habitual relationship is a long-term relationship between a business and the military. The nature of this relationship is established through the terms and conditions of a contract, and extends beyond that of the organization to include the individual contractor employee and soldier. This type relationship establishes a 'comrade-at-arms' kinship, which fosters a cooperative, harmonious work environment, and builds confidence in each other's ability to perform. The relationship between the Army and some weapon system contractors may be long-term and continuous. Accordingly, the Army may not be able to deploy these weapon systems without also deploying the supporting contractors.

FM 100-21, s*upra* note 75, at 1-5.

[85] Kern, s*upra* note 79, at slides 10-11. Exactly how close to the battlefield is determined by the commander based on risk assessment and mission, enemy, terrain, troops, time available, and civilian considerations (METT-TC). Campbell, *supra* note 6. In anticipation of reaching the battlefield, Brown & Root, a former LOGCAP contractor, puts its employees through training that involves basic first aid and survival skills, spotting and avoiding land mines, the use of the military gear and clothing they were issued, and the use of small arms in the event that they are authorized handguns. Peters, *supra* note 6.

[86] Orsini, s*upra* note 58, at 130-132. Kern, s*upra* note 79, at slide 8. During Desert Storm, a contractor field service representative (CFSR) deployed with every battalion of Apache helicopters. *Id.* at slide 7.

[87] The Javelin can be shoulder-fired or installed on tracked, wheeled, or amphibious vehicles. Army Technology (28 Apr. 2001) *available at* http://www.army-technology.com /projects/javelin/index.html (on file with the Air Force Law Review).

[88] Kern, s*upra* note 79, at slide 7.

[89] Zamparelli, s*upra* note 8, at 14. The Patriot missile is a long-range, all-altitude, all-weather air defense system to counter tactical ballistic missiles, cruise missiles, and advanced aircraft. The TOW is a wire-guided heavy anti-tank missile used in anti-armor, anti-bunker, anti-fortification, and anti-amphibious landing roles. Army Technology (28 Apr. 2001) *available at* http://www.army-technology.com/projects/patriot/index.html (on file with the Air Force Law Review) and http://www.army-technology.com/projects/tow/index.html (on file with the Air Force Law Review).

Although not labeled as such, similar arrangements exist in the Air Force. Since 1995, Predators, an unmanned aerial vehicle (UAV), [90] operated from ground stations by a pilot and a payload operator, have flown surveillance missions over Bosnia.[91] Until recently, both military and civilian contractors have operated these ground stations.[92]

While they do not necessarily accompany the forces, civilians involved in military information operations (IO) raise similar problems.[93] Not surprisingly, IO is contractor reliant.[94] Civilian contractors "staff the entire IO cell supporting the U.S. Southern Command, which is responsible for defense operations in 32 countries in Central America, South America and the Caribbean."[95] According to John Thomas, the former commander of the Pentagon's Global Network Operations Center, although he has no firsthand

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[90] The Air Force currently has two reconnaissance squadrons that operate the Predator, the 11th and 15th at Indian Spring Air Force Auxiliary Field, Nevada. Although UAVs have been around since the 1960s, improved technology has now made them a critical part of Air Force program development. DAVID A. ANTHONY AND DAGNIA STERSTE-PERKINS, CONGRESSIONAL RESEARCH SERVICE, MILITARY UNMANNED AERIAL VEHICLES (UAVs) CRS-1 (Library of Congress Jan. 1996/Aug. 1998) [hereinafter Congressional Research Service]. Currently used for reconnaissance and surveillance, future roles include suppression of enemy air defenses (SEAD) and strike missions with the use of unmanned combat air vehicles (UCAVs). Federation of American Scientists, *X-45 Unmanned Combat Air Vehicle (UCAV)* (visited Apr. 11, 2001) *available at* http://www.fas.org/man/dod-101/sys/ac/ucav.htm (on file with the Air Force Law Review).

[91] MSgt Dale Warman, *Air Force Squadron takes over Predator Operations*, AIR FORCE NEWS SERVICE (visited Mar. 26, 2001) *available at* http://www.fas.org/irp/news/1996/n19960905_960887.html (on file with the Air Force Law Review).

[92] Congressional Research Service, s*upra* note 90, at CRS-5. It is now Air Force policy to man the UAVs with only military personnel. Gen Michael Ryan, Chief of Staff of the Air Force, Speech at Air Force Air Command & Staff College (Apr. 2001). This switch in policy is crucial in light of the recent arming of UAVs with hellfire missiles and their use in combat against Taliban forces in Afghanistan. *Armed Drones in Combat for First Time*, ST. PETERSBURG TIMES, Oct. 18, 2001, at 10A.

[93] U.S. DEP'T OF DEFENSE, JOINT PUB. 3-13, JOINT DOCTRINE FOR INFORMATION OPERATIONS (9 Oct. 1998) defines IO as "actions taken to affect adversary information and information systems, while defending one's own information and information systems." *Id.* at Ch 1, para. 3g. IO consists of offensive and defensive. Offensive IO includes OPSEC, military deception, PSYOP, EW, physical attack/destruction, and special information operations (SIO), and could include computer network attack (CNA). *Id.* Defensive IO includes information assurance (IA), OPSEC, physical security, counterdeception, counterpropaganda, counterintelligence (CI), EW, and SIO. *Id.* Offensive IO that cause a destructive effect within the sovereign territory of another state would be an armed attack under the law of armed conflict. Sharp, s*upra* note 34, at 133. As stated earlier, this would make the operator behind the IO a direct participant in a hostile act.

[94] Dan Verton, *Navy Opens Some IT Ops to Vendors*, FEDERAL COMPUTER WEEK (Aug. 21, 2000) *available at* http://www.fcw.com/fcw/articles/2000/0821/pol-navy-08-21-00.asp (on file with the Air Force Law Review)

[95] *Id.* "The contractor IO cell at Southcom is involved in coordinating psychological operations with ongoing military operations, including counter-drug missions and other classified operations." *Id*.

knowledge of it, he is confident that there are contractors involved in some aspects of offensive IO in DOD.[96] "You have contractors in every aspect of IO. They're working hand-in-glove with the military."[97]

Even systems contractors not working under contract with the Department of Defense are in danger of participating in hostilities. As part of the anti-drug effort in Colombia, employees of DynCorp Technical Services (DynCorp)[98] under contract with the Department of State are maintaining and piloting Blackhawk attack helicopters and manning search and rescue (SAR) teams.[99] While such activities are described as providing support for local police in coca eradication programs,[100] these missions are often conducted against assets under the protection of the Marxist guerillas of the Revolutionary Armed Forces of Colombia (FARC).[101] This was evident in February of 2001 when one of the DynCorp SAR aircrews became involved in a firefight with FARC guerillas while trying to rescue the Colombian police crew of a helicopter the guerillas had downed.[102] These same guerillas are waging a civil war against the government of Colombia.[103] The fact that the Colombian military is receiving training from United States military to conduct similar eradication missions[104] has led some to accuse the contractors of being mercenaries.[105]

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[96] *Id.*

[97] *Id.*

[98] DynCorp also happens to be the current Army LOGCAP contractor. James Folk and Lieutenant Colonel Andy Smith, *A LOGCAP Success in East Timor*, ARMY LOGISTICIAN, Jul.-Aug. 2000 at 38.

[99] Tamayo, s*upra* note 7. There is even an Internet rumor that retired Navy Seals, ostensibly in Peru as contract personnel for a Virginia contractor manning gunboats for the Peruvian military to intercept coca base making its way through the Amazon, are actually being used to kill Marxist guerrillas of the Revolutionary Armed Forces of Colombia (FARC) who are trying to retreat onto Peruvian soil. Peter Gorman, *Ex-Navy Seals on Pay-per-Kill Mission*, NARCO NEWS REPORTS (Feb. 19, 2001), (visited on Apr. 24, 2001) *available at* http://www.narconews.com/iquitos1.html (on file with the Air Force Law Review).

[100] Tamayo, s*upra* note 7.

[101] BUREAU FOR INTERNATIONAL NARCOTICS AND LAW ENFORCEMENT AFFAIRS, U.S. DEPARTMENT OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT 1999, (2000); Ignacio Gómez, *U.S. Mercenaries in Colombia*, COLOMBIA REPORT (Jul. 16, 2000), (visited on Apr. 24, 2001) *available at* http://colombiareport.org/colombia19.html (on file with the Air Force Law Review).

[102] Garry M. Leech and Eric Fichtl, *Are They Civilians or Mercenaries?* COLOMBIA REPORT, Feb. 26, 2001, (visited on Apr. 24, 2001) *available at* http://colombiareport.org/colombia52.html (on file with the Air Force Law Review).

[103] *Colombia's Civil War*, WASHINGTON POST, *available at* http://www.washingtonpost.com/wp-dyn/world/issues/colombiareport/ (collection of articles).

[104] The training is received under Plan Columbia. Associated Press, *Green Berets Train Colombian Battalion*, ST. PETERSBURG TIMES, May 6, 2001, at 21A. The U. S. Dep't of Defense role is outlined in the statement of Brian E. Sheridan, Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, to the United States House of Representatives, Committee on International Relations, subcommittee on Western Hemisphere, Sept. 21, 2000, (visited on Apr. 25, 2001) *available at* http://www.house.gov

There is no doubt that the contractors firing weapons in Colombia would be directly participating in hostilities if an international armed conflict was underway there. But what of the other systems with which contractors have "habitual relationships?" Are the contractors not intrinsically involved in the systems that they are servicing? If they were only training combatants to use the systems or performing routine maintenance, their status would not be in question. Serving alongside combatants as on call troubleshooters is a different matter, though. These systems, by their very nature, are intended to cause harm to an enemy, either through destruction or by acquiring sensitive intelligence. That the act of correcting any deficiencies that may arise, and thereby enabling the system to function as intended, can be construed as "likely to cause actual harm to the personnel and equipment of the enemy"[106] seems self-evident. In fact, to argue to the contrary would seem akin to suggesting that a shell loader is not a direct participant because someone else is firing the cannon.

As to whether deployed contractors will be indistinguishable from combatants in appearance, some confusion exists. Initially, both the Army and the Air Force indicated that contractors should not wear military uniforms. "Contractors accompanying the force are not authorized to wear military uniforms, except for specific items required for safety or security, such as: chemical defense equipment, cold weather equipment, or mission specific safety equipment."[107] On February 8, 2001, the Acting Secretary of the Air Force issued a similar admonition,[108] but the prohibitions are not ironclad: "If required by the Theater Commander, the deployment processing center will issue Organizational Clothing and Individual Equipment (OCIE) to contractor personnel. The wearing of such equipment by contractor personnel, however, is voluntary."[109] "Exceptions may be made for compelling reasons. . . . Should

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/international_relations/wh/colombia/colombia.html (on file with the Air Force Law Review).

[105] Gomez, s*upra* note 101. The mercenary issue aside, as long as the contractors are not participating in an international conflict, they are not unlawful combatants under the law of armed conflict because the concept of "combatant" does not exist in non-international conflicts. ICRC, Statement to the UNHCR Global Consultations on International Protection (8-9 Mar. 2001). Whether they are violating the United States policy to apply the law of armed conflict to all "operations" is another question.

[106] Additional Protocols Commentary, s*upra* note 30, at 619.

[107] U.S. DEP'T OF THE ARMY, REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE, 3-3e (29 Oct. 1999) [hereinafter AR 715-9].

[108] "Air Force commanders should not issue military garments (e.g., BDUs, Gortex jackets) to contractor personnel." Memorandum, Lawrence J. Delaney, subject: Interim Policy Memorandum—Contractors in the Theater (8 Feb. 2001) (on file with author) (*see* attachment, USAF Guidance on Contractors in the Theater) [hereinafter Delaney Memo].

[109] DA PAM 715-16, s*upra* note 62, at 5-1a. Battle Dress Uniforms are included in the OCIE list. *Id.* at App B, b-1a. This contrasts with FM 100-21, which provides: "Either the government or the contractor may decide that a uniform appearance is necessary for contractor employees. In this case, the contractor should provide appropriate attire which is distinctly not

commanders issue any type of standard uniform item to contractors personnel, care must be taken to require that the contractor personnel be distinguishable from military personnel through the use of some distinctively colored patches, armbands, or headgear."[110]

Following recent pressure from host nations, the Army now requires all contractors in the Balkans to wear civilian clothing.[111] Whether this policy will be extended beyond the region remains to be seen.

The contractors' policies on wearing uniforms are as varied as the military guidelines. At one point, DynCorp seemed to consider the wearing of uniforms by its personnel as one of the keys to success.[112] On the other hand, its employees in Colombia appear to dress less formally.[113] Another major contractor, Brown & Root, now prohibits its employees from wearing "military garb" so as to avoid confusion.[114]

The Army and the Air Force provide similar guidance with regard to the arming of contractors.

> The general policy of the Army is that contractor personnel will not be armed.
> However, under certain conditions . . . they may be allowed to do so. The decision to allow contractor personnel to carry and use weapons for personal protection rests with the CINC. Once the CINC has approved their issue and use, the contractor's company policy must permit the use of weapons by its employees; and, the employee must agree to carry a weapon. When all of these conditions have been met, contractor personnel may only be issued military specification sidearms, loaded with military specification ammunition, by the military. Additionally, contractor personnel must be specifically trained and familiarized with the weapon, and trained in the use of deadly force in order to protect themselves. Contractor personnel will not possess privately owned weapons.[115]

Air Force commanders should not issue firearms to contractor personnel operating on their installations, nor should they allow contractor personnel to carry personally owned weapons. With the express permission of the

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military, and which set them apart from the forces they are supporting." FM 100-21, s*upra* note 75, at 3-5.

[110] Delaney Memo, s*upra* note 108.

[111] Telephone Interview with Mr. Rich Adams, contractor working for Lesco, Inc. for the Director of Readiness at the U. S. Army Communications-Electronics Command (CECOM) (Apr. 23, 2001) [hereinafter Adams].

[112] DynCorp Technical Services, *Briefing on Contractors on the Battlefield*, at slide 10, (visited on Apr. 11, 2001) *available at* http://www.cascom.army.mil/Rock_Drill/c_Contractors_on_ the_Battlefield/AUSA_Symposium/ (on file with the Air Force Law Review) [hereinafter DynCorp Briefing].

[113] "[The DynCorp pilots] fly in Bermuda shorts, smoke wherever they want, and drink whiskey almost everyday." Gomez, s*upra* note 101.

[114] E-mail from Chris Heinrich, spokesman for Halliburton, to Major Lisa Turner (May 1, 2001) (on file with author) [hereinafter Heinrich E-mail].

[115] FM 100-21, s*upra* note 75, at 3-5.

geographic CINC and in consultation with host nation authorities, Air Force commanders may deviate from this prohibition of firearms only in the most unusual of circumstances (e.g., for protection from bandits or dangerous animals if no military personnel are present to provide protection).[116]

As with the policies for wearing uniforms, the policies on carrying weapons varies amongst the contractors. Obviously, some DynCorp personnel in Colombia are heavily armed. As recently as 1996, Brown & Root was training its employees on the use of small arms.[117] However today it now prohibits them from carrying weapons.[118]

Regardless of how they are dressed and whether or not they are armed, certain contractors are in danger of being called upon to perform activities reserved for combatants. Ultimately, both for contractors and government employees, each situation is fact specific,[119] but this does not mean that a more definitive rule as to what activities are allowed cannot be formulated.

V. DRAWING THE LINE

The need for clearer guidance is obvious.[120] Both the United States Army and Air Force have recognized the danger civilians face from uncertainty in the law of armed conflict.

> Civilians who take part in hostilities may be regarded as combatants and are subject to attack and/or injury incidental to an attack on military objectives. Taking part in hostilities has not been clearly defined in the law of war, but generally is not regarded as limited to civilians who engage in actual fighting. Since civilians augment the Army in areas in which technical expertise is not available or is in short supply, they, in effect, become substitutes for military personnel who would be combatants.[121]

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[116] Delaney Memo, *supra* note 108.
[117] Peters, *supra* note 6.
[118] Heinrich E-mail, *supra* note 114.
[119] Supplement to Commander's Handbook, *supra* note 17, at 484.
[120] "The point is that civilians should know what to expect if they are attacked and captured. Not enough has been done in recent years to clarify the status of contractors on the battlefield, although this probably is more an issue of international law than Army doctrine." Althouse, *supra* note 11, at 17.
[121] DA PAM 690-47, *supra* note 60, at 1-22. The Army's awareness of the risk also can be seen in the rationale behind the wearing of uniforms and carrying arms.

> Contractor personnel supporting military operations should be visibly distinct from the forces they are supporting so that they do not jeopardize their status as civilians accompanying the force . . . . When determining to issue weapons to a contractor the CINC must consider the impacts this may have on their status as civilians accompanying the force.

FM 100-21, *supra* note 75, at 3-5.

"Civilians accompanying the armed forces and performing duties directly supporting military operations may be subject to direct, intentional attack."[122] "Their entitlement to Geneva Convention protections, including the possibility they might be properly accused of violations of the law of war or foreign domestic law, will depend upon their compliance with provided training as well as their behavior in deployed locations."[123]

Admonitions about being attacked are not idle warnings. Any doubts as to the inherent risks dissolved during Operation Desert Storm when the Scud missile decimated the barracks.[124] More current illustrations of the dangers civilians face abound. The bomb that devastated the United States military office in Riyadh, Saudi Arabia, in November 1995 killed four Department of Defense government employees.[125] In the United Nations peacekeeping operations in Angola, Africa, as of May 31, 1999, of the 1,200 DynCorp contractors supporting the operations, three contractor personnel had been killed, four had been wounded, and two were missing.[126] So far, only three DynCorp pilots have been killed in the anti-drug effort in Colombia, but the FARC has launched at least one attack against the base where the personnel are located, with the contractors as the principle target.[127]

Nor is the possibility of capture a remote notion. The WW II incident where the Japanese captured Naval Civil Engineering Corps contractors makes this clear.[128] More recent episodes emphasize this point. On March 13, 1995, William Barloon of New Hampton, Iowa, and David Daliberti of Jacksonville, Florida, both civilian employees working for McDonnell Douglas Corporation pursuant to a contract with Kuwait, strayed into Iraq by mistake.[129] They were detained, convicted of entering the country illegally by an Iraqi court, and sentenced to eight years in prison.[130] In 2000, a former contractor employee was kidnapped by guerillas in Colombia. Although he was later released unharmed, his abduction highlights the danger contractors face.[131] Just as illustrative was the detention of the United States Navy EP-3E by the Chinese

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[122] AFPAM 10-231, s*upra* note 26, at 6.3.3. This statement could be read to indicate that the civilians may be unlawful combatants, because only combatants are subject to direct, intentional attack. *See*, s*upra* note 28.

[123] AFPAM 10-231, s*upra* note 26, at 6.3.6.

[124] The military now relies heavily on contractors for the support being provided by the Army Reservists who were killed and injured in the attack. Zamparelli, s*upra* note 8, at 17.

[125] Peters, *supra* note 6.

[126] DynCorp Briefing, s*upra* note 112, at slide 9.

[127] Gomez, s*upra* note 101.

[128] *See* text accompanying notes 47-51.

[129] Douglas Jehl, *Americans in Iraq Given 8-Year Term*, N.Y. TIMES, Mar. 26, 1995, Section 1, Page 1.

[130] After American protests the two men were finally released on Jul. 17, 1995. Jamal Halaby, *Freed By Iraq, Two Americans Arrive in Jordan*, ASSOCIATED PRESS, Jul. 17, 1995.

[131] "Leftist guerrillas last year kidnapped one American helicopter mechanic, who stayed in Colombia after his DynCorp contract ended because of a love affair, but freed him after a few weeks 'because he was so crazy'. . . ." Tamayo, s*upra* note 7.

on April 1, 2001.[132] Although all twenty-four crewmembers on the intelligence-gathering mission were military,[133] at the rate the United States is civilianizing its forces, the configuration may someday include civilians.

Despite these incidents, until now civilians could still draw comfort from the fact that capture by an opposing force, while possible, remained remote, making prosecution for being an unlawful belligerent unlikely. However, that may change with the pending creation of the International Criminal Court (ICC).[134] The United States, which signed the statute on December 31, 2000, is not likely to ratify the treaty anytime soon.[135] Nevertheless, the ICC is expected to come into existence, and, when it does, it will have the power to try persons accused of war crimes[136]even if they are not citizens of a ratifying country.[137] Furthermore, all signatory states will be obliged to turn over suspected war criminals.[138] Thus, the possibility exists that in the future an American civilian could be arrested while travelling overseas and then be tried for an alleged war crime committed while working for the military.

As civilians put their lives and liberty at risk, the least the United States can do is ensure that they do so lawfully. Not only is this critical for the concerned workers, but also for the commanders who must make certain that subordinates and others under their control comply with the law of armed conflict.[139] Failure of a commander to do so is itself a violation of the law of armed conflict.[140] The current practice of merely warning commanders with generalities not to jeopardize civilian status is insufficient.[141]

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[132] Sara Fritz, *Bush Wins High Praise for Handling First Crisis*, ST. PETERSBURG TIMES, Apr. 12, 2001, Section 1, page 1. The crew was released unharmed on April 11, 2001.

[133] *Id.*

[134] Created by the Rome Statute of 17 July 1998, the ICC will come into existence when 60 countries have ratified the treaty. As of 31 Aug. 2001, 37 countries had done so. Information *available at* http://www.un.org/law/icc/statute/status.htm (on file with the Air Force Law Review) [hereinafter Rome Statute].

[135] *President Clinton Authorizes Treaty to Create Permanent War Crimes Tribunal, but Measure Faces Stiff Opposition in Senate* (CNN television broadcast Dec. 31, 2000).

[136] Generally, the court only will have jurisdiction over war crimes committed as part of a plan or policy or as part of a large-scale commission of such crimes. Rome Statute, s*upra* note 134, Article 8(1). But given the tendency of such bodies to expand their jurisdiction, the limitations could be stretched. Aldrich, *supra* note 18, at 48.

[137] "The ICC will have jurisdiction over all individuals for every incident that occurs within the territory of a state party or any other country that agrees to the ICC's ad hoc jurisdiction." Captain Andrew S. Williams, *The Proposed International Criminal Court: An Imminent Danger?* THE REPORTER (Jun. 2000).

[138] Articles 86 and 89 of the Rome Statute, *supra* note 134.

[139] Additional Protocol I, s*upra* note 18, Art. 87.

[140] War Trial Reports, s*upra* note 32, at pp. 69-71. Article 28 of the Rome Statute extends jurisdiction of the ICC to prosecute commanders who allow war crimes to take place. Rome Statute, s*upra* note 134. Additionally, although the U.S. has not ratified Additional Protocol I, Article 58 of the protocol requires parties to remove civilians from the vicinity of military objectives and to protect them from the dangers of military operations. There is a concern

At first glance, it would seem that any attempt to refine what is meant by "direct participation in hostilities" should focus on those civilians working with combatants at the frontlines. After all, the purpose behind distinguishing between combatants and noncombatants is to protect civilians,[142] and those nearest the fighting are at the greatest risk. Technology and resulting military advances have highlighted fundamental flaws with this reasoning. For starters, in an age where weapons of mass destruction, intercontinental missiles, long range aircraft and space-based platforms, and electronic warfare have made military force a global, omnipresent threat, no one is safe.[143] The bombing of civilian population centers such as London, Dresden, Tokyo, Nagasaki, and Hiroshima during the Second World War[144] and the subsequent Cold War policy of mutual assured destruction have proven this.

Furthermore, the law of armed conflict specifically recognizes that civilians will be accompanying the forces, so proximity to the battlefront and the dangers associated therein already are taken into account. Commentators who argue that otherwise noncombatant conduct, such as providing military transport or logistical support, becomes combatant activities if performed at the frontlines are mistaken in two areas. First, they are using the increased danger inherent with accompanying forces to graft a geographic element onto the law where none exists. The logical extension of their arguments would make merchant seamen and civilian aircrews like the United States Civil Reserve Air

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among nations that have ratified the Additional Protocol that employing civilians near the frontlines violates these requirements. *See* ADF Project Paper, s*upra* note 52, at 8.2.76. As to whether this will affect U.S. operations depends on the extent to which Article 58 has or will someday become customary international law.

[141] For example: "[C]ontracted support service personnel ... may be used to perform only selected combat support and combat service support activities. They may not be used in or under-take any role that could jeopardize their status as civilians accompanying the force." AR 715-9, s*upra* note 107, at 3-3d. Or "[C]ommanders, when determining the nature and extent of their use, will not put contractors in a position that jeopardizes this status. Contractor status is an important issue for the commander in determining the extent of their use and where within the theater of operations they should be permitted. FM 100-21, s*upra* note 75, at 1-9.

[142] "This was certainly the view of the XXth International Conference of the Red Cross when it adopted a resolution in 1965, which contained a solemn declaration addressed to all governments and other authorities with responsibility for action in armed conflicts. It stressed that a "distinction must be made at all times between persons taking part in the hostilities and members of the civilian population, to the effect that the latter be spared as much as possible." Additional Protocols Commentary, s*upra* note 30, at 509.

[143] "At the end of the nineteenth century, the overwhelming percentage of those killed or wounded in war were military personnel. Toward the end of the twentieth century, the great majority of persons killed or injured in most international armed conflicts have been civilian non-combatants." Aldrich, s*upra* note 18, at 48.

[144] Estimates indicate that as many as 275,000 civilians were killed as a result of these attacks. ALAN J. LEVINE, THE STRATEGIC BOMBING OF GERMANY, 1940-1945, 180 (1992); DAVID IRVING, THE DESTRUCTION OF DRESDEN 27 (1963); *The Effects of Atomic Bombs on Hiroshima and Nagasaki, in* THE UNITED STATES STRATEGIC BOMBING SURVEY, Vol. 7, 15 (David MacIsaac ed., 1976).

Fleet[145] combatants, when under international law they are not.[146] Secondly, they fail to take into account the changing nature of technology and weapons delivery. A civilian need no longer be near the front lines to take a direct part in delivering destructive munitions or information.

Finally, as was discussed previously, no civilian can ever lawfully directly participate in hostilities. Whether they are accompanying the forces, manufacturing munitions in a factory, or farming land in Iowa, civilians are noncombatants. No matter the level of danger they face because of their location, participation in combatant activities is forbidden.

To be effective, a better description must take into account traditional civilian support roles while simultaneously encompassing the modern spectrum of civilian activities, wherever such activities occur. With this in mind, the following is proffered: civilians may support and participate in military activities as long as they are not integrated into combat operations. In this context, integration is becoming an uninterrupted, indispensable part of an activity such that the activity cannot function without that person's presence and combat operations are any military activities that are intended to disrupt enemy operations or destroy enemy forces or installations.

Under this criterion, civilians providing non-weapons systems logistics support would not be jeopardizing their noncombatant status.[147] This applies to LSE personnel, LOGCAP contractor employees, merchant seamen, CRAF aircrews, and maintenance personnel working on non-combat equipment such as transport aircraft and ships, generators, trucks, etc. For personnel performing weapons systems support, their situations will vary. Pilots, weapon loaders, and maintainers assigned to combat-positioned, combat-coded aircraft, tanks, and similar equipment, whether working at a deployed location or at a base in the United States, would be integrated into combat operations.[148] In a similar vein, weapons system technicians who have a "habitual relationship" with combat troops to the extent that they deploy with them to the "foxholes" or "downrange" would be performing combatant activities.[149] However, technicians occasionally travelling to a missile silo in

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[145] *See*, *supra* note 73.

[146] Geneva Convention III, s*upra* note 14, at art. 4A(a) and (b).

[147] Although logistical support elements represent legitimate military targets, they are not combat operations. In other words, to use the language in the Additional Protocols Commentary (*supra* note 30), logistics activities only indirectly cause harm to the enemy.

[148] The key here is the availability of the equipment for participation in combat operations. Fighters, attack helicopters, tanks, etc., that require transportation to a frontline base or staging area before entering the fighting are not combat-positioned. Nor is equipment withdrawn from combat use for depot maintenance or training. Accordingly, personnel assigned to such equipment need not be combatants. In contrast, long range bombers such as B-52s or B-2s, which can strike from a base in the United States, are always combat-positioned unless they are undergoing depot maintenance or have been relegated to training use only.

[149] This is a close call. Both arguments for and against whether this constitutes direct participation can be found in the Commentary to the Additional Protocols. "Undoubtedly there

the continental United States[150] or to the frontline to perform maintenance or repairs on a weapons system would lack the requisite integration, and therefore remain lawful noncombatants.

As for intelligence gatherers, by collecting information they intend to disrupt enemy operations or destroy enemy forces or installations. Therefore, they would also be involved in duties restricted to combatants. This is particularly the case for aircrew members of surveillance aircraft and ground control operators of UAVs. The civilians retrieving data from satellites or listening posts while sitting at terminals in the National Security Agency or the National Reconnaissance Office are more problematic. From a legal standpoint, there is no difference between gathering intelligence from an aircraft or forward location and gathering such information from a headquarters building located in the United States.[151] However, historically, civilians have conducted much of this work.[152] Declaring this workforce to be

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is room here for some margin of judgment: to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad." Additional Protocols Commentary, *supra* note 30, at 516. "The increasingly perfected character of modern weapons, which have spread throughout the world at an ever-increasing rate, requires the presence of such specialists (military technicians), either for the selection of military personnel, their training or the correct maintenance of the weapons. As long as these experts do not take any direct part in the hostilities, they are neither combatants nor mercenaries, but civilians who do not participate in combat." *Id.* at 579. The first position is more in keeping with the fundamental aspiration of protecting civilians. Otherwise, not only would civilians be commingled with combatants, making differentiation by the enemy impossible, but commanders also would have to ensure that in the heat of battle the civilians do not become direct participants. Take for example a technician assigned to a Patriot missile battery to ensure that the missile guidance system functions properly. If one or more of the soldiers became incapacitated during the fighting, the commander would be faced with either having the qualified technician take over or waiting on replacements and possibly jeopardizing the mission. Given the alternatives, most commanders likely would choose the first option and worry about unlawful combatant issues later.

[150] Obviously, the missile officers in charge of firing the ICBMs are combatants.

[151] With the Joint Distributive Intelligence Support System (JDISS), which allows the high volume transfer of digitized information such as maps, graphics, imagery, text, and full motion video over the Joint Worldwide Intelligence Communication System (JWICS), there is also not much of an operational difference either as the gatherers based on U.S. soil can now disseminate intelligence information to the war-fighter in real time. Senior Intelligence Officials DoD Background Briefing, U.S. DEP'T OF DEFENSE, subject: Intelligence Support to Operation JOINT ENDEAVOR (18 Jan. 1996) (visited on 23 Apr. 2000) *available at* http://www.defenselink.mil/news/Jan1996/x011996_x0118oje.html (on file with the Air Force Law Review).

[152] The composition of the workforce at the various intelligence agencies ranges from almost 100 percent civilian at the CIA to 80 percent at NSA to 70 percent at DIA. GOVERNMENT ACCOUNTING OFFICE, INTELLIGENCE AGENCIES: SELECTED PERSONNEL PRACTICES AT CIA, NSA, AND DIA COMPARED TO OTHER AGENCIES, GAO/NSIAD-96-6 (Mar. 11, 1996). Precisely what duties they perform is classified.

combatant-only would require a complete overhaul of the organizations.[153] The customary practice among nations would make such an overhaul unnecessary.

Finally, for the civilians working in information operations, their status would correlate to their duties. Personnel involved in offensive IO such as CNA, whether they located at Space Command headquarters[154] or in makeshift tents at the front, would be integrated into combat operations.[155] Those involved in defensive IO could be lawful noncombatants, assuming there is no crossover between functions. To the extent that defensive IO can cause disruption or harm to enemy operations, forces, or installations, the activities would require combatant manning.

Although far from comprehensive, the above paradigm would provide both civilians and commanders with a firmer understanding as to where activities fall within the law of armed conflict.[156] One thing is already clear, under the proposed criterion the United States may be violating its own policy with regard to the use of civilians in combatant roles under international law. The next section will consider the possible solutions available to remedy the situation.

VI. POSSIBLE REMEDIES

The responses available to the United States, or any other country in jeopardy of using civilians in an inappropriate manner are as varied as the opinions of international legal scholars. The safest route would be to cease using civilians whenever the possibility exists that their activities are integrated into combat operations, but this would prove difficult from a political standpoint. The positions affected are critical for military operations; eliminating them without replacement would mean a reduction in military capability while replacing them with military personnel would be expensive. Either choice would not be appealing to Congress or the taxpayers.[157] A less

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[153] Perhaps a distinction should be made between active intelligence gathering (using resources to discover secret or protected information) and passive gathering (collecting readily available information).

[154] Space Command has recently taken over the CNA mission. Paul Stone, *Space Command Plans for Computer Network Attack Mission*, AIR FORCE NEWS, 10 Jan. 2000.

[155] Sharp, s*upra* note 34.

[156] Obviously, the criterion is one person's attempt to draw a clearer line. As with any compromise, some will find it too restrictive, arguing that it omits many combatant-type activities, while others will see it as too liberal, casting a wide net over functions that can be performed by civilians.

[157] As if to refute this sentence, on April 16-27, 2001, U.S. Representative Janice Schakowsky, D-Ill, introduced a bill that would ban the federal government from hiring private companies or individuals to carry out military, law enforcement, armed rescue or related operations in Peru, Colombia and other Andean countries. Susan Taylor Martin, *Private Firms Aid U.S. Covert Work*, ST. PETERSBURG TIMES, Apr. 29, 2001, at 2A.

drastic approach, at least theoretically, would be to discontinue their usage temporarily while attempts are made to clarify the law (or perhaps amend the law to recognize the aforementioned quasi-combatant status), but as anyone familiar with international law knows, getting countries to agree on anything is extremely difficult. Although several decades is considered short-term when it comes to establishing international agreements,[158] it would be prohibitively long-term in addressing the issue of civilians operating in questionable roles.

An alternative option would be to view the muddled legal interpretations as an excuse to press ahead and hope that no civilian is ever captured and put on trial. The problems with this approach are obvious. First, the United States is committed to following the law of armed conflict.[159] Such ducking of responsibility would not be in accord with such commitment. Second, any trial would be embarrassing and lower our standing in the international community. Third, contractors might also be reluctant to go along with this approach. The branding of their employees as war criminals would not be good for their public image and could affect their ability to operate internationally.[160] Finally, as American litigiousness spreads, multinational corporations could be exposed to lawsuits for damages, and a creative prosecutor might even try to hold them criminally liable for allowing their employees to commit war crimes. Instead of totally ignoring the problem, the United States could, while continuing to utilize the civilians, try to clarify or alter the law. Of course, the glacial pace of change mentioned above would hinder this approach.

Given the difficulties with the preceding alternatives, the ultimate solution, most likely, will be a compromise: turning the questionable civilians into combatants. This alchemy can be achieved in one of two ways. The first method is to declare some of them to be combatants. This is possible because under international law, the composition of an armed force is determined by the individual state in accordance with.[161] In this instance, the applicable law is set out in the four criterion required of combatants mentioned earlier.[162] The

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[158] Aldrich, s*upra* note 18 at 42.

[159] U.S. DEP'T OF DEFENSE, DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM, 1.1 (9 Dec. 1998); CJCSI 5810.01A, s*upra* note 15, provides "The Armed Forces of the United States will comply with the law of war . . . ." *Id.* at 5a.

[160] Based on the publicity DynCorp has been receiving from its operations in Colombia, this argument may not be all that persuasive.

[161] Ipsen, s*upra* note 16, at 66.

[162] a) Be commanded by a person responsible for his subordinates; b) Have a fixed distinctive emblem recognizable at a distance; c) Carry arms openly; and d) Conduct operations in accordance with the laws and customs of war. Hague IV, *supra* note 20, at art. 1. Additional Protocol I amended the requirements by relaxing the distinctive emblem requirement (only necessary during military engagements and the deployment time preceding an attack) and by stating that members of armed forces "shall be subject to an internal disciplinary system." Article 43(1), Additional Protocol I, *supra* note 18. Again, to the extent the latter reflects customary international law, it is applicable to the United States.

fixed distinctive emblem and carrying arms openly aspects already have been discussed. Deployed government employees and contractors (the latter depending on their location and the circumstances) wear military uniforms and when they carry weapons, do so openly. If these civilians are commanded by a responsible person and obey the laws of war, the United States could validly declare them to be members of the armed forces.[163]

As for obeying the laws of war, all United States citizens can now be held accountable for most violations. This started with the War Crimes Act of 1996,[164] which made certain war crimes committed by or against nationals of the United States a federal offense, no matter where the offenses were committed.[165] A second law, The Military Extraterritorial Jurisdiction Act of 2000,[166] extended federal jurisdiction to federal felonies committed outside the United States by military members and civilians employed by or accompanying the Armed Forces.[167] Finally, the establishment of the aforementioned International Criminal Court also will ensure compliance with the law of armed conflict.

The remaining criterion, whether the civilians are subject to command, is questionable. The Department of Defense defines command as "the authority that a commander in the Armed Forces lawfully exercises over subordinates by virtue of rank or assignment. Command includes the authority and responsibility for effectively using available resources and for planning the employment of, organizing, directing, coordinating, and controlling military forces for the accomplishment of assigned missions."[168] Ultimately, military command in the United States is enforced by the Uniform Code of Military

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[163] Declaring in advance of a conflict puts other countries on notice; an action that is recommended in the Commentary to the Additional Protocols. Additional Protocols Commentary, s*upra* note 30, at 516.

[164] War Crimes Act, *supra* note 21.

[165] Under the statute, war crimes are (1) grave breaches of the Geneva conventions of 12 August 1949 or any protocols to which the United States is a party, (2) conduct prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, (3) conduct which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 Aug. 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict, and (4) conduct of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians. *Id.* § 2441(c) (1-4).

[166] 18 U.S.C. § 3261-3267 (2000**).** For a discussion of the Military Extraterritorial Act, see Andrew D. Fallon & Theresa A. Keene, *Closing the Legal Loophole? Practical Implications of the Military Extraterritorial Jurisdiction Act of 2000*, 51 A.F.L. REV 273 (2001) (this volume); Glenn R. Schmitt, *The Military Extraterritorial Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—Problem Solved?*, ARMY LAW, Dec. 2000, at 1; Mark J. Yost & Douglas S. Anderson, *The Military Extraterritorial Act: Closing the Gap*, 95 A.J.I.L. 446 (Apr. 2001).

[167] *Id.* § 3261.

[168] JOINT PUB 1-02, s*upra* note 10.

Justice (UCMJ),[169] but only during a Congressionally declared war does the UCMJ apply to civilians accompanying the forces.[170] Given the fact that the United States has only declared war five times, the last such declaration taking place during the Second World War,[171] and that the United Nations prohibition against aggression discourages countries from doing so,[172] declared wars are now the rare exception. Does this automatically mean that civilians, for all practical purposes, are not commanded? A look at the two types of civilians produces varying results.

For government employees, the Army does not differentiate between command of soldiers and civilians:

> During military operations, soldiers and DACs [Department of Army Civilians] are under the direct C2 [command and control] of the military chain of command. In an area of operation (AO), the senior military commander is responsible for accomplishing the mission and ensuring the safety of all deployed military, government civilians, and contractor employees. He can direct soldier and DAC task assignment including special recognition or, if merited, disciplinary action.[173]

The Air Force, although less explicit, seems to take a similar approach:

> During a crisis situation or deployment, civilian employees are under the direct command and control of the on-site supervisory chain. Therefore, the on-site supervisory chain will perform the normal supervisory functions; for example, those related to performance evaluations, task assignments and instructions, and initiating and effecting recognition and disciplinary actions.[174]

Civilians are subject to an internal disciplinary system, but it is not in place to enforce compliance with the law of armed conflict. Accordingly, despite what the regulations say, government employees are not under the same control as military members. An example often cited to support this proposition is the August 1976 incident in Korea in which North Korean

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[169] 10 U.S.C. § 801-946 (1983).

[170] Reid V. Covert, 354 U.S. 1 (1956); 10 U.S.C. § 802 (a)(10) (Aug. 10, 1956). A proposed amendment to Title 10 (through the FY 1996 DoD Authorization Act) would have created court-martial jurisdiction over civilians "accompanying the forces in the field in time of armed conflict," defining "armed conflict" broadly so as not to require declaration of war or national emergency by the President or Congress, but was not made into law.

[171] BRIEN HALLETT, THE LOST ART OF DECLARING WAR 169 (1998) ("in 1812 for the war of 1812, in 1846 for the Mexican-American War, in 1892 for the Spanish-American War, in 1917 for World War I against Imperial Germany and the Imperial and Royal Austro-Hungarian Government, and in 1941 for World War II against Japan, Nazi Germany, Italy, Bulgaria, Hungary, and Romania").

[172] Louis Rene Beres, *The Oslo Agreements in International Law, Natural Law, and World Politics*, 14 ARIZ. J. INT'L & COMP. L. 715, n 68 (Fall 1997).

[173] FM 100-21, s*upra* note 75, at 1-3.

[174] AFPAM 10-231, s*upra* note 26, at 1.5.1.

border guards attacked and killed two U.S. Army officers attempting to cut down a tree in the demilitarized zone.[175] "That incident caused an increase in the alert status to Defense Readiness Condition (DEFCON)-3, and as a result hundreds of Department of the Army (DA) civilians who had replaced military depot maintenance and supply workers requested immediate transportation out of Korea."[176] Unlike their military counterparts, they could not be ordered to remain.

While an argument theoretically can be made that government employees are subject to command, and therefore meet the four criteria, realistically, declaring them to be combatants might be available only as a penultimate resort.[177] This is because such a move likely would be met with strong resistance from the employees and their union, Congress, American allies, and the international community at large.

As for contractor personnel, the idea is a nonstarter. They do not work directly for the United States, but rather for third parties. Military regulations recognize this in addressing their status:

> The command and control of contractor employees is significantly different than that of DA civilians. For contractor employees, command and control is tied to the terms and conditions of the government contract. Contractor employees are not under the direct supervision of military personnel in the chain of command. The Contracting Officer is the designated liaison for implementing contractor performance requirements.[178]

The lack of command over contract employees effectively bars them from being declared lawful combatants.[179] It also further highlights the fundamental problem, aside from the legal concerns, of relying on civilians for critical needs. During Desert Storm, questions arose as to whether they would remain in the area of operations. "There were a few instances of

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[175] History of the U.S. Air Force's 8th Fighter Wing, (visited on Apr. 24, 2001) *available at* http://www.zianet.com/jpage/airforce/history/wings/8th.html.

[176] Orsini, s*upra* note 58, at 130-132.

[177] The ultimate or last resort would be a declared war, which then would obviate the need for such a declaration.

[178] DA PAM 715-16, s*upra* note 62, at 1-1. The most a military commander can do is:

> indirectly influence the discipline of contractor employees through revocation or suspension of clearances, restriction from installations or facilities, or revocation of exchange privileges. The process of removal of contractor employees from the theater is dependent upon the policies issued by the theater commander and the extent to which those policies are incorporated in the terms of the contract, and are exercised through the contracting officer. FM 100-21,

s*upra* note 75, at 1-10.

[179] *Cf.*, Brady, s*upra* note 4, in which the author argues that contractors have been assimilated into the U.S. military.

contractor/Department of the Army Civilians wanting to leave the theater because of the dangers of war. However, many people have doubts about how long they would have stayed if the operations had been costly in lives."[180] As a result, special arrangements were made for some civilians that complicated and hindered the mission.[181]

If the United States cannot or chooses not to declare some of its civilian workers to be combatants, it can still turn them into combatants. This can be done in one of two ways. The first is to require that government employees and contractor personnel have military obligations. Army Material Command is already suggesting that this be considered.

> For very dangerous situations, the contract may require the contractor to hire personnel with a military obligation, including retirees, individual reservists and members of troop program units. The military chain of command can bring those personnel onto active duty through Temporary Tours of Active Duty or mobilize them involuntarily to ensure continuation of essential services. Of course, such action risks loss of contractor personnel to a call-up or mobilization for other duties. Activation and mobilization are last resorts. They will be used to ensure continuity of essential services, when the civilian contractor employees are evacuated.[182]

For practical reasons, namely to ensure that their employees will not breach the contract by quitting, many contractors are pursuing this course on their own and hiring only personnel with military obligations.[183] In what may be an indication of the future, the British have enacted legislation that mandates this policy. The United Kingdom Sponsored Reserve Act[184] requires each defense contractor "to have a specified number of its employees participate as military reservists ... ."[185] This enables the personnel to "be mobilized and deployed to contingency operations as uniformed members, rather than civilian

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[180] GEORGE B. DIBBLE, CHARLES L. HORNE III, AND WILLIAM E. LINDSAY, ARMY CONTRACTORS AND CIVILIAN MAINTENANCE, SUPPLY AND TRANSPORTATION SUPPORT DURING OPERATIONS DESERT SHIELD AND DESERT STORM, Vol. 1: Study Report AR113-01RD1 (Logistics Management Institute, Jun. 1993).

[181] "[E]fforts were taken to help alleviate the fear of attack against civilian personnel and encourage them to remain in-theater. The C21 maintenance contractors were separated from military forces and housed in downtown Riyadh. While this decreased their vulnerability to attack, it also separated them from the aircraft they maintained and the commander they served, further affecting the overall unity of command."

Nelson, s*upra* note 9, at 14.

[182] HEADQUARTERS, UNITED STATES ARMY MATERIEL COMMAND, PAM. 715-18, AMC CONTRACTS AND CONTRACTORS SUPPORTING MILITARY OPERATIONS, 7-4 (26 Jun. 2000).

[183] Adams, *supra* note 111.

[184] The Sponsored Reserve Act was included in the UK Reserve Forces Act, 1996, but was not enacted until 1997. ADF Project Paper, s*upra* note 52, at 8.4.50.

[185] Bo Joyner, *The Future Total Force*, CITIZEN AIRMAN, Apr. 2001, at 10-12.

contractors."[186] Australia and Canada are studying the concept, and the United States Air Force will conduct several tests of a similar program in the late spring or summer of 2001.[187]

The second method of transforming civilians into combatants is to bypass the contractors by creating a special reserve force. The theory is that, by relaxing military regimentation, a Technology Reserve Force[188] or Information Corps[189] would attract the engineers and technicians needed for modern warfare. In the end, this might be the best way to recruit and keep highly skilled individuals who do not want to give up lucrative jobs.

VII. CONCLUSION

As the United States has reduced its military size and budget, two developments of the last half-century—the desire of the international community to protect civilians and the revolution in military affairs pertaining to technology—have collided.[190] While civilian casualties are being scrutinized more closely than ever, the demands of the modern battlespace are requiring the presence of civilians in greater numbers. The end result is that some of the very people the law of armed conflict is intended to protect are being placed increasingly in harm's way. Although this civilianizing of the United States forces raises many other issues,[191] this article has tried to answer but one: Are some civilians being placed in roles that will make them unlawful combatants?

Because international law provides no definitive definition, a more descriptive criterion has been proposed to clarify matters: Civilians should not be integrated into any military activities that are intended to disrupt enemy operations or destroy enemy forces or installations. To some, this standard will be too encompassing, thereby overly restricting civilian participation; others will not find it inclusive enough. One thing is certain though, unless a line is drawn and a precedent established, the situation will continue to blur. With so much fog already obscuring modern conflicts, we owe it to both commanders and civilians to clarify this particular area.

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[186] *Id.* at 12.
[187] *Id.* at 12.
[188] Stephen Bryen, *New Era of Warfare Demands Technology Reserve Force*, DEFENSE NEWS, 17-23 Mar. 1997, at 27.
[189] BGen Bruce M. Lawlor, ARNG, *Information Corps*, A. F. J. INT'L. 26 (Jan. 1998).
[190] Ironically, the technological revolution has also fueled the increased emphasis on protecting civilians because of the development of smarter, more discriminating weaponry.
[191] Lt Col Lourdes A. Castillo, USAF, *Waging War with Civilians: Asking the Unanswered Questions*, AEROSPACE POWER JOURNAL, 26-31 (Fall 2000).

TEARING DOWN THE FACADE: A CRITICAL LOOK AT THE CURRENT LAW ON TARGETING THE WILL OF THE ENEMY AND AIR FORCE DOCTRINE

MAJOR JEANNE M. MEYER*

I. INTRODUCTION

Wars are rarely fought for the pure joy of battle. Rather, as Carl von Clausewitz noted in the early 19th century, war is most often "a true political instrument, a continuation of political intercourse, carried on with other means."[1] Moreover, "the destruction of the military forces of the enemy is not now and never has been the objective of war; it has been merely a means to an end–merely the removal of an obstacle which lay in the path of overcoming the will to resist."[2]

For as long as nations have wielded war as a political instrument, men have also attempted to regulate or limit war.[3] The most recent comprehensive

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* *Major Meyer (B.A., Duke University; J.D. Duke University School of Law; LL.M., The Army Judge Advocate General School; MA in Air Warfare from American Military University) is a Judge Advocate with the United States Air Force currently assigned as an instructor, International and Operational Law Division, The Army Judge Advocate General School, Charlottesville, Virginia. She is a member of the Texas State Bar.*

[1] CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Paret eds. and trans., 1976).

[2] Lieutenant General Harold L. George, Chief, Bombardment Section, Air Corps Tactical School, Lecture to ACTS students, 1932, *quoted in* HAYWOOD S. HANSELL, JR., THE AIR PLAN THAT DEFEATED HITLER 33 (1972).

[3] These attempts generally fall into two categories: *jus ad bellum* and *jus in bello*. The former attempts to regulate when force may be used, while the latter regulates the means and methods of force nations may resort to once engaged in conflict. William J. Schmidt, *The Protection of Victims of International Armed Conflicts: Protocol I Additional to the Geneva Conventions*, 24 A.F. L. REV. 189, 191-92 (1984). Although the development of *jus ad bellum* has a rich history, in theory, the concept is inapplicable today, as the United Nations' Charter effectively outlaws the use of force except in cases of collective security or self-defense. U.N. CHARTER art. 2, para 4, art. 39, and art. 51. The primary focus over the past century has been on *jus in bello*, the regulation of the means by which nations fight. Within the principle of *jus in bello*, the development of the law fell into two categories. The first category, governed by the Geneva Conventions, regulates treatment of those individuals out of combat. *See* Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in* DIETRICH SCHINDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS 373 (3d ed. 1988); Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, *reprinted in* SCHINDLER & TOMAN, *supra*, at 401; Convention (III) Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75

efforts to regulate the conduct of war are found in Protocols I and II to the Geneva Conventions and were completed over twenty years ago.[4] Portions of the Protocols codify and reflect basic principles of the laws of war, such as the principle of distinction and the prohibition against infliction of unnecessary suffering.[5] Other articles, and one in particular, Article 52(2) of Protocol I, may not necessarily reflect customary international law or state practice. On its face, Article 52(2) may appear consistent with customary international law and state practice,[6] however, the definition of a military objective in Article 52(2) arguably allows for the imposition of new limits on targeting inconsistent with prior customary international law and state practice. The specific language that focuses on the military aspect of a potential target creates these limitations. In addition, the international community restrictively interprets the language of Article 52(2), particularly what constitutes a military advantage or a contribution to military action.[7] As a result, some in the international community are increasingly questioning the legality of targets previously considered legitimate military objectives.

When interpreted in such a restrictive way, Clausewitz' observations of war as an extension of politics are disregarded. Previously legitimate targets, whose destruction provided a psychological or strategic advantage, potentially fail under current restrictive interpretations of what contributes to a military

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U.N.T.S. 135, *reprinted in* SCHINDLER & TOMAN, *supra*, at 423; and Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S 287, *reprinted in* SCHINDLER & TOMAN, *supra*, at 495. The second category, governed by the law of The Hague, regulates the way in which war is fought. *See* Convention (II) with Respect to the Laws and Customs of War on Land, *opened for signature* July 29, 1899, 32 Stat. 1803, *reprinted in* SCHINDLER & TOMAN, *supra*, at 63; Convention (IV) Respecting the Laws and Customs of War on Land, *opened for signature* Oct. 18, 1907, 36 Stat. 2277, *reprinted in* SCHINDLER & TOMAN, *supra*, at 63.

[4] Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 48 [hereinafter Protocol II]. The U.S. has not ratified Protocol I, however it does consider most provisions reflective of customary international law and has not specifically objected to the language in Article 52. Michael J. Matheson, *Session I; The United States' Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U.J. Int'l L. & Pol'y 419, 420 (1987).

[5] Protocol I, *supra* note 4, art. 48, 51. In its 1996 Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons, the International Court of Justice referred to the principles of distinction and unnecessary suffering as the two "cardinal principles" of international humanitarian law. 1996 I.C.J. 226, 257 (July 8).

[6] *See infra* text accompanying note 8.

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

effort or provides a military advantage. These restrictions should concern air power advocates in particular as they limit some of the most fundamental and powerful applications of air power during combat. Furthermore, the ultimate result may be that the drafters, and those who wish to interpret and apply Article 52(2) restrictively, unwittingly increase the potential human cost of conflict to both sides.

Using the application of air power as the context, this article will review the historical background of targeting and regulations relating thereto to delineate customary international law and state practice. It will analyze Article 52 in light of customary international law and state practice. It concludes that, as it is increasingly interpreted and applied, Article 52 does not accurately reflect customary international law or current state practice. Attempts to apply Article 52 in such an overly restrictive manner unnecessarily restrict commanders from striking legitimate strategic targets and may even increase the loss of combatant and noncombatant life. An interpretation and application of Article 52 to reflect the realities of war would better serve both the warrior and the protected civilian.

II. DEVELOPMENT OF INTERNATIONAL LAW REGULATING AIR WARFARE

Article 52(2) states:

> Attacks shall be limited strictly to military objectives. In so far as objectives are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[8]

As stated in the first sentence, targeting is limited to attacking only "military objectives." Furthermore, an attack is legitimate only if it provides a "definite military advantage." In order to fully analyze Article 52(2)'s definitions of military objective and military advantage, it is important to understand how, or if, previous conventional and customary international law defined these terms.[9] Thus, the following section addresses the development of targeting under conventional and customary international law, focusing in particular on developments concerning the application of air power in combat.[10]

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[8] Protocol I, *supra* note 4, art. 52, para. 2.

[9] Previous treaties or attempts to codify the law of war are important, as "treaties must often be interpreted in light of the rules of customary international law or of the nonconsensual sources. Like statutes in common law context, treaties often presume and rely upon a preexisting set of legal rules." MALCOLM N. SHAW, INTERNATIONAL LAW 11 (4th ed. 1977). *See also* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 8 I.L.M. 679.

[10] For a very thorough history of this area, see W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, (1990).

A. Principles of International Law Regulating Air Warfare

The chief of the RAF Bomber Command during World War II, Air Marshal Arthur Harris, concluded after the war that "[i]nternational law can always be argued pro and con, but in this matter of the use of aircraft in war there is, it so happens, no international law at all."[11] While perhaps not entirely true, Air Marshal Harris' statement concerning the regulation of air warfare by international law was more true than not. By the mid-twentieth century, only a few basic principles of the law of war, in combination with outdated conventional law, regulated the conduct of air warfare.

1. Basic Principles of International Law Regulating Air Warfare

The most basic principle underlying the law of war has always been that of discrimination–more commonly known as distinction.[12] The principle of distinction requires that an attacker direct his efforts against only enemy military objects and objectives.[13] This principle generally provided civilians and noncombatants with "an absolute moral immunity from direct, intentional attack,"[14] and was commonly referred to as providing noncombatant immunity. However, this immunity was not consistently accorded. Death of noncombatants was acceptable if they died as an ancillary to an attack on a lawful target.[15] Thus, if the death or injury to civilians was an indirect and unintentional result of a lawful attack, then the requirement of distinction was met.[16]

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[11] ARTHUR HARRIS, BOMBER OFFENSIVE 177 (1947).

[12] Parks *supra* note 10, at 4.

[13] Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE H.R. & DEV. L.J. 143, 148-49 (1999).

[14] JAMES TURNER JOHNSON, CAN MODERN WAR BE JUST? 27 (1984). A judge advocate in the Spanish Army of the Netherlands, Balthazar de Ayala, noted in 1582 that the "intentional killing of innocent persons, for example, women and children, is not allowable in war." 2 AYALA, DE JURE ET OFFICIO ET DISCIPLINA MILITARI 33, 44 (Classics of International Law, ed. 1912) *quoted in* Burrus M. Carnahan, *The Law of Air Bombardment in its Historical Context*, 17 A.F. L. REV. 39, 40 (1975).

[15] Parks, *supra* note 10, at 4. This was best evidenced in the methods of siege warfare. One of the primary principles of siege warfare was that the defender of the city under siege bore the burden of protecting his citizens from incidental harm. Any harm occurring as a result of the siege—starvation, bombardment, sacking—was considered incidental and allowable. *See also* Matthew C. Waxman, *Siegecraft and Surrender: The Law and Strategy of Cities as Targets*, 39 VA. J. INT'L L. 353 (1999).

[16] Spanish theologian Francisco De Vitoria went so far as to state that "[i]t is occasionally lawful to kill the innocent not by mistake, but with full knowledge of what one is doing, if this is an accidental effect: for example, during the justified storming of a fortress or city, where one knows there are many innocent people." FRANCISCO DE VITORIA, POLITICAL WRITINGS 315 (Anthony Pagden & Jeremy Lawrence eds., 1991).

The natural derivative of distinction is the principle of military objective.[17] If one is entitled to target only "lawful" targets, and incidental injury to noncombatants is acceptable only as an indirect and unintended consequence of striking a lawful target, then the definition of what is a lawful target becomes paramount. The somewhat circular answer to this question is often the response that lawful targets are all military objectives. As discussed below, several attempts were made to define what constituted a military objective.[18] For various reasons, however, states did not accept these proposed definitions, and left the determination of what constituted a military objective primarily to the attacker.[19]

In addition to the limitations imposed by the principle of distinction and the requirement of striking only military objectives, classic law of war also required that attacking the target was a military necessity.[20] A Nuremberg tribunal articulated the customary law principle of military necessity in *United States v. List*:

> Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money . . . . It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.[21]

The principle of military necessity then, similar to the principle of distinction, acknowledges the potential for unavoidable civilian death and injury ancillary to the conduct of legitimate military operations. However, the principle of military necessity adds to distinction's requirement for targeting only a military objective. Military necessity adds the additional requirement that destroying a particular military objective will provide some type of advantage in overcoming the enemy.

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[17] Horace B. Robertson, Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, *in* 72 THE LAW OF MILITARY OPERATIONS 196, 196 (Michael N. Schmitt ed., 1998).
[18] *See* discussion Part III.C.
[19] *Id.*
[20] The concept of military necessity is reflected in Article 52(2)'s requirement that destruction of the target provide a "military advantage" to the attacker. *See* Protocol I, *supra* note 4, art. 52, para. 2.
[21] 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1253-54 (1950).

Thus, several basic principles of customary international law that governed the use of all force, including air power, existed by the mid-twentieth century. Attackers were required to distinguish between military objectives and civilians, targeting only military objectives. Further, the destruction of a target had to provide some military advantage to the attacker.

2. Conventional International Law Regulating Air Warfare

The basic principles discussed above were not only considered customary international law, but also were articulated in several international legal documents. Dr. Francis Lieber wrote one of the first modern statements of the law of war.[22] During the Civil War, President Lincoln requested that Lieber write a code of law summarizing the customary practice of nations as it existed at the time.[23] President Lincoln then adopted and issued Lieber's code to the Union Army as Union Army General Order No. 100.[24] The Lieber Code, as it is commonly known, contained several articles articulating basic principles of the law of war. Articles 14 and 15 recognized the principle of military necessity:

> Art 14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.
> Art 15. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war . . . .[25]

The Lieber Code also formally recognized the principle of distinction in Article 22:

> Art. 22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.[26]

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[22] Introductory Note to Francis Lieber, Instructions for the Government of Armies of the United States in the Field, originally published as U.S. War Department, Adjutant General's Office, General Orders No., 100 art. 22 (Apr. 24, 1863) [hereinafter The Lieber Code], *reprinted in* SCHINDLER & TOMAN, *supra* note 3, at 3.
[23] *Id*.
[24] *Id*.
[25] *Id*. art. 14, 15 (emphasis added).
[26] *Id*. art. 22.

The principle of distinction, however, was not without exception. Lieber specifically states that "[p]ublic war is a state of armed hostility between sovereign nations or governments," and therefore "[t]he citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war."[27] Lieber therefore reflected in his code the prevailing belief of the time that while civilians should not be directly targeted, nevertheless they did not remain immune from injury during combat.

Five years later, the St. Petersburg Declaration tacitly recognized the principle of distinction.[28] Although the purpose of the Declaration was to prohibit a certain type of bullet, its preamble states "[t]hat the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy."[29] The Declaration did not, however, address exactly how one was entitled to weaken such forces.

At the time of the birth of air power, then, several basic principles of international law, codified in various documents, regulated the use of force between states. Upon the arrival of air power and all that its proponents portended, nations took on the task of drafting law specifically regulating the use of this new weapon. In August of 1898, Russia proposed convening an international conference to address issues of disarmament and weapons regulation.[30] The conference convened at The Hague in May of 1899.[31] One of the items proposed for regulation was the discharge or launching of weapons from the air.[32] At the time of this proposal, "every major army in Europe had for some time been making an ongoing investment in military aeronautics."[33]

Although little more than observation from balloons had been done by this time, nations recognized the future potential for using balloons to drop explosives.[34] In response to such uncertainty, the Russians proposed a permanent ban on the discharge of explosives or projectiles from balloons.[35] Initially the commission working on the proposal voted unanimously to adopt

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[27] *Id.* at 6-7 (quoting The Lieber Code, *supra* note 22, art. 20, 21).

[28] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297 (1868-69), *reprinted in* SCHINDLER & TOMAN, *supra* note 3, at 102.

[29] *Id*.

[30] INSTRUCTIONS TO THE AMERICAN DELEGATES TO THE HAGUE PEACE CONFERENCES AND THEIR OFFICIAL REPORTS 1-2 (James Scott Brown ed., 1916).

[31] THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, vi (James Scott Brown ed., 1918).

[32] *Id.* at 220-22.

[33] LEE KENNETT, THE FIRST AIR WAR 1914-1918, 2 (1991).

[34] One Polish scholar warned in 1898 that "[i]t appears that we are very close to finding ourselves face to face with a danger before which the world cannot remain indifferent." *Id.* at 1 (quoting I JEAN DE BLOCH, LA GUERRE, 203 (1898)).

[35] KENNETT, *supra* note 33, at 1-2.

the resolution.[36] Ultimately, however, the ban was limited to five years, the final treaty stating that the parties agreed "to prohibit, for a term of five years, the launching of projectiles and explosives from balloons, or by other new methods of a similar nature."[37] This limited ban effectively allowed nations to take a wait-and-see attitude regarding possible future uses of air power. It also shifted the dynamic regarding air power from one of prohibition to one of regulation. From its inception, air power and its potential proved too alluring for nations to relinquish completely.

The Second Hague Peace Conference convened in 1907.[38] Perhaps due to the rapid advancement of air power in the previous eight years, little enthusiasm existed for renewing the 1899 prohibition.[39] Although the Conference's attempt to regulate air warfare specifically did not go very far, the Conference did regulate air warfare through conventions regarding land and sea forces. Article 25 of the 1899 Convention on Land Warfare was amended to include bombardment from the air. It read: "The attack or bombardment, *by whatever means,* of towns, villages, dwellings, or buildings

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[36] *Id.*

[37] Declaration (IV, 1) to Prohibit for the Term of Five Years the Launching of Projectiles and Explosives from Balloons, and Other Methods of a Similar Nature, July 29, 1899, 32 Stat. 1839, *reprinted in* SCHINDLER & TOMAN, *supra* note 3, at 202-03. An Army artillery officer, Captain William Crozier, proposed the limited ban, arguing:

> We are without experience in the use of arms whose employment we propose to prohibit forever. Granting that practical means of using balloons can be invented, who can say that such an invention will not be of a kind to make its use possible at a critical point on the field of battle, at a critical moment of the conflict, under conditions so defined and concentrated that it would decide the victory and thus partake of the quality possessed by all perfected arms of localizing at important points the destruction of life and property and of sparing the sufferings of all who are not at the precise spot where the result is decided. Such use tends to diminish the evils of war and to support the humanitarian considerations which we have in view.

THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, THE CONFERENCE OF 1899, 354 (James Brown Scott ed., 1920). Crozier's argument appealed to the delegates' eternal hope that a weapon could be found that would make war less bloody and indiscriminate through efficiency. KENNETT, *supra* note 33, at 2.

[38] The five-year prohibition agreed upon at the conference lapsed in 1904, but the anticipated follow-on conference did not take place as scheduled due to, among other things, the Russo-Japanese War. KENNETT, *supra* note 33, at 5.

[39] Ultimately, the prohibition was renewed, but instead of setting a specific timeframe, the prohibition was to be in effect until the Third Hague Peace Conference, anticipated in 1916. Paul A. Goda, *The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War,* 33 MIL. L. REV. 93, 94 (1966). In reality, the prohibition had little significance, as only the United States and Great Britain committed themselves to the treaty. As the treaty only bound parties at war with each other, it had no effect in either World War I or World War II. Parks, *supra* note 10, at 17.

which are undefended is prohibited."[40] Article 25, then, essentially replaced the prior prohibition on discharging explosives from balloons or from other new methods, at least with regards to undefended targets.

Restrictions set out on naval bombardment in Convention (IX) Concerning Bombardment by Naval Forces in Time of War[41] proved to be more relevant. Article 1 of the Convention applied the prohibition against land forces bombing undefended places to naval forces as well.[42] Article 2, however, went on to enumerate items that were not covered by Article 1's prohibition. These items included military establishments as well as industries that provided for the armed forces.[43] For the first time, parties recognized that the legitimacy of bombardment was not necessarily related to whether the object was defended, but instead to whether it had military significance.[44] Furthermore, foreshadowing the Army Air Corps' doctrine during World War II, Article 2 recognized the legitimacy of striking economic or industrial targets that were key to the enemy's military effort.

Thus, when World War I broke out seven years later, customary law prohibiting indiscriminate attack and the applicable portions of The Hague Peace Conferences of 1899 and 1907 constituted the only existing regulation of air warfare. After WWI, the international community tried unsuccessfully to modify the existing law regarding air warfare with the 1923 Hague Rules of Air Warfare.[45] Although never formally accepted, the proposed provisions are worth noting for two reasons. First, the proposed conventional rules regulating combat contradicted prior state practice and military thinking of the time.[46] Second, the rules attempted for the first time, in a roundabout way, to define or limit what constituted a military objective.[47] Unfortunately, the proposed

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[40] Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, *reprinted in* SCHINDLER & TOMAN, *supra* note 3, at 83-84 (*emphasis added*).

[41] Convention (IX) Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, *reprinted in* SCHINDLER & TOMAN, *supra* note 3, at 812.

[42] *Id.*

[43] *Id.*

[44] Parks, *supra* note 10, at 18.

[45] Hague Rules of Air Warfare, drafted Dec. 1922-Feb. 1923 [hereinafter Hague Rules], *reprinted in* SCHINDLER & TOMAN, *supra* note 3, at 207.

[46] Parks, *supra* note 10, at 31. For example, Article 24(3) prohibited bombing an objective listed in Article 24(2) if "they cannot be bombarded without the indiscriminate bombardment of the civilian population." SCHINDLER & TOMAN, *supra* note 3, at 210 (quoting the Hague Rules, *supra* note 45, art. 24, para. 3). This proposal directly contradicted at least two customary international law principles. First, it shifted the burden of avoiding an undefined "indiscriminate" attack to the attacker, whereas previously collateral damage was simply considered an allowable consequence if the damage was unintentional and indirect. Second, Article 24(3) shifted the criteria for determination of the legitimacy of an attack from the intent of the attacker to the results of an attack. Both concepts were unacceptable to the nations in attendance. Parks, *supra* note 10, at 33.

[47] Article 24(2) provided an exclusive list of military objectives: "military forces; military works; military establishments or depots; factories constituting important and well-known centers engaged in the manufacture of arms, ammunition or distinctively military supplies;

definition did not reflect customary international law or past state practice. Based at least in part on these failures to reflect current state practice and customary international law, states' "condemnation of the rules was virtually unanimous," and they "drifted into obscurity, adopted by no nation, and completely ignored by most aviation historians."[48] The world community strongly rejected attempts to codify the law of air warfare that contradicted customary international law. This near unanimous rejection became relevant nearly fifty years later, as the drafters of Protocol I, attempting to once again regulate air warfare, drew on language similar to that rejected in the 1923 Hague Air Rules.[49]

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lines of communication or transportation used for military purposes." SCHINDLER & TOMAN, *supra* note 3, at 210 (quoting the Hague Rules, *supra* note 45, art. 24, para. 2). The term "military objective" itself was left undefined. By providing an exclusive list, however, Article 24(2) contradicted customary international law and current military thinking. As noted by James Spaight, a member of the British delegation to the conference, the restrictive list clearly did not reflect the practice of states during World War I. During the war, states targeted not only those items listed, but also docks, warehouses, blast furnaces, power stations, granaries, oil wells, and more. J.M. SPAIGHT, AIR POWER AND WAR RIGHTS 228 (3d ed. 1947). Furthermore, the exclusive list did not allow for the "dynamic nature of targeting, as the value of a potential military objective may vary depending upon the circumstances ruling at the time." Parks, *supra* note 10, at 33.

[48] Parks, *supra* note 10, at 33, 35.

[49] There was one final non-binding attempt to limit air warfare just prior to the outbreak of World War II. British Prime Minister Neville Chamberlain proposed three basic rules for bombing during a debate in the House of Commons on June 21, 1938. Chamberlain stated:

> I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking these military objectives so that by carelessness a civilian population in the neighborhood is not bombed.

382 PARL. DEB., H.C. 1360 (1938), *quoted in* SPAIGHT, *supra* note 47, at 257. On the first day of WWII, President Franklin Roosevelt made a similar appeal, asking

> every government which may be engaged in hostilities publicly to affirm its determination that its armed forces shall in no event, and under no circumstances, undertake the bombardment from the air of civilian populations or of unfortified cities, upon the understanding that these same rules of warfare will be scrupulously observed by all their opponents.

B. Customary International Law—The Practice of States in Air Warfare

Perhaps most relevant to determining international law regarding aerial bombardment is the practice of nations. How nations actually conduct bombardment campaigns reflects not only their beliefs of what international law is and what they are legally obligated to follow, but, over time, also creates customary international law.[50] Thus, it is necessary to look briefly at what nations considered to be lawful targets during various air campaigns. As target selection is primarily determined by military doctrine and theory,[51] consideration of the air power doctrine followed by nations will also be addressed when assessing their practice.

1. World War I

Although unsure of all its potential future uses, almost all the major powers began to experiment with military uses for air power when it was still in its infancy.[52] There was, however, little agreement upon the best use for air power.[53] As a result, the major powers entered World War I with little coherent doctrine for using air power.[54] At the beginning of the war, air power doctrine and technology were still in the formative years. The war, ironically, provided a "legitimate" arena for testing and experimenting with various uses

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Letter of Franklin D. Roosevelt to the governments of Nazi Germany, Italy, France, Britain, and Poland (Sept. 1, 1939), *in* THE IMPACT OF AIRPOWER: NATIONAL SECURITY AND WORLD POLITICS 68 (Eugene M. Emme ed., 1959). Neither statement, however, was binding on any country, and in fact, simply reflected a universal acceptance of the principle of distinction. The general response of the warring nations was to promise to limit bombardment to "strictly military objectives." SPAIGHT, *supra* note 47, at 260. The end result, then, was little, if any effect, on actual practice during World War II. Parks, *supra* note 10, at 36-37.

[50] Customary international law is created upon the concurrence of two events: (1) a general and consistent practice of states; and (2) a sense of obligation on the part of the states to follow that practice. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

[51] JASON B. BARLOW, STRATEGIC PARALYSIS: AN AIRPOWER THEORY FOR THE PRESENT 25 (1994); *see also* Phillip S. Meilinger, *Air Strategy: Targeting for Effect*, XIII AEROSPACE POWER J. 48, 56 (Winter 1999) ("One must realize, however, that the choice of strategy will have a significant effect on the targets selected for air attack. . . . Our policy goals and the nature of the war will determine the most effective air strategy to employ.").

[52] *See* KENNETT, *supra* note 33, at 1-22.

[53] *See Id*.

[54] For a discussion of how various countries incorporated air power into their military prior to WWI, see *id*.

of air power.[55] Initially, states used air power rather sparingly, primarily for reconnaissance and ground troop support.[56] However, by 1917, advancements in technology and training, combined with "the failure of the army campaigns of 1916 and the strategic stalemate on the Western Front promoted greater interest in long-range bombardment."[57] Scrutiny of how the warring parties conducted their bombing campaigns, particularly their choice of targets, reveals their perceptions of the international legal constraints in effect at the time.

The bombing campaigns of Britain, France, Germany, Italy, and America all reflect adherence to two, interrelated principles of international law: (1) the only legitimate targets are military objectives; and (2) indiscriminate bombing is prohibited.[58] As far as what was considered a military objective, it is important to note that the term was regarded as inclusive of far more than simply the military establishments of the enemy. Furthermore, the list of objects actually struck during the war reflected a far wider range than those listed in Article 24(2) of the 1923 Hague Air Rules.[59] To say that indiscriminate bombing was prohibited is not to say that it did not occur. Rather,

> [m]ilitary objectives were aimed at, but, for a variety of reasons, were not always hit and the effect of the attack was too often not very different from that which would have resulted from an intention to bomb indiscriminately. There was undoubtedly a lack of precision. The bombing was largely, to use a nautical expression, "by guess and by God." Things other than military were hit on many occasions. There was, furthermore, a good deal of doubt about what a military objective was.[60]

Numerous reasons accounted for the less-than-precise bombardments: bombing from great heights, faulty intelligence, adverse weather, limited technology, and minimal training and experience.[61] The intent, however, was to attack targets that contributed to the enemy's war fighting effort including those targets that would demoralize the enemy.[62]

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[55] Richard J. Overy, *Strategic Bombardment Before 1939: Doctrine, Planning, and Operations*, *in* CASE STUDIES IN STRATEGIC BOMBARDMENT 11, 13 (R. Cargill Hall ed., 1998).
[56] *Id.* at 13-14.
[57] *Id.* at 15.
[58] SPAIGHT, *supra* note 47, at 228-29. For a full discussion of the air warfare practice of states during WWI, see *id.* at 220-43; *see generally* KENNETT, *supra* note 33.
[59] Targets included iron, steel, chemical, and engine factories, docks, oil refineries and storage areas, power, water and gas stations, and granaries. SPAIGHT, *supra* note 47, at 228; Overy, *supra* note 55, at 19.
[60] SPAIGHT, *supra* note 47, at 228.
[61] *Id.* at 233-36.
[62] Attacks were not limited to bombardment of enemy forces, but also included German attacks on the Channel ports and French attacks on the Badische Analin und Soda Fabrik, rumored to be the production source for German chlorine gas, as well as German dirigible hangers. Both sides also made attempts to attack the others' leadership, as the Allies attempted to attack

As discussed above, collateral damage was considered acceptable (if regrettable) if it was an unintended and indirect consequence of bombing legitimate targets.[63] Similarly, the parties in WWI considered affecting enemy morale, including that of civilians, to be a legitimate, and perhaps desirable, consequence of aerial bombardment.[64] The difference between the wars, however, was that not only did the collateral effect injure and kill civilians, but also influenced an intangible–the morale of the population. The effect was indirect, but it was very much intended.[65] Such an effect was considered a legitimate corollary objective to striking a more traditional military target.[66] The practice of states, then, remained, at least in principle, consistent with the basic principles of distinction and targeting of only military objectives. It rejected, however, conventional law attempts to provide an exclusive list of military objectives and the requirement of a purely military advantage. As one international law scholar summarized, "The law of war is based upon the practice of nations. In that regard, during World War I, demoralization of the enemy by means of widespread bombardment was accepted by the military services as part of the functions of the aviation bombardment groups, as it was for artillery."[67]

Kaiser Wilhelm, the German Crown Prince, and Prince Rupprecht of Bavaria, while the Germans tried more than once to catch Tsar Nicholas with their bombers. KENNETT, *supra* note 33, at 49-50.

[63] *See supra* text accompanying notes 12-16.

[64] KENNETT, *supra* note 33, at 44-5. Kennett notes that prior to World War I, military strategists discussed the morale of the population to be a specific objective for strategic bombers. *Id.* For example, a French airman stated that while an air attack on Paris might do little in the way of material damage, it would have an immense psychological impact on Parisians; while an American aviator noted that a minor air attack against New York would be devastating to the population. *Id.* Such a result was considered desirable, as although it would kill and injure civilians, in the long run it would shorten the war as the same civilians would quickly sue for peace. *Id*. *See also* Overy, *supra* note 55, at 14.

[65] Parks notes that not only was collateral damage accepted as an inevitable result of bombardment, but also "an equally long-standing principle was that collateral damage, as a result either of general bombardment or inaccurate bombardment, [was] a way in which the morale of an enemy nation could be affected, legally." Parks, *supra* note 10, at 51.

[66] In the summer of 1917, the Germans launched a bombing campaign against England "partly in hopes that it would create a morale crisis and weaken England's willingness to prolong the conflict." Overy, *supra* note 55, at 17. The targets were military and military industries, but in addition to destruction of the targets, the Germans hoped to collapse British morale. The British responded with a plan to attack military targets and "densely populated industrial centers" in order to destroy the morale of the Germans. *Id.* at 20-21.

[67] M.W. ROYSE, LA PROTECTION DES POPULATIONS CIVILES CONTRE LES BOMBARDMENTS 73-74 (1930), *quoted in* Parks, *supra* note 10, at 41.

2. The Inter-war Period

The bloody trench warfare of World War I created a fundamental change in the nature of warfare. No longer was war a battle between just opposing armies and navies. War had become total, all encompassing conflict. Battles were now wars of attrition involving the material resources and the morale of entire nations.[68]

The rapid changes in industry, technology and politics added to this targeting evolution. The industrial revolution fully integrated civilians into the industrial war-making capability of their nation.[69] Technological advances in military equipment allowed nations to strike far beyond the military forces fighting on the battlefield, thereby inflicting damage where civilians lived and worked.[70] Furthermore, the idea of popular sovereignty replaced many monarchies, theoretically causing the declaration of war to become an expression of the will of not simply one man, but of the entire population.[71]

State practices in WWI reflected this fundamental change in targeting.[72] Enemy forces were no longer the only objective.[73] In a total war, a nation's entire war-making and war-supporting effort, to include the domestic economy and civilian morale, became a legitimate target.[74] Air power, strategic bombardment in particular, provided the most powerful and efficient method by which to reach these targets.

Proponents of air power came to the forefront after WWI, particularly those who advocated bombardment as the most effective strategic weapon available.[75] Strategic bombardment differed from any type of past warfare in two ways:

> First, it formed part of the grand strategic aim by directly attacking the enemy's will to resist, bypassing the surface campaign and independent of its immediate objectives. Second, strategic bombardment focused on complex target systems chosen not because of any direct or necessary relationship

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[68] Overy, *supra* note 55, at 12. *See also* JOHNSON, *supra* note 14, at 129-30. Johnson notes that "beginning with the French Revolution the entire nation was cast as simultaneously the cause for which to fight, the source of volunteer or conscript manpower, and the base of support for the military effort." *Id.*

[69] JOHNSON, *supra* note 14, at 130.

[70] *See, e.g.*, ROBERT FRANK FUTRELL, IDEAS, CONCEPTS, DOCTRINE: BASIC THINKING IN THE UNITED STATES AIR FORCE 1907-1960 75-76 (1989); John F. Shiner, *From Air Service to Air Corps: The Era of Billy Mitchell*, in WINGED SHIELD, WINGED SWORD: A HISTORY OF THE USAF 71, 75 (1997).

[71] Oji Umozurike, *Protection of the Victims of Armed Conflicts: Civilian Population*, *in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 187, 187 (United Nations Educational, Scientific and Cultural Organization ed., 1988).

[72] *See* discussion *infra* Part II.B.3.

[73] *Id.*

[74] Overy, *supra* note 55, at 26.

[75] FUTRELL, *supra* note 70, at 78-82.

> with the enemy's forces in the field, but because their destruction would undermine the enemy nation's willingness and capability to wage war at all.[76]

Strategic bombardment doctrine thus went beyond targets that provided an enemy the physical means to wage war—to include targets that affected his psychological ability to wage war. Different theories existed regarding what targets, if destroyed, would undermine an enemy's morale.[77] The concept of morale as a legitimate target was, however, universally accepted as one of the advantages provided by air power.[78] Air Marshal Hugh Trenchard, commander of the Royal Air Force, defined military objectives as "any objectives which will contribute effectively towards the destruction of the enemy's means of resistance and the lowering of his determination to fight."[79] Therefore, during the inter-war years air planners considered morale a military objective as defined by previous state practice. These military men accomplished what lawyers had failed to do previously—provide a viable definition for military objective.

3. World War II

"In the matter of bombing, the second great war started, doctrinally and legally, more or less where the first had left off, but at a greatly advanced point, technically and operationally."[80] The air power strategy of the Allies focused primarily on strategic bombardment.[81] Upon entering the war, the RAF and the Army Air Corps espoused similar targeting strategies in a cooperative strategy for use against the Axis called ABC-1.[82] The twin goals

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[76] *Id.* at 11.

[77] The Italian air power theorist, Giulio Douhet, proposed the most extreme view. Douhet argued that the quickest way to end a total war was to attack the population directly. He believed that "war is won by crushing the resistance of the enemy; and this can be done more easily, faster, and more economically, and with less bloodshed by directly attacking that resistance at its weakest point." GIULIO DOUHET, THE COMMAND OF THE AIR 196 (Dino Ferrari trans., 1942). In Douhet's view, the population was the weakest point. *Id*. Thus he advocated destroying morale by directly destroying the population.

[78] Overy, *supra* note 55, at 26.

[79] IV C. WEBSTER & N. FRANKLAND, THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY 1939-45, 74 (1961). During this time, only two air forces, the Royal Air Force and the Army Air Corps, made systematic operational plans for strategic air offensives. Others concentrated on tactical air power or delayed planning. Overy, *supra* note 55, at 65. As the RAF and the Army Air Corps were the primary strategic planners before the war, it seems particularly important to consider their understanding of what constituted a legitimate military objective.

[80] SPAIGHT, *supra* note 47, at 259.

[81] Bernard C. Nalty, *The Army Air Forces in Desperate Battle, 1941-1942*, in WINGED SHIELD, WINGED SWORD: A HISTORY OF THE USAF 201, 222-24 (1997).

[82] Stephen L. McFarland & Wesley Phillips Newton, *The American Strategic Air Offensive Against Germany in World War II, in* CASE STUDIES IN STRATEGIC BOMBARDMENT 183, 184 (R. Cargill Hall ed., 1998).

of the RAF and the Army Air Corps were to destroy both the capability and the willingness of the enemy to fight.[83] The RAF, however, perhaps due to the suffering England had endured from the Luftwaffe, initially was more disposed to considering Germany's morale as a specific objective.[84] The Army Air Corps entered the war with its strategic plan set out in Air War Plans Division Plan 1 (AWPD-1).[85] AWPD-1 espoused the doctrine of unescorted, high-altitude, precision bombardment of an enemy's industrial centers.[86] However, the Army Air Corps also considered morale a legitimate objective.[87] The Army Air Corps, however, believed that the best way to destroy morale was indirectly: "Morale was rejected as a proper objective on its own; the assumption held that the interruption of the economic system would have a secondary impact on German morale."[88]

By 1943, the British and the Americans combined their direct and indirect approaches to affecting morale.[89] In January of 1943, President Franklin D. Roosevelt and Prime Minister Winston Churchill met at Casablanca to discuss further plans for Allied action against Germany.[90] One result of the meeting was a jointly issued document, commonly referred to as the Casablanca Directive.[91] The directive declared the primary objective of the

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[83] *Id.* at 224-26.

[84] W.A. Jacobs, *The British Strategic Air Offensive Against Germany in World War II, in* CASE STUDIES IN STRATEGIC BOMBARDMENT 91, 118 (R. Cargill Hall ed., 1998)

> While mass bombing attacks on civilian morale were much discussed after World War I within and beyond the RAF, none of the [war plans] drafted before World War II singled out morale as a target. Moreover, none of the first three Air Ministry directives issued to Bomber Command in early 1940 even mentioned the civilian population or morale in any way.

Id. It was not until after the Luftwaffe bombing raids on London began in the fall of 1940 that Air Ministry directives addressed morale. At that time, the directives paired "traditional selective economic targets with a secondary emphasis on civilian morale." *Id.* at 119.

[85] For a full discussion of the development of AWPD-1, see HANSELL, *supra* note 2, at 33.

[86] AWPD-1 was written by a small number of influential airmen, all of whom had ties to the Army's Air Corps Tactical School (ACTS). The ACTS was the focal point for development of strategic doctrine prior to World War II. Therefore, not surprisingly, AWPD-1 reflected the ACTS view advocating direct attacks on the enemy's economic structure for the dual purposes of reducing the capability and willingness of the enemy to continue the war. BARLOW, *supra* note 51, at 47; *see also* Peter R. Faber, *Interwar US Army Aviation and the Air Corps Tactical School: Incubators of American Airpower, in* THE PATHS OF HEAVEN: THE EVOLUTION OF AIRPOWER THEORY 183, 211-21 (1997).

[87] Under the sub-heading of "Possible Lines of Action," AWPD-1 included "undermining of German morale by air attack" as a potential line of action for an air offensive. HANSELL, *supra* note 2, at 299 (extract of AWPD-1).

[88] Overy, *supra* note 55, at 71.

[89] EDWARD C. HOLLAND, III, FIGHTING WITH A CONSCIENCE: THE EFFECTS OF AN AMERICAN SENSE OF MORALITY ON THE EVOLUTION OF STRATEGIC BOMBING CAMPAIGNS 16 (1992).

[90] RICHARD D. DAVIS, CARL A. SPAATZ AND THE AIR WAR IN EUROPE 155 (1993).

[91] *Id.* at 589.

bombers was "the progressive destruction and dislocation of the German military, industrial and economic system, and the undermining of the morale of the German people to the point where their capacity for armed resistance is fatally weakened."[92] The subsequent offensive was carried out around the clock, the RAF employed night area bombing while the Air Corps attempted daylight precision bombardment.[93]

Although attainment of distinction was perhaps more difficult than in the past due to the high levels of commingling of military objectives with civilian populations, it remained viable during WWII.[94] The major parties clearly considered morale a legitimate objective for air planners.[95] The argument remains open whether the means chosen by the parties were effective against morale, or even if the technological means existed to achieve the parties' goals.[96] However, the level of effectiveness of the particular means chosen does not change the fact that state practice demonstrated that states considered affecting civilian morale to be a legitimate objective.

C. Post World War II Developments: Protocol I to the Geneva Conventions

Although World War II marked the end of total war, it was not the end of armed conflict. It did, however, provide the catalyst for new attempts at codifying international law relating to combat. The coming of age of strategic

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[92] WEBSTER & FRANKLAND, *supra* note 79, at app. 8, pt. 28.

[93] This division of work reflected not only the differing technological capabilities between the Allies, but also their interpretation of the Directive. The RAF focused on the portion concerning morale. They did not, however, interpret this to allow random killing of large numbers of people. However, "it did entail depriving them of their homes, heat, light, water, urban transportation, and perhaps food. Homeless and hungry workers, they reasoned, do not produce munitions and, like soldiers who are wounded, are a greater impediment to the state at war than dead ones." HANSELL, *supra* note 2, at 169. The American forces, however, concentrated on the portion regarding destruction of the industrial and economic system as the key to a "fatal weakening." However, "the differences between British and American airmen were not as deep as might appear on the surface. . . . The debate was over method, and was related more to operational equipment and capability and survivability than to the need for 'fatal weakening' per se." *Id.* at 169-70.

[94] Parks, *supra* note 10, at 52.

[95] *See infra* Part II.B.3. *But see* Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 401 (1993) (States agreeing at a minimum, "that the deliberate targeting of the civilian population for the purpose of terrorization was unlawful.").

[96] *See generally* STEPHEN T. HOSMER, PSYCHOLOGICAL EFFECTS OF U.S. AIR OPERATIONS IN FOUR WARS 1941-1991: LESSONS FOR U.S. COMMANDERS (1996) (discussing the psychological effects of bombardment on both enemy civilians and enemy combatants); THE UNITED STATES STRATEGIC BOMBING SURVEYS (EUROPEAN WAR, PACIFIC WAR) (reprint 1987) [hereinafter USSBS] (reprint of the summary reports of the strategic bombing surveys conducted at the close of World War II); Martin L. Fracker, *Psychological Effects of Aerial Bombardment*, VI AIRPOWER J. 56 (Fall 1992) (arguing that the effects of aerial bombardment on civilian morale primarily depend on the expectation of the population).

bombardment in WWII presented a powerful weapon with far-reaching capabilities. As a result, civilians became more vulnerable than ever before, "and were inevitably collateral targets, potentially on a much larger scale than previously."[97] Thus, unlike pre-war provisions, the majority of conventions and treaties proposed after WWII dealt with the protection of noncombatants, rather than regulation of the means and methods of warfare.[98]

In the 1950s, the International Committee of the Red Cross (ICRC), proponents of the Geneva Conventions, expanded its focus, venturing outside its role as protector of war victims and into the traditional Hague law of regulating combat. "In particular, members of the ICRC sought to regulate, if not prohibit, the employment of aerial bombardment beyond the immediate battlefield."[99] The ICRC put forth a number of drafts and proposals, as did the Institute of International Law and the United Nations.[100] While the proposals

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[97] Gardam, *supra* note 95, at 400. While Gardam's statement is accurate in that it reflects a "new" means by which militaries can inflict massive damage on civilians, by no means is airpower the only, or even predominant, means by which civilians have been killed. During World War II, only 1.5 to 2 million of the approximately 40 million civilian deaths were attributable to strategic bombardment. WILLIAMSON MURRAY & ALLAN R. MILLETT, A WAR TO BE WON: FIGHTING THE SECOND WORLD WAR 554-55 (2000). Further, the horrific casualties in some of the most recent conflicts, Rwanda, Sierra Leone, Angola, East Timor, and Kosovo, resulted almost exclusively from conflict on the ground. *See* GERARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 255-57, 261-65 (1995) (estimating approximately 800,000 killed, the majority by the use of guns or machetes); Human Rights Watch, *Government Human Rights Commissions in Africa: Sierra Leone*, *at* http://hrw.org/reports/2001/africa/sierraleone/sierraleone.html (last visited Nov. 5, 2001) (noting that the rebels accounted for vast numbers of civilian murders, rapes, executions, and limb amputations); Amnesty International, *1999 Annual Report on the Republic of Sierra Leone*, *at* http://www.amnesty.org/ailib/aireport/ar99/afr51.htm (last visited Nov. 5, 2001) (cataloging the thousands of civilians killed or abused by rebel forces); Amnesty International, *1999 Annual Report on the Republic of Angola*, *at* http://www.amnesty.org/ailib/aireport /ar99/afr12.htm (last visited Nov. 5, 2001) (noting the deaths and disappearances of hundreds of civilians at the hands of both government and rebel forces); Hansjorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 46 nn. 1-2, 50 (2001) (discussing the massive ethnic cleansing conducted against civilians by local armed forces in both Kosovo and East Timor).

[98] *See, e.g.*, Geneva Conventions, *supra* note 3.

[99] Parks, *supra* note 10, at 64.

[100] *See Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, ICRC (1956), *reprinted in* SCHINDLER & TOMAN, *supra* note 3, at 251; *Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare*, ICRC Res. XXVIII (1965), *reprinted in* SCHINDLER & TOMAN, *supra* note 3, at 259; *Human Rights in Armed Conflict*, Int'l Conf. on Human Rights Res. XXIII (May 12, 1968), *reprinted in* SCHINDLER & TOMAN, *supra* note 3, at 261; *Respect for Human Rights in Armed Conflicts*, G.A. Res. 2444, U.N. GAOR, 23rd Sess., Supp. No. 18, at 50-51, U.N. Doc. A/7218 (1969), *reprinted in* SCHINDLER & TOMAN, *supra* note 3, at 263; *The Distinction Between Military Objectives and Non-Military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction*, Inst. of Int'l Law Res. (Sept. 9, 1969), *reprinted in* SCHINDLER & TOMAN, *supra* note 3, at 265; *Basic Principles for the Protection of Civilian*

were put forth to the international community, it is important to note that none of them were binding. Furthermore, support for the proposals among the major powers was tepid, at best.[101] In fact the General Counsel of the Department of Defense specifically warned against "attempts to limit the effects of attacks in an unrealistic manner," citing the failed 1923 Hague Rules as such an attempt.[102]

The ICRC's most ambitious effort began in 1974. Over the course of three years, The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (the Conference), met in four sessions.[103] The result of the Conference was Protocol I and Protocol II to the Geneva Conventions.[104] Although the negotiating history and background of the Protocols is extensive,[105] only a few points are relevant to this analysis. Perhaps most surprising is that:

> [n]otwithstanding the very clear lesson of the failed 1923 Hague Air Rules against international lawyers exercising the lead in negotiating a treaty in which they lack subject-matter expertise, many delegations—and particularly the Western delegations—were almost exclusively comprised of international lawyers.[106]

Populations in Armed Conflicts, G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp. No. 28, at 76, U.N. Doc. A/8028 (1971), *reprinted in* SCHINDLER & TOMAN, *supra* note 3, at 267.

[101] Parks, *supra* note 10, at 66.

[102] Letter from General Counsel, Department of Defense, to Senator Edward M. Kennedy (Sept. 22, 1972) *in* Arthur W. Rovine, *Contemporary Practice of the United States Relating to International Law*, 67 AM. J. INT'L. L. 122, 123 (1973).

[103] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 xxxii-xxxiii (Yves Sandoz et al. eds., 1987) [hereinafter ICRC COMMENTARY].

[104] Protocol I, *supra* note 4, Protocol II, *supra* note 4.

[105] *See generally* ICRC COMMENTARY, *supra* note 103; W. Hays Parks, *The 1977 Protocols to the Geneva Conventions of 1949*, NAVAL WAR C. REV. 17-27 (Fall 1978).

[106] Parks, *supra* note 10, at 76. With regard to the employment of air power, "there was no delegate at the Diplomatic Conference who had dropped a bomb in anger in the quarter century preceding the conference," to include the United States delegation. *Id*. at 78, n.261. Considering the quantum leaps in air power technology and doctrine since the end of World War II, it seems particularly negligent to attempt to regulate the use of air power without the input of those familiar with its use and capabilities. In theory, this deficiency could have been addressed by ensuring that draft proposals received military review and input before acceptance. In reality, however, this was not the case. It was not until 1981, four years after the United States signed the Protocols, that a full military review of the provisions took place. *Id.* at 91. As Parks notes, although the United States delegation often assumed their interpretation of the effect of various provisions was correct, in fact, "the U.S. delegation made numerous decisions regarding provisions in Protocol I and Protocol II without an appreciation

The differing agendas of those present at the Conference are also relevant. Attendance at the Conference was far ranging—all state parties that had signed the 1949 Geneva Conventions were invited.[107] Not surprisingly, views of air power and its potential uses differed greatly between Western countries, which possessed superior, technologically advanced air forces, and lesser-developed countries. Viewing themselves as likely to be on the losing side of any battle involving air power, the Third World countries were interested primarily in restricting the use of air power.[108] The influence of these countries should be kept in mind when considering whether proposed restrictive language placed in Article 52(2) truly reflects prior state practice of customary international law, or rather attempts to restrict more powerful countries' possible uses of air power.

III. ANALYSIS

As noted above, states considered affecting enemy morale to be a legitimate consequence of aerial bombardment.[109] The broad concept of "enemy morale" parallels the concept of the "remarkable trinity of war." The trinity consists of the people, the government, and the military.[110] In order to

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of their potential implications, and without consultation with the military services." *Id.* at n.259.

[107] For a list of attendees, see SCHINDLER & TOMAN, *supra* note 3, at 700-03.

[108] As the senior U.S. representative to the Conference of Government Experts, Ambassador George H. Aldrich noted:

> Some countries have been led by their experience, geography, industrial development, and other factors to invest in and rely on certain weapons for their military forces, and other countries have been led to invest in and rely on other weapons . . . . All of these differences, and others, continue to produce profoundly different views of both priorities and possibilities in the development of legal restraints on the means and methods of warfare.

U.S. DEPARTMENT OF STATE, REPORT OF THE U.S. DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA, May 3-Jun 2, 1972, 54 (1972). Things had not changed much since the Hague Convention of 1899, where the Russians hoped for a slow in the growth of land armaments primarily because they realized its artillery was quickly becoming inferior to that of the Germans and Australians. Additionally, those present who lagged behind in submarine capabilities attempted to limit the future uses of submarines. KENNETT, *supra* note 33, at 1.

[109] *See* discussion *supra* Part II.B.3.

[110] HARRY G. SUMMERS, JR., ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR 5 (1982). Colonel Summers derives his trinity from Clausewitz' *On War*. Clausewitz' trinity is

win a war, all three must be in balance.[111] Similarly, in order to defeat an enemy, one can disrupt the enemy's balance by attacking some or all components of the enemy's trinity. In the context of attacking morale, or will, one could therefore attack the morale of the people, the morale of the leadership, the morale of the military, or any combination thereof. As evidenced by past state practice, all three have been attacked with varying degrees of success.[112] It is only the recent, restrictive interpretations of Article 52(2) that attempt to limit state practice, customary international law, and conventional law–all of which have allowed for targeting objectives with at least the partial purpose of affecting enemy morale. Clearly, the targeting of civilians to affect morale through the intentional killing and injuring of civilians is not allowed, and has been rejected by states both in practice and doctrinally.[113] This Part will explore how affecting the morale and will of the enemy, including its civilians, through other means has not been rejected, and, how, until recently, it has been accepted as a lawful use of air power and how recent restrictive interpretations of Article 52(2) attempt to unilaterally change that status, regardless of state practice and customary international law.

A. Article 52(2)

Protocol I, Chapter III is entitled "Civilian Objects." Article 52 is the first article of Chapter III, and is entitled "General protection of civilian objects." Paragraph 2 of Article 52 attempts to do what has not been done successfully in the past—define a military objective. Article 52(2) provides essentially two requirements for an object to qualify as a military objective, or target:[114] (1) the target must make an effective contribution to the enemy's military action; and (2) its destruction must provide a definite military advantage to the attacker.

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made up of three forces: (1) primordial violence, hatred, and enmity; (2) forces not the product of human thought or intent, such as friction; and (3) war's subordination to reason as an instrument of policy. CLAUSEWITZ, *supra* note 1, at 89. Clausewitz then links these three forces with, in order, the people, the military, and the government. *Id.* From this, many have inaccurately cited the people, the military, and the government as Clausewitz' "remarkable trinity." Edward Villacres & Christopher Bassford, *Reclaiming the Clausewitzian Trinity*, PARAMETERS 9, 11 (Autumn 1995).

[111] SUMMERS, *supra* note 110, at 5-6; CLAUSEWITZ, *supra* note 1, at 89.

[112] *See* discussion *infra* Part III.A.3-4.

[113] *See* discussion *supra* Part II.B.3.

[114] The Commentary makes clear that "objective" is defined as "the point aimed at;" in other words, the target. ICRC COMMENTARY, *supra* note 103, at 634. It was not intended to encompass "the general objective (in the sense of aim or purpose) of a military operation." *Id.*

Unfortunately, this definition increasingly is interpreted in an overly restrictive manner.[115] As will be discussed below, current interpretations and applications of Article 52(2) not only turn a blind eye to the reality of war, but also run counter to customary international law, as evidenced by the practice of states both before and after the signing of the Protocols.[116] Article 52(2)'s definition of military objective should be of particular concern to the United States Air Force because the interpretation of 52(2) can have a significant effect on the unique capabilities of air power that make it such a potent weapon.

B. Current Restrictive Interpretations

Before considering the impact of overly restrictive interpretations of Article 52(2), one must first delineate the substance of such interpretations. It is interesting to note that the majority of those redefining the scope of 52(2) are not state actors or militaries, but, rather, various non-governmental organizations. For example, subsequent to Operation Allied Force in Kosovo, Human Rights Watch (HRW) issued a detailed report in which it questioned several of the targets chosen by NATO during the air campaign.[117] In particular, HRW found fault with targeting several bridges and the Serb radio and television headquarters.[118]

The HRW report argued that these targets did not meet the definition of a "military objective" under Article 52(2).[119] In so doing, HRW applied an overly restrictive interpretation of the Article. For example, HRW questioned the destruction of several bridges they stated were "not major routes of communications."[120] In response, U.S. military sources stated "that bridges were often selected for attack for reasons other than their role in transportation (for example, they were conduits for communications cables, or because they were symbolic and psychologically lucrative)."[121] HRW discounted this argument by flatly stating, "The destruction of bridges that are not central to transportation arteries or have a purely psychological importance does not satisfy the criterion of making an 'effective contribution to military action' or

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[115] *See* discussion *infra* Part III.B.
[116] Article 52(2) is not the only provision that is a reversal of customary international law. *See* Parks, *supra* note 10, at 94-101, 173 (comparing prior customary international law to the Protocol provisions regarding reprisals, prisoner of war status, and the principle of proportionality).
[117] Human Rights Watch, Vol. 12, No 1. *Civilian Deaths in the NATO Air Campaign* (Feb. 2000), *available at* http://www.hrw.org/reports/2000/nato/index.htm (on file with the Air Force Law Review) [hereinafter HRW Report].
[118] *Id*.
[119] *Id.*
[120] *Id.*
[121] *Id.*

offering a 'definite military advantage,' the baseline tests for legitimate military targets codified in Protocol I, art. 52."[122]

The report also criticizes the targeting of the Serb Radio and Television (RTS) headquarters in Belgrade.[123] HRW questioned the legitimacy of the target, reasoning that the system "was not being used to incite violence (akin to [radio stations] during the Rwandan genocide), which might have justified their destruction. At worst, as far as we know, the Yugoslav government was using them to issue propaganda supportive of its war effort."[124] The report goes on to state:

> In this case, target selection was done more for psychological harassment of the civilian population than for direct military effect. . . . As a consequence, Human Rights Watch believes that `While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government's political support, *neither purpose offers the concrete and direct military advantage necessary to make them a legitimate military target.*'[125]

Amnesty International also published a report on Allied Force, critiquing the North Atlantic Treaty Organization's (NATO) compliance with the law of war, particularly Article 52(2).[126] Amnesty International also specifically criticized the attack on the RTS headquarters in Belgrade.[127] The report noted NATO's justification for attacking the station: "[the station] was a propaganda organ and that propaganda is direct support for military action,"[128] but stated:

> Amnesty International recognizes that disrupting government propaganda may help to undermine the morale of the population and the armed forces, but believes that justifying an attack on a civilian facility on such grounds stretches the meaning of 'effective contribution to military action' and 'definite military advantage' beyond the acceptable bounds of interpretation. Under the requirements of Article 52(2) of Protocol I, the [station] cannot be considered a military objective. As such, the attack on the [station] violated the prohibition to attack civilian objects contained in Article 52(1) and therefore constitutes a war crime.[129]

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[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* (emphasis added).
[126] Amnesty International, *NATO/FRY, "Collateral Damage" or Unlawful Killings?: Violations of the Laws of War by NATO During Operation Allied Force*, AI Index: EUR 70/18/00 (June 2000), *available at* http://www.web.amnesty.org/ai.nsf/index/EUR700182000 (on file with the Air Force Law Review).
[127] *Id.* at 38.
[128] *Id.* at 39.
[129] *Id.*

Both reports concluded that NATO, and the United States in particular, violated the law of war (Article 52(2)), with Amnesty International ultimately accusing the United States of war crimes.[130] Based on these reports, it is not wild speculation to state that as NGOs gain more influence, their restrictive interpretations of Article 52(2) are currently being adopted by the international community and potentially have far-reaching effects.[131]

C. The Reality of War

The fundamental problem with Article 52(2)'s definition of military objective is that, similar to previous failed attempts,[132] it tries to constrict the use of air power to the specific tactical military effort at hand.[133] By restricting targets to those that contribute to *military* action and provide a *military* advantage, paragraph 2 ignores the reality that a nation's war effort is composed of more than just military components. Furthermore, defeating an enemy often requires the attainment of advantages that are not necessarily considered strictly military.[134] The goal of war is not simply to defeat the enemy's military forces. "We don't go to war merely to have a nice fight; rather, we go to war to attain something of political value to our organization."[135]

War is a means to an end, and as Clausewitz noted, "[t]he political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose."[136] If the ultimate purpose of war

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[130] *Id*.; HRW Report, *supra* note 117.

[131] One could argue that the simple existence of such "extreme" or "fringe" interpretations by these organizations has little or no real effect on the international community. However, no less than the Office of the Prosecutor of the International Criminal Tribunal for Yugoslavia considered the reports of both organizations, as well as the organizations' calls for indictments of NATO political and military figures, when determining if the Court should indict such figures. International Criminal Tribunal for Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, para. 6 (June 13, 2000), *reprinted in* 39 ILM 1257, 1258 (2000) [hereinafter *Final Report to ICTY*].

[132] Note the similarity of Article 52(2)'s language with that contained in Article 24(1) of the 1923 Hague Air Rules: "Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent." SCHINDLER & TOMAN, *supra* note 3, at 210 (quoting the Hague Rules, *supra* note 45, art. 24, para. 1).

[133] War, however, is fought at a strategic level, with strategic targets. Limitation of Article 52(2) to tactical targets purposely ignores this reality. *See* FINAL REPORT ON THE CONDUCT OF THE GULF WAR 613 (1992) (stating that "military advantage is not restricted to tactical gains, but is linked to the full context of war strategy").

[134] "Military" is normally defined as "of, for, or pertaining to the armed forces," or "of, for, or pertaining to war." *See* RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1220 (2d ed. 1998).

[135] John A. Warden, III, *The Enemy as a System*, 1 AIRPOWER J. 40, 43 (Spring 1995).

[136] CLAUSEWITZ, *supra* note 1, at 87.

is political, then the goal is to use combat power to change the mental state of the opponent—to impose the attacker's will upon the enemy's will. In order to achieve that, "[i]t is a question, first and last, of persuading minds—the minds of the Government and . . . of the people of the enemy country."[137] Defeat of the enemy forces is but one way to achieve this end. In fact, "the destruction of the military forces of the enemy is not now and never has been the objective of war; it has been merely a means to an end–merely the removal of an obstacle which lay in the path of overcoming the will to resist."[138] Air power is the most efficient way to reach beyond the enemy forces to strike at the will of the enemy. Article 52(2), however, prohibits attacks that may provide such potential or indeterminate advantages,[139] as well as advantages that extend beyond those associated with the enemy's tactical military effort. State practice shows, however, that the attainment of indeterminate, non-military advantages, such as strategic and psychological advantages, can often be effective in contributing to the defeat of the enemy's will.[140]

D. State Practice and Psychological Advantages in War

State practice over time indicates a clear acceptance of the use of force during war to achieve goals concurrent with destruction of military forces or armament.[141] Psychological advantages over the enemy, whether positive or negative, have long been such a parallel goal of states at war.[142] As previously discussed, during WWII, the RAF and Army Air Corps both considered defeating the morale of the enemy population and leadership to be a legitimate goal that provided an advantage to the Allies.[143] The United States Strategic Bombing Survey reported that by the spring of 1945, sixty-four percent of the Japanese population stated they had reached a point where they felt unable to go on with the war.[144] Of those, "less than one-tenth attributed the cause to military defeats . . . the largest part [attributed the cause] to air attack."[145] More recently, Iraqi air attacks on Iran during the Iraq-Iran War "certainly

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[137] SPAIGHT, *supra* note 47, at 2.
[138] Lieutenant General Harold L. George, Chief, Bombardment Section, Air Corps Tactical School, Lecture to ACTS students, 1932, *quoted in* HANSELL, *supra* note 2, at 33.
[139] *See* ICRC COMMENTARY, *supra* note 103, at 636.
[140] In fact, means short of force are often used against countries to pressure them to modify their behavior. The UN Charter specifically sanctions the use of these measures, such as economic embargoes and diplomatic pressures, when determined appropriate by the Security Council. U.N. CHARTER art. 41. These measures are specifically intended to bend a country's will to that of another country or group of countries.
[141] See discussion *supra* Part II.B.3.
[142] *Id*.
[143] *Id.*
[144] USSBS, *supra* note 96, at 95. Arguably such effects ultimately result in little or no gain when imposed upon populations of totalitarian states. Nonetheless, it is still instructive to note that such degeneration of morale through air power is possible.
[145] *Id.*

affected civilian morale and almost certainly led the Iranian government to agree to an armistice with Iraq."[146]

State practice shows that attackers often intend air attacks to influence the enemy decision-makers. Air planners in Korea specifically targeted military objectives after dropping leaflets announcing their intentions.[147] The intent was to evidence to the population and the leadership that the United Nations forces controlled the air.[148] Furthermore, as truce talks began to stalemate after July of 1951, "air power became the dominant instrument for exerting leverage on the enemy to end the war."[149] Similarly, in Vietnam, President Nixon ordered massive bombing attacks during Linebacker I and Linebacker II to bring Hanoi to the bargaining table and force North Vietnam "to abandon its stalling tactics and to settle the war on the terms it had already agreed to."[150]

Furthermore, attacks that are directed at the enemy's military forces may have as their primary intent a psychological effect, rather than a destructive effect. In the Gulf War, the Coalition effectively employed the threat of B-52's to convince Iraqi troops to surrender.[151] The Coalition dropped leaflets stating when and where the bombers would attack, and then attacked precisely as advertised.[152] The psychological effect on the Iraqi troops was stunning—most had to experience such an attack only once to be convinced that surrender was the best course of conduct.[153]

Not all air attacks provide an advantage solely by negatively affecting the enemy's morale. Some also are intended to positively affect friendly morale. General Jimmy Doolittle's raids over Tokyo in 1942 arguably provided negligible military value to the American forces. However they clearly boosted the morale of the American population and forces, which had previously suffered a series of defeats.[154] Perhaps just as importantly, the raids

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[146] Warden, *supra* note 135, at 8.

[147] ROBERT F. FUTRELL, THE UNITED STATES AIR FORCE IN KOREA 1950-1953, 516 (1983).

[148] *Id.* at 521.

[149] HOSMER, *supra* note 96, at 17-18; *see also* ROBERT FRANK FUTRELL, IDEAS, CONCEPTS, DOCTRINE: BASIC THINKING IN THE UNITED STATES AIR FORCE 1907-1960, 340-45 (1989).

[150] HOSMER, *supra* note 96, at 39. Interestingly, the North Vietnamese were also able to attack and affect the morale of the United States population, albeit in a more indirect way. "As the North Vietnamese showed, it is entirely possible to create conditions that lead the civilian population of the enemy to call on its government to change the state's policies. The North Vietnamese accomplished their aims by raising American military casualty levels higher than the American people would tolerate." Warden, *supra* note 135, at 8.

[151] RICHARD P. HALLION, STORM OVER IRAQ: AIR POWER AND THE GULF WAR 218-19 (1992) (giving several examples of the B-52s' effect on the Iraqi surrender).

[152] *Id*.

[153] As the Coalition had hoped, some did not even have to experience an attack before surrendering. One troop commander stated that he had surrendered because of the B-52 attacks. When told that his position had never been attacked by B-52's, he replied "That is true, but I saw one that *had* been attacked." *Id.* at 218.

[154] Meilinger, *supra* note 51, at 11.

had a significant psychological effect on Japanese leadership.[155] Not only did the raids redirect the focus of Japanese war planning, they also impacted greatly on the Japanese Imperial General Staff.[156] For perhaps the first time, the military staff experienced the reality of their inability to completely defend their homeland from air power.[157]

As evidenced above, militaries have not refrained from using air power to achieve goals other than or concurrent with the destruction of enemy militaries. Such attacks have been directed at enemy military forces, enemy civilians, and enemy leadership. Results varied, but each attack provided some measure of psychological advantage to the attacking force.

E. State Practice and Strategic Advantages in War

Air strikes can also provide strategic advantages, which would rarely meet a limited interpretation of Article 52(2). Under a restrictive interpretation of a military objective, the aerial attacks on targets such as bridges and railroads in the Pas de Calais during the spring of 1944 would not have been permitted because they provided little immediate military advantage to the Allies. Rather, their goal was to provide an indeterminate effect in the future—to convince the Germans that the Allied invasion would occur there, thereby diverting the German military effort away from Normandy.[158] The Allied attack on Dresden poses similar problems. On a tactical level, the attack seemed to provide minimal military advantage. However, on the strategic level, the attack potentially offered the advantages of "providing support for the advance of Soviet forces into eastern Germany, destruction of the lines of communication at a critical chokepoint in order to prevent German reinforcement in opposition to the Soviet advance, and possible hastening of the end of the war."[159]

Thus, the practice of states over time has been to use air bombardment to achieve not only immediate tactical military advantages, but also strategic and psychological advantages over their enemies. The overriding goal of such attacks is to undermine not only the enemy's capability to continue the war, but also his will to continue the war. Furthermore, such attacks can also provide pressure upon the enemy to accede to the will of the attacker. Until the drafting of Article 52(2), states understood these uses of air power to be a legitimate use of force. A restrictive interpretation of the Article, however,

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[155] *See* UNITED STATES STRATEGIC BOMBING SURVEY, JAPANESE AIR POWER 10 (July 1946).
[156] *Id*.
[157] RONALD H. SPECTOR, EAGLE AGAINST THE SUN: THE AMERICAN WAR WITH JAPAN 155 (1985); JOHN KEEGAN, THE SECOND WORLD WAR 271 (1989).
[158] W. Hays Parks, *Conventional Aerial Bombing and the Law of War, in* PROCEEDINGS, NAVAL REVIEW 98, 114 (1982).
[159] Parks, *supra* note 10, at 176-77. Whether one agrees that firebombing was the best way to achieve Allied ends is a question not addressed here.

requires an attacker to "fit" a potential target within a limited definition of an object that contributes to the enemy's military effort or provides a military advantage to the attacker.

While some of the examples discussed above can easily meet this current restrictive definition of a legitimate target; as discussed below, many would argue that not all could.[160] Commanders are increasingly forced into word games or mental gymnastics in order to justify target choices within the restrictive definition of Article 52(2). By doing so, commanders implicitly attribute binding force of law to the restrictive definition of Article 52(2), opening the door to future limitations on the use of air power in the manner discussed above. The better solution is simply to interpret Article 52(2) consistent with past state practice and customary international law, thereby openly allowing for destruction of targets beyond those focused purely on the immediate tactical military aspect of the conflict.[161].

F. Article 52(2) and the United States Air Force

Since the inception of air power, advocates recognized that it provided a new dimension to warfare. The ability to work in the third dimension allows an attacker to fly over the enemy's fielded forces and directly attack his willingness and ability to fight the war.[162] Air power extends the battlefield significantly. Defeating the protective shield of enemy forces is no longer a prerequisite to victory. Douhet first articulated this unique characteristic of air power,[163] and was soon followed by Spaight,[164] Mitchell,[165] Trenchard,[166] and

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[160] Such a statement is not an extreme view, in light of the stance already taken by an eminent international lawyer. Professor Hamilton DeSaussure argues, based on Article 52(2)'s requirement of a military advantage, that the Linebacker II bombing during Vietnam was an illegal operation. Hamilton DeSaussure & Robert Glasser, *Methods and Means of Warfare: Air Warfare—Christmas 1972, in* LAW AND RESPONSIBILITY IN WARFARE: THE VIETNAM EXPERIENCE 119-39 (Peter D. Trooboff ed., 1975). DeSaussure states: "any destruction that is not primarily and predominantly designed to weaken the enemy military is unlawful. When its foremost purpose is to coerce an immediate political settlement, it is illegal per se, even though military objects are targeted." *Id.* at 139.

[161] Such an interpretation would still, of course, have to comply with basic principles of the law of war, such as the principles of distinction and proportionality, and the prohibition against unnecessary suffering.

[162] Overy, *supra* note 55, at 11.

[163] DOUHET, *supra* note 77, at 179.

[164] SPAIGHT, *supra* note 47, at 3.

[165] Mark A. Clodfelter, *Molding Airpower Convictions: Development and Legacy of William Mitchell's Strategic Thought, in* THE PATHS OF HEAVEN: THE EVOLUTION OF AIRPOWER THEORY 79, 96 (Phillip S. Meilinger ed., 1997).

[166] Phillip S. Meilinger, *Trenchard, Slessor, and Royal Air Force Doctrine before World War II, in* THE PATHS OF HEAVEN: THE EVOLUTION OF AIRPOWER THEORY 41, 41-42 (Phillip S. Meilinger ed., 1997).

the ACTS war planners.[167] Today's United States Air Force continues to follow doctrine that exploits this unique characteristic of air power.

1. United States Air Force Doctrine

Since the signing of Protocol I, Air Force doctrine continues to reflect the belief that air power is not restricted to striking purely military targets that provide only a military advantage. Air Force doctrine documents clearly reflect a continuing belief that war is still politics by other means. *Air Force Doctrine Document 1: Air Force Basic Doctrine* sets out several "enduring truths" it uses to describe the "fundamental nature of war:"

> War is an instrument of national policy. Victory in war is not measured by casualties inflicted, battles won or lost, or territory occupied, but by whether or not political objectives were achieved. More than any other factor, political objectives (one's own and those of the enemy) shape the scope and intensity of war. Military objectives and operations must support political objectives . . .
> War is a clash of opposing wills . . . . While physical factors are crucial in war, *the national will and the leadership's will are also critical components of war.* The will to prosecute or the will to resist can be decisive elements.[168]

AFDD-1 also clearly recognizes that strategic bombardment is a legitimate means by which to affect the enemy's will:

> [Strategic] operations are designed to achieve their objectives without first having to necessarily engage the adversary's fielded military forces in extended operations at the operational and tactical levels of war . . . . Strategic attack objectives often include producing effects to demoralize the enemy's leadership, military forces, and population, thus affecting an adversary's capability to continue the conflict.[169]

Air Force doctrine clearly recognizes and allows for the attainment of advantages beyond simple tactical military advantages on the battlefield. It provides for choosing targets that also affect the enemy's will and morale, both of their military forces and their civilian population. Air Force targeting directives acknowledge the same concepts. The *USAF Intelligence Targeting Guide* acknowledges the language of Article 52(2), but only as a guide, or a starting point. The *Guide* states that a target must qualify as a military objective, and defines military objectives as *including* those objects so defined

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[167] Faber, *supra* note 86, at 215.
[168] AIR FORCE DOCTRINE DOCUMENT I: AIR FORCE BASIC DOCTRINE [AFDD-1] 6-7 (1997) (emphasis added).
[169] *Id.* at 51.

by Article 52(2).[170] It does not, however, consider the Protocol's definition as exclusive. It focuses instead on the strategic necessity of the target, rather than its military characteristics: "the key factor [in choosing a target] is whether the object contributes to the enemy's war fighting or war sustaining capability."[171] Unlike Article 52(2), this guidance allows for the possibility that a target may not provide an immediate military advantage per se, but may still contribute to the enemy's ability to fight.

2. United States Air Force Practice

As discussed above, U.S. Air Force practice has long been to strike at targets beyond military forces or armament. Some of the examples discussed would meet the current definition of a military objective under Article 52(2). For example, bombing troops in Iraq after first dropping warning leaflets, although meant primarily to have psychological effects, clearly was an attack authorized by Article 52(2). The troops contributed to Iraq's military effort, and their destruction or surrender provided an obvious advantage to the coalition forces.

However, several of the previous examples, if evaluated honestly, would not comply with current limited interpretations of Article 52(2). Yet arguably, all are consistent with prior state practice and customary international law. The allied bombing of bridges and railroads in the Pas de Calais just prior to the invasion at Normandy clearly provided a military advantage to the Allies. The Germans were convinced that the invasion would occur in the Pas de Calais, thereby diverting the Germans from Normandy.[172]

Article 52(2)'s two-part test requires[173] that the target by its nature, location, purpose or use, make an effective contribution to military action. Arguably, the railroads and bridges in France did not, by their current nature, location, purpose or use make such a contribution. Furthermore, the proposed advantage of their destruction–diversion of the Germans–was hopeful

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[170] U.S. DEP'T OF AIR FORCE PAM. 14-210, USAF INTELLIGENCE TARGETING GUIDE, para. 1.7.1 (1 Feb. 98).
[171] *Id.*
[172] *See* text accompanying note 158.
[173] The commentary states:

> The definition [of a military objective] comprises two elements:
> a) the nature, location, purpose or use which makes an effective contribution to military action;
> b) the total or partial destruction, capture or neutralization which in the circumstances ruling at the time offers a definite military advantage.
> Whenever these two elements are simultaneously present, there is a military objective in the sense of the Protocol.

ICRC COMMENTARY, *supra* note 103, at 635.

speculation on the part of the Allies. Article 52(2), however, requires the military advantage to be definite. This means "it is not legitimate to launch an attack which only offers potential or indeterminate advantages."[174] Such an unreasonable requirement could prevent legitimate ruses.

The Linebacker II campaign during Vietnam undoubtedly was intended to affect the psychology of the enemy: "Unlike Linebacker I, the President aimed the December bombing directly at the North's will. The President desired a maximum psychological impact on the North Vietnamese to demonstrate that he would not stand for an indefinite delay in the negotiations."[175] Despite this stated intent, however, arguably the campaign complied with the requirements of Article 52(2) as the objects struck were traditional military targets, the destruction of which would provide a military advantage to the Americans.[176] An honest evaluation of the campaign, however, indicates that it might not meet the current restrictive interpretation of Article 52(2).

By the time Linebacker II commenced, the Americans had been bombing North Vietnam intermittently for almost five years.[177] While some targets had previously been off-limits, nevertheless, at Linebacker II's inception, previous bombardment had reduced substantially the number of viable targets.[178] Although leaders stated that the objective of the bombings was "the deliberate destruction of military targets in North Vietnam," they also conceded that fewer targets existed after 1968.[179] While certainly some useful targets still existed, based on the assessment of American leaders as to the quantity and quality of targets remaining, it seems difficult to justify the massive amounts of firepower laid down during Linebacker II.[180] It is rather hard to argue that the few remaining targets of Linebacker II were truly contributing the North's military effort, or that their destruction provided any real military advantage to the South. Yet, Linebacker II did accomplish its true intent—to bring North Vietnam quickly back to the bargaining table. Under a

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[174] *Id.* at 636.

[175] MARK CLODFELTER, THE LIMITS OF AIRPOWER: THE AMERICAN BOMBING OF NORTH VIETNAM 182 (1989).

[176] Targets included rail yards, storage areas, power plants, communication centers, and airfields. *Id.* at 184.

[177] *Id.* at 172.

[178] Some have gone so far as to argue that almost "every major military target and installation that could directly weaken the enemy forces in the South had been destroyed well before December 1972." DeSaussure & Glasser, *supra* note 160, at 129. This argument not only ignores the existence of numerous previously off-limit advantageous targets, but also assumes that a target once struck could never again become a valid target.

[179] *Id.* at 121, *quoting* General Earl Wheeler, then Chairman of the Joint Chiefs of Staff and Secretary of Defense Robert McNamara; *see also* CLODFELTER, *supra* note 175, at 189 ("Haiphong's absence from the strike list was symptomatic of a new problem for the Air Force planners: a lack of suitable targets.").

[180] B-52s alone dropped 15,237 tons of bombs during Linebacker II. Navy and Air Force fighters combined to drop roughly another 5,000 tons. CLODFELTER, *supra* note 175, at 194.

broader interpretation of a military objective under Article 52(2), consistent with prior state practice, there would be no question of the legitimacy of Linebacker II. Under current restrictive interpretations, however, the campaign is open to question.

Likewise, the recent conflict in Kosovo readily highlights the application of air power to achieve more than destruction of the enemy's military capability. Clearly, destruction of the Serbian military forces was a goal of the NATO coalition.[181] From inception, however, the primary goal of the campaign was to influence the behavior of Serbia's leader, Slobodan Milosevic, and bend his will to that of the coalition.[182] In pursuit of these goals, the air campaign took a dual approach: "destruction of Serb forces and enabling installations in Kosovo and attack of strategic targets within Serbia itself, which attacks were intended to diminish the will to resist of both Milosevic and the Serb population."[183] Targets included bridges, railroads, airfields, airplanes, petroleum and oil stocks, power, broadcast capabilities, and command and control headquarters, at least two of which were Milosevic's homes.[184] Each target arguably contributed to the Serbs' military effort, and the destruction of each would provide a military advantage to the NATO alliance, thereby falling within the definition of military objective as required

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[181] It must be kept in mind, however, that one of the main reasons for the destruction of the military was not necessarily to destroy the military per se, but to remove the Serbian capability to continue ethnic cleansing in the region. Interview by PBS with U.S. Army General Wesley Clark, Supreme Allied Commander, NATO, (Feb. 2, 2000) *at* http://www.pbs.org /wgbh/pages/frontline/shows/kosovo/interviews/clark.html (visited Apr. 16, 2001) (on file with the Air Force Law Review) [hereinafter Clark Interview] ("[i]t was very important militarily [to bomb the Serb ground forces as] these forces were the agents and the support of the ethnic cleansing."). Additionally, strikes at Serbian troops prevented them from mounting an effective offensive against the Kosovo Liberation Army. James A. Kitfield, *Another Look at the Air War That Was*, 82 AIR FORCE MAG. 4 (Oct. 1999), *available at* http://www.afa.org/magazine/1099eaker.html (on file with the Air Force Law Review); *see also* Clark Interview ("It was clear that [Milosevic] was going to use his military forces [to finish off the KLA]. Therefore, they quite properly became one of the focuses of the campaign.") Finally, if and when NATO ground troops were to be deployed, any prior reduction of Serbian troops in Kosovo would have been welcomed by NATO planners.

[182] General Klaus Naumann, Chairman of the North Atlantic Treaty Organization's Military Committee, stated that the military option was intended "to go after those targets which really hit the opponent and force him to accept our will." Interview by PBS with Gen. Klaus Naumann, Chairman, NATO Military Committee (Feb. 22, 2000) *available at* http://www.pbs.org/wgbh/pages/frontline/shows/kosovo/interviews/naumann.html (visited Apr. 16, 2001) (on file with the Air Force Law Review). NATO goals demanded that Serbia: "(1) halt the ethnic-cleansing campaign against ethnic Albanian Kosovars, (2) pull Serb troops and police from Kosovo, (3) permit deployment in Kosovo of a NATO-led peacekeeping force, (4) allow the expelled Kosovars to return to their homes, and (5) resume participation in efforts to reach a political solution in Kosovo." John A. Tirpak, *Victory in Kosovo*, 82 AIR FORCE MAG. 2 (July 1999), *available at* http://www.afa.org/magazine/watch/0799watch.html (on file with the Air Force Law Review).

[183] Tirpak, *supra* note 182, at 5.

[184] Clark Interview, *supra* note 181.

by Article 52(2). However, as explained above, several NGO's would not consider all these targets as lawful military objectives.

When analyzing the air campaign in Kosovo, it is interesting that although this was certainly a military effort on the part of NATO, it was not necessarily a conflict in the traditional, military v. military, sense. The Serbs did possess some anti-air weaponry, but after the first several days, the conflict was not between two military forces. Rather, the conflict pitted the military force of NATO against the will and resolve of Milosevic and the Serbian leadership.[185] In fact, arguably it was not until the air campaign shifted focus from striking troops and armament[186] to strategic targets or centers of gravity[187] that the campaign became truly successful.[188] Viewing the conflict from this perspective requires a concomitant change in targeting perspective. Bending the will of Milosevic required more than just destruction of objects that contributed to the military effort, particularly if preservation of those objects was not one of his priorities. For example, some targets were chosen for reasons other than their military value:

> There were other types of targets that had a high political symbolism, which went beyond their actual military value—like the television system. We knew that Milosevic used TV as an instrument of command and control. He used it to control the population, to inflame the passions of ethnic cleansing, and so forth.[189]

Furthermore, viewed from the perspective of NATO's quickly gained air supremacy and lack of NATO troops on the ground, destruction of few, if

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[185] Similar to the Linebacker II campaign in Vietnam, a primary goal of the air campaign was to bring Milosevic back into negotiations with the NATO countries: "The lights are going out, the bridges are coming down, and the military headquarters are going to be blown up. And we're going to go after that target set until it's destroyed. We think that'll bring Milosevic to the table." Interview by PBS with Lt. Gen. Michael C. Short, Joint Forces Air Component Commander, NATO (Feb. 22, 2000), *available at* http://www.pbs.org/wgbh/pages /frontline/shows/kosovo/interviews/short.html (visited Apr. 16, 2001) (on file with the Air Force Law Review) [hereinafter Short Interview].

[186] From the beginning, U.S. Air Force leaders considered striking Milosevic's 3rd Army to be a waste of time and assets. Lt. Gen. Michael C. Short, NATO's Joint Force Air Component Commander stated that he never felt the Serbian Army was a center of gravity. Short did not think that Milosevic considered his own Army important: "Body bags coming home from Kosovo didn't bother [Milosevic], and it didn't bother the [Yugoslav] leadership elite." Dana Priest, *The Commander's War: The Battle Inside Headquarters*, WASH. POST, Sept. 21, 1999, A1.

[187] *See* AFDD-1, *supra* note 168, at 79 (defining centers of gravity as "those characteristics, capabilities, or localities from which a military force derives its freedom of action, physical strength, or will to fight.").

[188] "[M]ost analysts agree that the Air Force's campaign against bridges, buildings, refineries, and other fixed targets—once NATO approved them—was an enormous success." Richard J. Newman, *The Bombs that Failed in Kosovo*, U.S. NEWS & WORLD REP. 28, 30 (Sept. 20, 1999).

[189] Clark Interview, *supra* note 181.

any, targets could provide a true military advantage to NATO under a restrictive interpretation of Article 52(2). Yet the destruction of those targets could, and ultimately did, provide a strategic and psychological advantage to the coalition, contributing to Milosevic's capitulation.[190]

NATO specifically targeted objects intended to affect the morale of the enemy forces and civilian population.[191] While the affect on enemy troop morale arguably is allowed under Article 52(2), current restrictive interpretations of the Article do not allow for targeting enemy civilian morale.[192] If so, then it appears that a majority of the NATO air campaign against Kosovo, while a key component of the overall campaign, was illegitimate under some current interpretations of what constitutes a legitimate military objective. This unusual result is not only inconsistent with prior state practice, but clearly points out the difficulty with interpreting Article 52(2) in a restrictive manner. If the very real possibility exists, as was the case of Kosovo, that "the Serbian population forced Milosevic to call the war off when the life of the Serbian population was made very uncomfortable,"[193] then removal of that strategic option for overcoming the will of the enemy may ultimately lead to longer and more destructive wars.

G. Application of Article 52(2)

The stated goal of Article 52(2) was to provide increased protection for the civilian population.[194] Ironically, by drafting provisions that are interpreted contrary to customary international law and state practice, the ICRC may have achieved the opposite effect.

No one would argue that terror bombing or directly targeting civilians to cause death or injury is lawful. However, as has been discussed, affecting enemy morale, including that of civilians, through indirect means has long been considered a legitimate goal. The question is how best to achieve that goal. In the past, effectiveness of attempts to use air power to affect enemy

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[190] Kitfield, *supra* note 181, at 4-5.

[191] Lt. Gen. Short clearly suggested that NATO's intent was to affect Serb civilians:

> There can be no doubt in your mind that with the power down as the result of a hard kill and refrigerator not running and no water in your house and the public transportation system in Belgrade not running and no street lights, that the war was brought home, not just to the ruling elite, but to the average Serb on the street.

Interview by Steve Inskeep with Lt. Gen. Michael C. Short, NATO Joint Forces Air Component Commander, *NPR's Morning Edition* (National Public Radio broadcast, Sept. 15, 1999) (on file with author).

[192] *See supra* Part III.A.1.

[193] Edward N. Luttwak, senior fellow at the Center for Strategic and International Studies, *quoted in* Kitfield, *supra* note 181, at 4.

[194] ICRC COMMENTARY, *supra* note 103, at xxxiv.

morale was mixed, due in part to limited technological capability to strike with precision. Ironically, just as air power began to attain the technological capability to strike targets with precision, Protocol I reduced its options to do so. As a result, air planners are placed in an unusual situation. In order to affect what has customarily been considered a legitimate target, the will of the enemy (to include civilian morale), the Air Force must first find a target that can be defined as a legitimate military objective under a restrictive interpretation of Article 52(2). Often this can cause more damage to the civilian population than is intended or desired.

This trend can be seen most vividly in the destruction of dual-use targets. Dual-use targets are most commonly defined as those targets that are used for both military and civilian purposes, such as power plants that provide electricity to both civilian institutions as well as military command and control centers.[195] Theoretically, destroying or disabling such targets gives the attacker a dual effect—he cripples the ability of the enemy forces to function, while simultaneously affecting the morale of the civilian population.

Two problems arise, however, when targeting dual-use targets. First, the desired effect may be relatively short-term, but may cause more long-term damage than desired. For example, the morale of the Iraqi citizens was clearly a target during the Gulf War.[196] In order to achieve that objective, Coalition forces struck dual-use targets such as power supplies, railroads, and bridges.[197] The strikes had the desired temporary effects, but also imposed more serious long-term effects on the civilian population.[198] Similarly, in Kosovo, one of NATO's goals was to influence the Serbian population to pressure their leadership to end the conflict.[199] Again, as in the case of the Gulf War, the means chosen ultimately may have caused more negative long-term effects than desired.[200]

The question becomes whether the pressure to justify a target as dual-use, thereby conforming to the requirements of Article 52(2), causes the

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[195] *See* U.S. DEP'T OF AIR FORCE PAM. 14-210, USAF INTELLIGENCE TARGETING GUIDE, para. A4.2.2 (1 Feb. 98). Other targets include fuel depots, transportation systems, communication systems.

[196] EDWARD C. MANN, III, THUNDER AND LIGHTNING: DESERT STORM AND THE AIRPOWER DEBATES 44 (1995); THOMAS A. KEANEY & ELIOT A. COHEN, REVOLUTION IN WARFARE? AIR POWER IN THE PERSIAN GULF 36 (1995).

[197] KEANEY & ELIOT, *supra* note 196, at 34-36. Destruction of the targets provided military advantages to the Coalition, but it was clear that planners also envisioned and considered the effect on civilian morale and will to fight. *Id.*

[198] Charles J. Dunlap, Jr., *Technology: Recomplicating Moral Life for the Nation's Defenders, in* XXIX PARAMETERS 24, 30-31 (1999); Gardam, *supra* note 95, at n.13.

[199] *See supra* text accompanying notes 181-193.

[200] For example, the short-term military advantage of destroying bridges over the Danube has caused other long-term effects. *See* e.g. *Romania Loses $100M Over Danube,* AP WORLDSTREAM, Mar. 19 2000, available in Lexis-Nexis library AP file (reporting that Romania has lost over $100 million in shipping revenue due to rubble blocking the Danube after NATO bombing of Danube bridges) (on file with the Air Force Law Review).

rejection of targets better tailored to achieve the desired objective. For example, in Kosovo, NATO employed a weapon designed to knock out Serbian power grids and transformer yards.[201] NATO aircraft dropped small dispensers that opened over the power sources, setting free specially treated wire that intertwined and caused instant short circuits in the electrical system.[202] The weapon cut off power to 70 percent of Yugoslavia, yet the effect was only temporary, with most power returning within a day.[203] Although temporary, the attack effectively brought the war home to the Serbian population—without massive, long-term destruction. Such a short duration of disablement, however, was unlikely to severely affect the Serbian military effort. Arguably, a restrictive interpretation of Article 52(2) would not consider the first strikes to be against legitimate military objectives, as it is unlikely that disruption of electricity for such a short period of time truly provided a military advantage to NATO.[204] These strikes would therefore be illegal.

Soon thereafter, NATO struck power sources with more force, disabling them for much longer periods of time.[205] Because these strikes offered a definite military advantage to an object that made a contribution to military action, these strikes would comply with Article 52(2). However, in the long run, the first strikes, rather than the more destructive later strikes that complied more fully with Article 52(2), were perhaps not only the more effective strikes in terms of ending the conflict, but also the more humane strikes.

The second problem with dual-use targeting is that the sole goal of the attacker may be only to affect the will of the enemy leadership and population. There may not be any military advantage to striking the target—at least as military advantage is defined by Article 52(2). Yet, from the beginning one of the goals in Kosovo was to bend Milosevic to the will of the NATO coalition. As Lt. Gen. Short stated, "I'd have gone for the head of the snake on the first night. I'd have turned the lights out the first night. . . . Milosevic and his cronies would have waked up the first morning asking what the hell was going on."[206]

If in fact the goal is not necessarily to destroy an enemy's war-fighting capability, but rather to modify their willingness to use that capability. It seems that it would be more efficient to allow destruction of the targets that would best achieve those objectives. More importantly, it may also be more

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[201] Dana Priest, *The Commander's War: Bombing by Committee*, WASH. POST, Sept. 20, 1999, at A1.
[202] *Id.* at A10.
[203] *Id.*
[204] Others would argue that even short-term disruption of power can provide a military advantage such as temporary safe air corridors.
[205] *Id.*
[206] Dana Priest, *Air Chief Faults Kosovo Strategy*, WASH. POST, Oct. 22, 1999, at A14.

humane.[207] However, such targets may not always fit into the current restrictive interpretation of Article 52(2). As a result, attackers may feel pressure to chose a target that results in more destruction, but can more readily be justified under a restrictive interpretation.

As a corollary to broadening the interpretation of Article 52(2) to allow for a military advantage to include affecting the will of the enemy, consideration should also be given to allowing a more expansive interpretation of objects that contribute to military action.[208] Perhaps the targets best suited to achieving that goal are those expressly prohibited by Article 52—civilian objects, specifically, those objects that will affect the citizens'.[209]

Extending the chain of causation by this step is not as extreme as it initially sounds. If the destruction of certain civilian property contributes to the demoralization of the population, thereby leading to pressure to end the conflict, this result is more humane than protecting these items at the price of prolonging a bloody conflict.[210] This does not mean allowing for the attack of life-sustaining necessities.[211] Rather it foresees attacks on property that enjoys no special protection under current international law, other than the fact that it is categorized as exclusively civilian property.[212] Furthermore, any such attack would still have to comply with the prohibition against targeting civilian lives as well as military necessity.

The concept of destroying property, rather than life, is not new. J.M. Spaight stated in 1947:

> [airpower's] purpose is the destroying of your enemy's morale and will to resist. That purpose can be achieved by other means than mass-slaughter. It can be achieved by methods which international law can approve, as it never will approve the destruction of innocent lives for such an end. Let your object be to destroy the enemy's inanimate rather than his human resources, his wealth and business rather than his citizens' lives; to make work, if one may put it so, for the builder, the unemployment exchange, the bankruptcy

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[207] Including striking those targets that the independent group Human Rights Watch considered violations of Article 52(2), the group estimated that only between 488 and 527 civilian deaths occurred as a result of NATO bombing in Kosovo. *See* HRW Report, *supra* note 117. While any civilian death is tragic, relative to the amount of air munitions released (23,614 munitions by NATO's estimate) civilian casualties were extremely low. *Final Report to ICTY, supra* note 131, at para. 54.

[208] Charles J. Dunlap, Jr., *The End of Innocence: Rethinking Noncombatancy in the Post-Kosovo Era*, STRATEGIC REVIEW 9, 17 (Summer 2000).

[209] *Id*. at 11-16. Examples include banks, financial institutions, and factories and stores that produce and sell luxury products. Id. at 14.

[210] *Id*. at 13-14 and 16.

[211] *Id*. at 15. Article 54, Protocol I already prohibits the targeting of objects "indispensable" to civilian survival, such as food and water, when the intent is to deny them to civilians. Protocol I, *supra* note 4, art. 54.

[212] Dunlap *supra* note 208.

> court, rather than for the coroner and the undertaker . . . . In brief, I will give [airpower] *property* to destroy if [airpower] will give me *life* to save.[213]

The goal in destroying such property is to influence the population to bring the war to a quicker, less bloody end. According to General William T. Sherman, in response to criticism of his treatment of the Southern population in the Civil War, if the population protests, "I will answer that war is war, and not popularity seeking. If they want peace, they and their relatives must stop the war."[214] It seems equally logical that air power could have been used to pressure the silent "Serbian intelligentsia" to influence the Serbian leadership.[215] Perhaps the most humane way of achieving that goal would be to target objects not indispensable to survival, but objects the destruction of which would have a direct impact on the population. Such targets might include bank accounts, financial institutions, shops, entertainment sites, and government buildings.[216] Destruction of these targets would likely have a significant impact on the population's morale, but would not cause the type of long-term suffering and casualties potentially caused by destruction of dual-use targets. Under Article 52(2), however, such attacks are prohibited, leaving only those that provide a direct military advantage, such as dual-use targets, to be destroyed. Ultimately restricting the targeting of bank accounts, financial institutions, shops, entertainment sites, and government buildings and similar objects may prove more destructive in the long run.

The difficulty with such an approach is, and always has been, the determination of which targets to strike in order to achieve the goal of affecting the will of the enemy—both leadership and population. Simply because this is difficult, however, does not mean that it should be abandoned or ignored. The future of air power appears to be application in precise, discrete measures in order to aid in the attainment of political goals. Rarely, if ever, will it be applied as it was during World War II, with the stated goal of unconditional surrender of the enemy. If so, military leadership must attain a better understanding of the centers of gravity of its potential enemies—and not simply the military-oriented centers. According to one analyst, "the central problem is this: If we are going to make it with this kind of precision airpower in very low volume, akin to acupuncture, we really have to know where to put the needle. To make the other guy back down, you must understand his politics, his soul."[217] Once this capability is attained, Article 52(2) should not be restrictively interpreted to prohibit the ability to exploit the unique

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[213] SPAIGHT, *supra* note 47, at 17-18.
[214] WILLIAM T. SHERMAN, MEMOIRS 585 (1990).
[215] Dunlap *supra* note 208, at 14-15.
[216] *Id.* at 14.
[217] Edward N. Luttwak, senior fellow at the Center for Strategic and International Studies, *quoted in* Kitfield, *supra* note 181, at 4.

capabilities of air power to assist in the quick and humane termination of conflict.

IV. CONCLUSION

Although attempts to regulate war have occurred for almost as long as war has existed, the fundamental nature of war has not changed. War is a means states use to achieve a political aim. The ultimate goal of a nation at war is to impose its will on the enemy. The advent of air power provides the most powerful means to achieve this goal because it operates in the third dimension to bypass the fielded forces and directly attack the enemy's capability and will to fight.[218] Restrictive interpretations of Article 52(2), however, limit this capability unnecessarily.

Article 52(2) defines legitimate targets as objects that contribute to military action, or whose destruction provides a military advantage to the attacker.[219] Interpreting Article 52(2) restrictively by focusing solely on the military effort of the enemy, however, is shortsighted and inconsistent with prior state practice. The type of conflicts prevalent in the world today center more than ever on the application of force to bend the will of the enemy. Moreover, destruction of military-oriented targets is not always the most efficient or humane way in which to achieve that goal.

The U.S. Air Force in particular has developed precise, long-range capabilities to strike targets that can affect the will of the enemy—both military and civilian. As such, U.S. military leadership must resist the pressure to accept restrictive interpretations of Article 52(2). To do so ultimately may cause more destruction and devastation as planners search for targets that will not only achieve their specific goals, but can also be justified under a restrictive interpretation of a legitimate military objective. Rather, the United States should openly assert that it continues to consider bending the will of the enemy to be a legitimate goal when applying the force of air power. Furthermore, during times of armed conflict, the United States should continue to strike targets to achieve that goal, consistent with the basic principles of the

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[218] Air power is uniquely capable of directly and immediately affecting the enemy's will:

> when the decision is made to use force, then [air power] need[s] to go in with overwhelming force, quite frankly, extraordinary violence that the speed of it, the lethality of it, the weight of it has to make an incredible impression on the adversary, to such a degree that he is stunned and shocked and his people are immediately asking, `Why in the world are we doing this? If this is just the first night, then what in the world is the rest of it going to be like? How long can we endure it, and more importantly, why are we having to endure it? Let's ask our leaders why this is happening.

Short Interview, *supra* note 185.

[219] *See* Protocol I, *supra* note 4, art. 52, para. 2.

law of war. Such actions do not repudiate the value or legitimacy of Article 52(2), but instead exercise a valid interpretation of its language consistent with prior customary international law and state practice.

Editor's Note: In 1997, the International Committee of the Red Cross (ICRC) began a program entitled SirUS. It was designed to be used in making determinations as to the legality of weapons of war. This Article maintains that the underlying purpose of the Program was to wrest the responsibility for the determination of the legality of weapons from governments through the use of flawed and politically-motivated data. Following criticism, the ICRC suspended SIrUS in the spring of 2001. This article tracks events leading up to the Program's demise and outlines U.S. procedures for conducting legal reviews of new weapons. Maintaining that similar issues are likely to occur in the future, this article, through documenting the history of the SIrUS Program, maintains that such efforts are flawed and that the process of determining legality should be left to sovereign states.

JUST SAY NO! THE SIrUS PROJECT: WELL-INTENTIONED, BUT UNNECESSARY AND SUPERFLUOUS

MAJOR DONNA MARIE VERCHIO[*]

> *Imagine it's the year 2025. Several nations, including the United States, have developed a new anti-personnel laser that discharges a programmable "energy ray" at its target. If the laser is set at its highest level, it will instantaneously reduce the human body to a pile of ashes. At lower settings, the laser "stuns" the target, producing seconds to minutes of unconsciousness. These nations intend to incorporate the laser into their battlefield arsenals. It is economical, and easy to train upon and maintain. Their goal is to supplement, and ultimately replace, the use of kinetic energy weapons on the battlefield.*
>
> *The United States reviewed the weapon according to relevant treaty and customary international law and determined that the laser complies with its international obligations. However, other nations, especially those unable to procure the laser for their own arsenals, disagree. They seek an international conference to either ban the laser, or delay its*

[*] *Major Verchio (B.S., University of Scranton; J.D. Rutger—The State University of New Jersey—Camden; LL.M., The Army Judge Advocate General School) is a Judge Advocate with the United States Air Force currently assigned is Legal Advisor, Information Operations Technology Center, Office of the General Counsel, National Security Agency. She is a member of the Bar in the state of New Jersey and Pennsylvania.*

deployment until they too can acquire it. The International Committee of the Red Cross (ICRC)[1] strenuously denounces the design and use of the laser. Founders of the SIrUS Project,[2] working under the auspices of the ICRC, begin a campaign to stigmatize the use of the laser. They claim the laser causes unnecessary suffering or superfluous injury[3] because it exceeds their theoretical health-based standards for determining the legality of weapons.[4]

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[1] The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavors to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement

The ICRC--its mission role and mandate at http://www.icrc.org/icrceng.nsf (last visited Nov. 8, 2001) [hereinafter ICRC] (on file with the Air Force Law Review).

[2] The word SIrUS is the Project's acronym for "superfluous injury or unnecessary suffering." The SIrUS Project is a novel attempt to define and quantify a law of war principle known as superfluous injury or unnecessary suffering. Its founder is Dr. Robin Coupland. The International Committee of the Red Cross (ICRC) supports the Project.

[3] Unnecessary suffering or superfluous injury is a well established, yet generally undefined principle in the law of war. It seeks to limit the amount of suffering which may be lawfully inflicted on combatants. *See* The Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 23 (e), 36 Stat. 2277 [hereinafter The Hague Convention No. IV] ("[I]t is especially forbidden to employ arms *calculated to cause* unnecessary suffering.") (emphasis added); 1977 First Protocol Additional to the Geneva Conventions, Dec. 12, 1977, art. 35(2), 16 I.L.M. 1391 [hereinafter Protocol I] *reprinted in* CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 389 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON PROTOCOL I] ("[I]t is prohibited to employ weapons, projectiles and materials and methods of warfare *of a nature to cause* superfluous injury or unnecessary suffering.") (emphasis added). *See generally* Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977*, 299 INT'L REV RED CROSS 98, 102 (1994) [hereinafter Meyrowitz Article] (noting in the official French text, the language is "propres a causer des maux superflus.") When translated into in English in 1899, the text read as "of a nature to cause;" however, in the 1907 English text, it was translated as "calculated to cause." *Id*. The two phrases generally have been regarded as synonymous. *Id*.

[4] ROBIN M. COUPLAND, INTERNATIONAL COMMITTEE OF THE RED CROSS, THE SIRUS PROJECT: TOWARDS A DETERMINATION OF WHICH WEAPONS CAUSE "SUPERFLUOUS INJURY OR UNNECESSARY SUFFERING" (November 10, 1997) [hereinafter COUPLAND, THE SIRUS PROJECT] (defining four medical effects common to weapons and establishing a standard criteria for evaluating weapons). The criteria purportedly serve as objective health-based determinations for defining "superfluous injury" and "unnecessary suffering" under international law. *Id*. at 7. As such a particular weapon would become illegal per se based upon the weapon's medical effects on human health under its criteria. *Id*. at 8. *See also*,

I. INTRODUCTION

This article will trace the historical development of the internationally recognized principle of unnecessary suffering or superfluous injury. It will analyze current treaty and customary international law approaches used to determine whether a particular weapon causes unnecessary suffering or superfluous injury. The ICRC-sponsored SIrUS Project will be examined from its origin in 1997, through its subsequent non-substantive revisions in January 2000.[5] The SIrUS Project's opposition to laser weapons uses an impracticable, one-dimensional, health-effects-based criteria. It will argue that international compliance with the weapons review requirement of Protocol I, Article 36, is a better way to determine if a weapon causes unnecessary suffering or superfluous injury. The United States' law of war program, and its weapons review program,[6] will then be examined and advanced as an international model for the ICRC to promote. This article proposes that the ICRC shift its focus away from the SIrUS Project and instead advocate for international compliance with Protocol I, Article 36, through its recognized role as "guardian" of the Geneva Conventions.[7] Why? Because it is the inherent

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INTERNATIONAL COMMITTEE OF THE RED CROSS, THE SIRUS PROJECT AND REVIEWING THE LEGALITY OF NEW WEAPONS, 2000 [hereinafter ICRC, THE SIRUS PROJECT] (only slightly revising, COUPLAND, THE SIRUS PROJECT, *supra*).

[5] Note that the ICRC, THE SIRUS PROJECT, *supra* note 4, is a slight revision of COUPLAND, THE SIRUS PROJECT, and the latter remains the seminal work product. Interview with W. Hays Parks, Special Assistant to The Judge Advocate General of the Army in Rosslyn, Va. (Nov. 3, 2000) [hereinafter Parks Interview I]. Minor revisions were made to COUPLAND, THE SIRUS PROJECT, in accordance with a peer review of the Project that took place at a meeting of governmental, medical and legal experts in Geneva, Switzerland in May 1999. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, SUMMARY REPORT, EXPERT MEETING ON LEGAL REVIEWS OF WEAPONS AND THE SIRUS PROJECT 5 (2001) [hereinafter ICRC SIRUS 2001 SUMMARY REPORT]. The ICRC SIrUS Project is virtually the same SIrUS Project. At the second ICRC Meeting of Experts on SIrUS, held in Jongny sur Vevey, Switzerland, 29-31 January 2001, Dr. Coupland acknowledged that while some changes had been made to the SIrUS Project description following the May 1999 experts' meeting, its core concept remained unchanged. *Id*.; *see also* Memorandum, Office of the Judge Advocate General of the Army, International and Operational Law, to The Judge Advocate General of the Army, subject: International Committee of the Red Cross Expert Meeting on Legal Reviews of Weapons and the SIrUS Project, Jongny sur Vevey, Switzerland, 29-31 January 2001 at 2 (Feb. 5, 2001) [hereinafter *Jongny sur Vevey Memorandum*] (on file with author).

[6] *See generally* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM, para. 4.1 (Dec. 9, 1998) [hereinafter DOD DIR. 5100.77] (stating "it is DoD policy to ensure the law of war obligations of the United States are observed and enforced by the DoD Components"); U.S. DEP'T OF DEFENSE, INSTR. 5000.2, DEFENSE ACQUISITION para. 4.7.3.1.4 (Oct. 23, 2000) [hereinafter DOD INSTR. 5000.2] (appointing the general counsel and alternatively the service judge advocate general responsible for reviewing the legality of weapons under international law).

[7] Protocol I, article 36, *supra* note 3, provides that "in the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an

responsibility of sovereign nations, not non-governmental organizations (NGOs),[8] such as the United Nations (UN), to determine whether a weapon causes unnecessary suffering or superfluous injury. This article will consider the following questions:

> *(1) Should the determination of "unnecessary suffering or superfluous injury" be assessed solely with regard to so-called "objective health-based criteria" espoused by the SIrUS Project? Why SIrUS?*
>
> *(2) Is the problem developing weapons that may cause "superfluous injury or unnecessary suffering," or the illegal use of lawful weapons, as in Kuwait (by Iraq), Angola, the Balkans, Sierra Leone, East Timor, and elsewhere?*
>
> *(3) Is there a clearly identified problem of illegal use of weapons in international armed conflict? Or, is SIrUS an ICRC expression of frustration with the anarchy of post-Cold War collapse of governments (Somalia, the Balkans), ethnic violence (the Balkans, East Timor), and violence against civilians in less-developed nations' internal conflicts (Angola, Eritrea, and elsewhere)?*
>
> *(4) Should weapons reviews continue to make "unnecessary suffering or superfluous injury" determinations according to objective principles of military necessity, distinction, proportionality, and humanity applied subjectively by sovereign nations?*
>
> *(5) Currently, the trend is for nations to come together at Weapons Conventions to outlaw specific weapons. They do not use objective criteria, and the vote to outlaw is by consensus. Is this effective?*

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obligation to determine whether its employment would, in some or all other circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party."

[8] NGOs are "[t]ransnational organizations of private citizens that maintain a consultative status with the Economic and Social Council of the United Nations. NGOs may be professional associations, foundations, multinational businesses or simply groups with a common interest in humanitarian assistance activities (development and relief)." U.S. DEP'T OF ARMY, FM 100-20, MILITARY OPERATIONS IN LOW INTENSITY CONFLICT, 1-111 (05 Dec. 1990) *at* http://www.adtdl.army.mil/atdls.htm. The ICRC is an NGO.

(6) What is the best approach to fill the "unnecessary suffering or superfluous injury" vacuum left undefined by treaty and customary international law? Is a more stringent adherence to Protocol I-mandated weapons review programs (similar to that of the United States') a better approach than the implementation of the SIrUS Project?

(7) Whose bailiwick is it anyway? In other words, who should be responsible to determine whether a particular weapon causes "unnecessary suffering or superfluous injury," governments, NGOs, or the UN?

II. THE HISTORICAL DEVELOPMENT OF UNNECESSARY SUFFERING OR SUPERFLUOUS INJURY

The regulation of unnecessary suffering or superfluous injury is a long-standing concept in the law of war. "[A]s weapons become more fearsome, a feeling of fair play or chivalry began to revolt against the use of some weapons, along with the fear of retaliation in kind, or escalation."[9] In 1139 A.D., the Roman Catholic Church's Second Lateran Council took the first known official action outlawing a weapon.[10] The Council outlawed the crossbow, calling it a weapon, "hateful of God and unfit for Christians."[11] The prohibition was short-lived. Richard I re-introduced the crossbow during his reign (1189-1199). It continued in military service until it became obsolete more than three hundred years later.[12] Centuries later, efforts were made to outlaw the use of muskets, with no lasting success.[13] The situation at that point in history[14] is the same we observe today—no weapon has been effectively restricted or eliminated by international regulation.

In 1625, Hugo Grotius advocated humanity in war, saying, "it behooves Christian princes to prohibit all unnecessary effusion of blood, as they must render an account of their sovereign commissions to him, by whose authority, and in whose stead, they bear the sword."[15] Great philosophers, like Jean

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[9] Major Harold E. Harris, *Modern Weapons and the Law of Land Warfare*, 12 REVUE DE DROIT PENAL MILITAIRE ET DE DROIT DE LA GUERRE 9 (1973).

[10] *Id.* While there is some evidence of the custom existing earlier, this was the first official action. *Id*.

[11] *Id*. (citing J. Mallison *The Laws of War and the Juridical Control of Weapons of Mass Destruction in General and Limited Wars*, 36 GEO. WASH. L. REV. 306, 318 (1967)).

[12] SIR RALPH PAYNE-GALLWEY, THE CROSSBOW 3-4, 46-48 (1958).

[13] Harris, s*upra* note 9, at 9 (citing C. FENWICK, INTERNATIONAL LAW 667 (4th ed. 1965)).

[14] M. W. ROYCE, LA PROTECTION DES POPULATIONS CIVILES CONTRE LES BOMBARDMENTS 77 (1930) (Mr. Royce, a respected international scholar at the time, noted at a meeting of experts hosted by the ICRC in 1930 that weapons had not, to date, been effectively restricted).

[15] HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE: INCLUDING THE LAW OF NATURE AND NATIONS 364 (A.C. Campbell trans., 1979).

Jacques Rousseau, continued to echo and expand the thoughts of Grotius. In the late 18th century, Rousseau wrote in, "The Social Contract,"

> [T]he end in war is to defeat the enemy and in doing so there is a right to kill its defenders while they remain armed, but as soon as they lay them down or surrender they cease to be enemies or instruments of the enemy, and become once more merely men, whose lives no one has any right to take.[16]

Rousseau believed there should be a distinction between combatants and non-combatants and that, "there is no right to inflict more suffering than is necessary for the attainment of victory."[17] These thoughts became part of the modern codifications of the law of war principle of unnecessary suffering and superfluous injury[18] found in the Lieber Code[19] and the St. Petersburg Declaration.[20]

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[16] HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 215 (1992).
[17] *Id*.
[18] *Id.*
[19] *Instructions for the Government of Armies of the United States in the Field*, General Order No. 100, 24 April 1863, [hereinafter The Lieber Code], THE LAWS OF ARMED CONFLICTS. A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3 (Dietrich Schindler & Jiri Toman eds., 1988) [hereinafter Schindler & Toman].
[20] DECLARATION RENOUNCING THE USE, IN TIME OF WAR, OF EXPLOSIVE PROJECTILES UNDER 400 GRAMMES WEIGHT, Dec. 11, 1868, (1907 Supp.) 1 AM. J. INT'L L. 95 [hereinafter The St. Petersburg Declaration of 1868]. The St. Petersburg Declaration of 1868 is the first formal agreement prohibiting the use of certain weapons in war. Schindler & Toman, *supra* note 19, at 101. It had its origin in the 1863 invention by Russian military authorities of a bullet which exploded on contact with a hard substance and whose primary purpose was to blow up ammunition wagons. *Id*. In 1867, the bullet was modified so as to explode on contact with a soft substance. *Id*. The Russian Government, unwilling to use the bullet itself or to allow another country to take advantage of it, suggested that the use of the bullet be prohibited by international agreement. *Id*. This Declaration was the first multilateral statement of what has become the customary rule that the use of arms, projectiles and material of a nature to cause unnecessary suffering is prohibited. *Id*. The original parties to the Declaration were Austria-Hungary, Bavaria, Belgium, Denmark, France, Great Britain, Greece, Italy, Netherlands, Portugal, Prussia, and North German Confederation, Russia, Persia, Sweden, Norway, Switzerland, Turkey, and Wurtemburg. *Id*. at 103. A recent Army Judge Advocate General legal review, while acknowledging the St. Petersburg Declaration to be the origin of the prohibition on weapons calculated to cause unnecessary suffering, determined (through extensive historical review of the practice of nations) that the 400-gram limit on explosive or incendiary munitions was obsolete unless the projectiles are exclusively anti-personnel in character. *See* Memorandum, Office of The Judge Advocate General of the Army, International and Operational Law Division, to US Army Armament Research, Development and Engineering Center, subject: Legal Review, Mk 211, MOD O, Cal. .50 Multipurpose Projectile (14 Jan. 2000) [hereinafter Mk 211 Review 14 Jan. 2000] (on file with author) (noting the ICRC representatives indicated their agreement with the earlier memorandum's analysis (the original version of the same review dated 19 Feb 1998 was coordinated with the other military services, DOD General Counsel, and the Office of the Legal Adviser, Department of State) and conclusion regarding the obsolescence of the 400-gram limitation).

In 1863, the Lieber Code, during United States Civil War era, related combatant suffering to the concept of military necessity.[21] It expressly prohibited, "the infliction of suffering for the sake of suffering."[22] Thus, suffering should be avoided if not a military necessity. In warfare then, the injury and suffering caused must not be superfluous or unnecessary when balanced against the intended military purpose. The St. Petersburg Declaration of 1868 expressly recognized the purpose of combat to, "disable the greatest possible number of men," but further qualified that statement by asserting, "this object would be exceeded by the employment of arms which would uselessly aggravate the suffering of disabled men or render their death inevitable."[23]

The subject munition is an armor-piercing incendiary projectile weighing 43.6 grams that is in use by the U.S. Army, Navy and Marine Corps, and more than a dozen other nations. *Id*.

[21] The Lieber Code, *supra* note 19, arts. 14, 15. Article 14 states "[m]ilitary necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to modern law and usages of war." Further, article 15 states:

> [m]ilitary necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communications, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the sustenance and safety of the army, and of such deception as does not involve the breaking of good faith positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

[22] *Id*. Art. 16 states:

> [m]ilitary necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or revenge, nor of maiming or wounding except in fight, nor torture to extort confessions." It does not admit to the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and in general military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

[23] St. Petersburg Declaration of 1868, *supra* note 20, at para. 1 states:

> The progress of civilization should have the effect of alleviating as much as possible the calamities of war; that the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by employment of such

In summary, the Lieber Code limited enemy suffering to military necessity. The St. Petersburg Declaration codified unnecessary suffering or superfluous injury and placed restrictions on the methods and means of warfare, particularly the use of certain weapons that exceeded humanitarian principles. Neither the Code nor the Declaration acquired the status of international law at that time.[24] However, their principles were the basis for the Brussels Conference of 1874, and the subsequent Hague Conventions of 1899 and 1907.[25]

The Brussels Conference convened in 1874 to, "examine the draft of an international agreement concerning laws and customs of war submitted to them by the Russian Government."[26] While an amended draft was adopted, it never became a binding convention because it was not ratified.[27] However, the real importance of the Brussels Convention was that it provided the basis for language incorporated into the subsequent Hague Regulations.[28]

The Hague Conferences of 1899 and 1907 reaffirmed, in treaty format, the overarching principles of the St. Petersburg Declaration and the Leiber Code. The Hague regulations stated, "that the necessities of war ought to be measured against the requirements of civilization and humanity . . . ."[29] Three declarations were adopted at the 1899 Conference. These declarations banned specific weapons, to include: the launching of projectiles from balloons and other methods of a similar nature,[30] asphyxiating gases,[31] and expanding bullets (also known as dum-dum bullets).[32] The declarations were adopted on

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> arms which would uselessly aggravate the suffering of disabled men or render their death inevitable; that the employment of such arms would be contrary to the laws of humanity.

[24] Schindler & Toman, *supra* note 19, at 25-26.
[25] *Id*.
[26] *Id*. at 25.
[27] *Id*.
[28] *Id*. at 26.
[29] Fritz Kalshoven, *Arms, Armaments and International Law*, 191 HAGUE RECUEIL DES COURS 213 (1985).
[30] Schindler and Toman, *supra* note 19, at 201. This prohibition was temporary. *Id*. It was renewed in The Hague Declaration XIV of 18 October 1907 until the conclusion of the Third Hague Peace Conference. *Id*. That conference was not held because of the commencement of World War (WW) I, which rendered the declaration obsolete. *Id*.; s*ee also* Donald Cameron Watt, *Restraints on War in the Air before 1945*, *in* RESTRAINTS ON WAR 60-61 (Michael Howard, ed., 1979); W. Hays Parks, *Air War and the Law of War*, 32 A.F.L. REV. 1 (1990).
[31] Schindler and Toman, *supra* note 19, at 105. This declaration was not entirely successful, as each side utilized chemical weapons in WW I following their introduction by Germany. *Id*. Its failure led to the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. *Id.*
[32] *Id*. at 109. The term "dum-dum" is derived from a British manufacture of the Mk. IV .303 rifle bullet at the Dum-Dum Arsenal near Calcutta, India. *Id*. The Mk. IV, a hollow-point projectile, was the basis for the 1899 prohibition on hollow point or expanding bullets. *Id*.; s*ee also*, Memorandum, Office of the Judge Advocate General of the Army, International and

humanitarian grounds.[33] The Hague Convention IV of 1907 regulated the law of armed conflict on land. The regulations annexed to this Convention are its most important element. These rules of warfare are considered principles of customary international law to the extent they have not been amended by subsequent treaties.[34]

Like the 1899 Conference, the Hague Convention IV of 1907 also set out humanitarian limitations on weapons used in warfare, declaring, "the right of belligerents to adopt means of injuring the enemy is not unlimited."[35] Convention IV expressly recognized limitations on the means and methods of warfare. It prohibited contracting parties from using "arms, projectiles or material calculated to cause unnecessary suffering."[36] However, the term "unnecessary suffering" was not defined. Other than recodifying the customary law prohibition on the use of poison, no specific weapons were mentioned.[37] An important result of the Hague Convention IV was that the

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Operational Law, to The Army Judge Advocate General, subject: Legal Review, 5.56mm, 77-grain Sierra MatchKing™ Bullet (19 May 2000) at 4-5 [hereinafter MatchKing Review] (on file with author).

[33] Kalshoven, *supra* note 29, at 216.

[34] *See* Schindler and Toman, *supra* note 19, at 63; *United States v. Krupp et al.*, IX INT'L MIL. TRIB. 1340 (1948) [hereinafter Krupp]. (noting that the Hague IV Convention is a slightly revised version of the 1899 Hague Convention II).

[35] Hague Convention No. IV, *supra* note 3, art. 22.

[36] *Id*. Art. 23 states:

> In addition to the prohibitions provided by special Conventions, it is especially forbidden to
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> (a) to employ poison or poisoned weapons;
> (b) to kill or wound treacherously individuals belonging to the hostile nation or army;
> (c) to kill or wound an enemy who, having laid down arms, or having no longer means of defense, has surrendered at discretion;
> (d) to declare that no quarter will be given;
> (e) to employ arms, projectiles or material calculated to cause unnecessary suffering;
> (f) to make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
> (g) to destroy or seize the enemy's property, unless such destruction or seizure imperatively demanded by the necessities of war;
> (h) to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.
>
> A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed at their own country, even if they were in the belligerent's service before the commencement of the war.

[37] *Id.*

balancing equation between military necessity and the requirements of humanity became binding treaty law. Through state practice, the same balancing test is binding on all nations as firmly rooted customary international law.[38]

The preamble to the Hague Convention IV, also known as the Martens Clause,[39] provides guidance for situations not addressed by the convention:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they may result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.[40]

Forty years later, the Geneva Conventions of 1949 codified the next set of major limitations on the amount of suffering in war. They focused on protecting the victims of war.[41] From 1974 to 1977, a Swiss-hosted multi-national diplomatic conference developed two protocols to the 1949 conventions. These protocols further defined and expanded upon The Hague and Geneva Conventions. Protocol I reaffirmed the limitations placed on the conduct of hostilities and clarified previous ambiguities. It prohibited "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."[42] Additionally, Protocol I

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[38] Krupp, *supra* note 34.

[39] Hague Convention IV, *supra* note 3, preamble. Martens was the name of the Russian negotiator at the Hague Conventions.

[40] *Id.* (mentioning for the first time public opinion as a means by which to evaluate unnecessary suffering in warfare).

[41] *See generally* Geneva Conventions for the Amelioration of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Conventions for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWS Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.N.T.S. 3316, 75 U.N.T.S. 135 [hereinafter GPW]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC].

[42] Protocol I, *supra* note 3, art. 35. Preceding the above quoted language, section 2 of article 35 includes a phrase similar to the Hague Convention No. IV, article 22, stating "in any armed conflict, the right of the Parties to the conflict to choose methods or means of war is not unlimited." The Hague Convention No. IV expressed the same statement in terms of *belligerents* but Protocol I expanded the definition and includes parties in *any armed conflict*. This reflects the Protocol's focus to obtain law of war protections in conflicts extending beyond traditional international armed conflict. The United States has rejected this politicization of the law of war. *See* Message of the President of the United States Transmitting Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, 100th Congress, 1st Session (1987), *reprinted in* 26 I.L.M. 561. Additional Protocol II of 1977 is concerned with internal armed conflicts, improving upon

mandated that contracting parties review weapons in all phases of development to determine their legality under all international obligations binding that party.[43]

The United States has not ratified Protocol I. However, the United States had a weapons review program before Protocol I's mandate for weapons review was even considered.[44] Furthermore, the United States acknowledges an obligation to follow article 35(2) of Protocol I to the extent that it is consistent with article 23(e) of Hague Convention IV.[45]

Unfortunately, the vast majority of state parties to Protocol I do not comply with the Article 36 mandate.[46] In January 2001, twenty-five years after the promulgation of Protocol I and its Article 36, the ICRC had a brief meeting of military, legal and medical experts at Jongny sur Vevey, Switzerland. [47] The validity of the SIrUS Project was debated.[48] However,

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Article 3 common to the 1949 Geneva Conventions. It made no change on the law respecting the legality of weapons.

[43] COMMENTARY ON PROTOCOL I, *supra* note 3. Regarding art. 36, this obligation was defined by the Rapporteur of Committee III as follows:

> The determination of legality required of States by this article is not intended to create a subjective standard. Determination by any State that the employment of a weapon is prohibited or permitted is not binding internationally, but is hoped that the obligation to make such determinations will ensure that means or methods of warfare will not be adopted without the issue of legality being explored with care. It should also be noted that the article is intended to require States to analyze whether the employment of a weapon for its normal or expected use would be prohibited under some or all circumstances. A State is not required to foresee or analyze all possible misuses of a weapon, for almost any weapon can be misused in ways that would be prohibited.

Id.

[44] U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM, para. 4.1 (9 Dec. 1979) ("[I]t is DoD policy to ensure the law of war obligations of the United States are observed and enforced by the DoD Components") (replaced by DOD DIR. 5100.77, *supra* note 6, which came out in 1998). The 1979 Directive codified the U.S. weapons practice, which predated Protocol I.

[45] MatchKing Review, *supra* note 32, at 2.

[46] Memorandum, Office of the Judge Advocate General of the Army, International and Operational Law, to The Judge Advocate General of the Army, Subject: International Committee of the Red Cross (ICRC) Meeting of Experts on ICRC SIrUS Project, Geneva, 10-11 May 1999; Trip Report, (19 May 1999) [hereinafter Trip Report 19 May 1999] (on file with author) (noting that of the 156 Contracting Parties to Protocol I, only 10 have established a weapons review program). The United States has implemented a weapons review program, which will is discussed *infra* Part III.A.). At the time of preparation of this article, the number of States Parties to Protocol I had increased to 158. The number of Parties with programs to implement Article 36 remains at ten. Interview with W. Hays Parks, Special Assistant to The Judge Advocate General of the Army at Rosslyn, Va. (16 Mar 2001) [hereinafter Parks Interview IV].

[47] ICRC SIRUS 2001 SUMMARY REPORT, *supra* note 5.

aside from this meeting, the ICRC has focused neither its efforts, nor its resources, towards promoting international compliance with the weapons review mandate of Protocol I through education, training, or encouragement.[49]

The ICRC joined the rest of the world in the post-World War I movement against chemical weapons. However, the ICRC's forte (and mandate from the governments that finance it) is the protection of war victims, not warfighting and weapons issues.[50] In 1973, the ICRC became involved in conventional weapons issues after criticism over U.S. weapons used in the Vietnam War. The ICRC knew that weapons issues would be discussed at the 1974-1977 Diplomatic Conference that promulgated Protocols I and II. It published an initial document, then hosted meetings of experts in Lucerne in 1974, and Lugano in 1976.[51] The experts held lengthy meetings, but reached no conclusions regarding any weapon. They specifically declined to say that any existing conventional weapon violated the prohibition on weapons calculated to cause unnecessary suffering or superfluous injury.

Proponents wanted new bans on existing conventional weapons incorporated into ICRC draft texts prepared for the 1974-1977 Diplomatic Conference.[52] The ICRC opposed specific weapons restrictions in its draft text for several reasons:

> (1) The question of arms and their prohibitions is dealt with by other organizations, including the United Nations;
> (2) The prohibition of specific weapons has always been the subject of legal instruments separate from the Geneva Conventions. The ICRC preferred to approach the weapons limitation issue through more effective rules for the use of lawful weapons, rather than prohibitions of weapons; and
> (3) A prohibition of a specific weapon should be the subject of a different conference and different treaty.[53]

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[48] *Id.*
[49] *Id.*
[50] *See generally* ICRC *supra* note *1*.
[51] ICRC, WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS (Geneva, 1973); ICRC, CONFERENCE OF GOVERNMENT EXPERTS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS, Lucerne, 24 September to October 18, 1974 (Geneva, 1975); and ICRC, CONFERENCE OF GOVERNMENT EXPERTS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS, Lugano, 28 January to 26 February 1976 (Geneva, 1976). The weapons considered included explosive and penetrating weapons, incendiary weapons, small-caliber projectiles, blast and fragmentation weapons, time-delay weapons, as well as futuristic weapons (directed energy weapons, such as lasers). For statements of the U.S. delegation at the 1974 Lucerne experts meeting, see U.S. DEPARTMENT OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 707-09 (1974).
[52] Parks Interview I, *supra* note 5.
[53] MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 197 (1982).

During the 1974-1977 Diplomatic Conference, an Ad Hoc Committee met to study the conventional weapons legality issue.[54] It reached no conclusions, but prepared Resolution 22, "Follow-up regarding Prohibitions or Restriction of Use of Certain Conventional Weapons."[55] Resolution 22 was adopted at the conclusion of the Diplomatic Conference. It called for the United Nations to convene a conference to consider the legality of certain conventional weapons, a procedure the UN began with preparatory sessions in 1978.[56] It then convened the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, which may be deemed to be Excessively Injurious or to have Indiscriminate Effects.[57] On October 10, 1980, the Conference concluded with a treaty of the same name, and three protocols.[58]

The debate over the Vietnam War, and the decade of negotiations following that conflict, did not produce revolutionary results. The following table summarizes the weapons (or purported weapons) considered and the results of the 1980 UN Conventional Weapons Conference:[59]

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[54] COMMENTARY ON PROTOCOl I, *supra* note 3.
[55] *Id*.
[56] *Id*.
[57] *Id*. at 402-03.
[58] *Id*. For a discussion of the 1980 treaty, see YVES SANDOZ,, PROHIBITIONS OR RESTRICTIONS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS 3-33 (1981) and W.J. Fenrick, *New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict*, in XIX THE CANADIAN YEARBOOK OF INT'L L., 229-56 (1981). The 1980 convention is commonly referred to as the UN Conventional Weapons Convention, or NCCW (to distinguish it from the 1993 Chemical Weapons Convention, referred to as the CWC).
[59] *See* Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct 10, 1980, U.S. Treaty Doc. No, 103-25, at 6, 1342 U.N.T.S. 137, 19 I.L.M. 1523 [hereinafter Conventional Weapons Convention of 1980] (containing four protocols of which the United States ratified two: Protocol I (non-detectable fragments—a non-existent weapon), and Protocol II (mines, booby traps and other devises). Protocol II was amended in 1996 and this amended protocol has been ratified by the United States. The additional Conventional Weapons Convention Protocols yet to be ratified by the United States regulate the use of incendiary weapons, and blinding laser weapons [hereinafter Blinding Laser Weapons Protocol] (prohibiting the use of weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision," but permitting the use of lasers which may cause blindness as an "incidental or collateral effect of the legitimate military employment of laser systems). None of the weapons in the Conventional Weapons Convention has been determined to cause unnecessary suffering or superfluous injury. Although both the Biological Weapons Convention of 1972 and the Chemical Weapons Convention of 1993 are arms control agreements, neither contains any provision concluding that either causes unnecessary suffering or superfluous injury. *See* Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxic Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163 [hereinafter Biological Weapons Convention of 1972] (prohibiting the development, storage and use of biological toxins having "no justification for prophylactic, protective, or other peaceful purposes); Convention on the Prohibition of the Development,

A Decade of Debate: Results of the UN Conference On the Legality of Certain Conventional Weapons, 1978-1980

Weapon or Purported Weapon	**Result**
Cluster bombs	No restriction.
"Plastic fragments"	Protocol I, UNCCW, prohibiting certain nondetectable fragments (a nonexistent weapon).
Land mines, booby traps and other devices.	Protocol II, UNCCW, regulating each to provide protection for the civilian population. No prohibition on use against combatants.
Incendiary weapons	Protocol III, UNCCW, providing restrictions on use to protect civilians. No prohibition on use against combatants.
Fuel air explosives	No restriction.
Small-caliber projectiles	No restriction.
Directed-energy weapons (lasers, particle beam weapons)	No restriction.
Flechettes	No restriction.

An extensive, formal, and multi-national discussion of certain conventional weapons produced a treaty with civilian population protections.[60] However, there was no prohibition against the use of an existing weapon against combatants. This suggests that the threshold for a weapon to cause unnecessary suffering or superfluous injury is a high one. The effects of a weapon must be weighed against those of other lawful weapons. [61]

Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan 13, 1993, 32 I.L.M. 800 [hereinafter Chemical Weapons Convention of 1993] (reaffirming both the Geneva Gas Protocol of 1925 and the Biological Weapons Convention of 1972 in its preamble).

[60] W. J. Fenrick, *The Conventional Weapons Convention: A Modest but Useful Treaty* 279 INT'L REV. RED CROSS 498-509 (1990).

[61] For a discussion of the UN Conventional Weapons Convention and its three initial protocols, see *id*.; Frits Kalshoven, *The Conventional Weapons Convention: Underlying Legal Principles*, 279 INT'L REV. RED CROSS 510-520 (1990); A.P.V. Rogers, *Mines, Booby Traps and Other*

Adding the 1978-1980 negotiations record to the 1994-1996 first review conferences for the UNCCW produces the following:

First Review Conference for the UNCCW, 1994-1996

Weapon or Purported Weapon	**Result**
Mines, booby-traps and Other devices	Protocol II substantially amended to improve protection for civilian population. No restrictions to protect combatants.
Blinding laser weapons	Protocol IV prohibits non-existent weapons. As such, it is more like an arms control document. The protocol does not conclude that blinding laser weapons cause unnecessary suffering or superfluous injury.
Small-caliber projectiles	A Swiss proposal, offered for economic more than humanitarian purposes, was withdrawn before conclusion of conference after receiving virtually no support from States Parties.

The second UNCCW Review Conference was held in Geneva, Switzerland, beginning with a preparatory session held April 2-6, 2001.[62] Anticipating the review conference, the United States hosted a limited meeting of interested governments at the Center for Law and Military Operations, The Judge Advocate General's School, U.S. Army, in Charlottesville, Virginia from February 20-21, 2001.[63] Topics discussed included cluster munitions and other unexploded ordnance, further improvements to the Amended Mines Protocol, and extending the scope of the UNCCW to internal conflicts.[64] This suggests that the second UNCCW Review Conference will mirror the work of its predecessors, seeking improved protection for civilians in time of war. Clearly, governments see the issue of unnecessary suffering in terms of

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Devices 279 INT'L REV. RED CROSS 521-534 (1990); and W. Hays Parks, *The Protocol on Incendiary Weapons* 279 INT'L REV. RED CROSS 535-550 (1990).

[62] Parks Interview I, *supra* note 5.

[63] Interview with W. Hays Parks, Special Assistant to The Judge Advocate General of the Army, at The Office of the Judge Advocate General, Rosslyn, Va. (Dec. 27, 2000) [hereinafter Parks Interview II].

[64] Personal observation of author, who attended the February 20-2, 2001 meeting as an observer.

increasing protection for civilians, particularly in internal conflicts, rather than an epidemic of weapons used against combatants that cause unnecessary suffering or superfluous injury.

Over the years, governments have used two legal regimes to consider whether a weapon causes unnecessary suffering or superfluous injury.[65] The first is the legal review process. This process is the responsibility of governments, and is based on objective treaty and customary law principles of military necessity, distinction, proportionality, and humanity. These principles are balanced to render a good faith decision on a weapon's legality. Each sovereign nation is ultimately responsible, along with its respective weapons review program, for deciding whether a weapon is lawful or unlawful.

The second method uses the conference mechanism of the1980 UN Conventional Weapons Convention.[66] At these conferences, governments meet to consider issues regarding certain conventional weapons.[67] Proposals are tabled to regulate or prohibit particular weapons based on the international consensus of States Parties to the UNCCW.[68] To date, these conferences have not banned any weapon on the basis that it causes superfluous injury or unnecessary suffering. Detailed rules have been promulgated for certain weapons to increase protection for civilian populations.[69] However, other groups and nations wish the UN could go farther with these conferences.[70] One frustration shared by the United States and the ICRC is the inability to extend the scope of the UNCCW to conflicts not of an international character.[71] Often, these conflicts are where the greatest suffering occurs. This issue will be considered at the second UNCCW Review Conference.[72]

Both regimes–one long standing, the other relatively new–work to control the potentially negative effects of war within their frameworks. However, the ICRC believes this is not enough.[73] Is there a more objective way to determine what constitutes unnecessary suffering or superfluous injury? The ICRC, through its sponsorship of the SIrUS Project, believes so. SIrUS seeks to objectively quantify the unnecessary suffering or superfluous injury principle. It proposes a novel medical approach to determine the lawfulness of a weapon based solely upon that weapon's health-effects on the human body.

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[65] Parks Interview II, *supra* note 63.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] Although the scope of the UNCCW is limited to international armed conflict (Article 1), the scope of the Amended Mines Protocol promulgated at the first review conference was extended to internal armed conflicts (Article 1, Amended Mines Protocol).
[73] The origins of the more activist ICRC approach began at the end of the Cold War. *See* LOUISE DOSWALD-BECK AND GERALD C. CAUDERAY, THE DEVELOPMENT OF NEW ANTI-PERSONNEL WEAPONS (1990).

III. THE SIRUS PROJECT

A new approach to define and quantify the principle of unnecessary suffering or superfluous injury has recently emerged from the gathering and interpretation of medical data. Dr. Robin Coupland, an ICRC physician and surgeon, wrote several articles on weapons and their wounding effect from a field surgeon's point of view.[74] One of these articles, originally a paper presented at an ICRC-hosted symposium, entitled, *The Medical Profession and the Effects of Weapons,*[75] appears to be the genesis of the SIrUS Project.[76]

The Medical Profession and the Effects of Weapons proposed certain parameters that could be used to establish a baseline to objectively measure the legal and philosophical concept of "superfluous injury and unnecessary suffering."[77] According to Coupland, the SIrUS Project aimed, "to place on an objective comprehensible basis what is already obvious: that the effects on human beings of weapons commonly used by armies now are bad enough so that if possible anything worse should be prevented."[78] SIrUS Project supporters know that an obligation already exists for countries to determine the legality of any new means of warfare they are procuring or developing.

Their second declared goal was, "to facilitate such determination without legal wrangling about certain materials and technologies."[79] Coupland asserts that because weapons are being developed with differing effects on the human body, "it is essential that some yardstick of injury and suffering be created against which the effect of any weapon can be measured."[80] The SIrUS Project's proposed yardstick was, "the effects of weapons on health."[81]

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[74] *See generally* Robin M. Coupland, *The Effect of Weapons on Health*, 347 THE LANCET 450-51 (1996) [hereinafter *The Effect of Weapons on Health*]; Robin M. Coupland, *Abhorrent Weapons and "Superfluous Injury or Unnecessary Suffering:" From Field Surgery to Law*, 315 BRIT. MED. J. 1450 (1997) [hereinafter *Abhorrent Weapons*].

[75] *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, Report on THE MEDICAL PROFESSION AND THE EFFECTS OF WEAPONS: THE SYMPOSIUM, Geneva (1996) [hereinafter SYMPOSIUM REPORT] (noting the symposium was held in Montreux, Switzerland, March 8-10, 1996).

[76] Coupland is also the editor of the SIrUS Project. COUPLAND, THE SIRUS PROJECT, *supra* note 4, at 5.

[77] *See* Robin M. Coupland, *The Effects of Weapons: Defining Superfluous Injury and Unnecessary Suffering*, 3 MED. & GLOB. SURV. 1 (1996) [hereinafter *Defining SIrUS*] (noting this article was previously a paper submitted to the 1996 Montreux Symposium, included in the Symposium Report, and previously entitled *Can We Define Superfluous Injury and Unnecessary Suffering?*).

[78] COUPLAND, THE SIRUS PROJECT, *supra* note 4, at 5.

[79] *Id.* at 14.

[80] *Id.* at 12.

[81] *Id.* at 13 (stating the effects of weapons on health should be the basis for legal, ethical, technical, and political decisions with respect to weapons; in other words, what weapons really do to human beings should be the lowest common denominator for different professional concerns).

The Project used the ICRC's field hospital database to create the Project's health-effects criteria.[82]

The ICRC database purportedly contains information on 26,636 "war-wounded" admitted to ICRC field hospitals.[83] Herein lie several major SIrUS flaws. First, its war-wounded figures are primarily for wounded civilians of varying ages and health. Second, these casualties come from internal conflicts in the least-developed nations. In those areas, emergency medical care is primitive and often days away. Finally, the data lacks transparency and was not subjected to peer review.[84]

Undeterred, and claiming it to be "the best index of injury and suffering available,"[85] the database information was, "analyzed to measure the collective effects of different conventional weapons, i.e., the effects measured as a proportion of all people injured by a certain type of weapon causing the

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[82] *Id*. at 7.

[83] *Id*.

[84] *See generally* THE GERMAN FEDERAL MINISTRY OF DEFENSE, COMMENTS OF THE GERMAN FEDERAL MINISTRY OF DEFENSE ON THE CONSULTATION DOCUMENT—"THE SIRUS PROJECT AND REVIEWING THE LEGALITY OF WEAPONS'' PUBLISHED BY THE ICRC IN JANUARY 2000 (Jan. 24, 2001) [hereinafter FMOD DOCUMENT]; THE GOVERNMENT OF FINLAND, COMMENTS OF THE GOVERNMENT OF FINLAND TO THE DOCUMENT "THE SIRUS PROJECT AND REVIEWING THE LEGALITY OF WEAPONS" (Sept. 13, 2000) [hereinafter FINLAND DOCUMENT]; THE UNITED KINGDOM PROLIFERATION & ARMS CONTROL SECRETARIAT, PROJECT SIRUS—A CRITIQUE (Dec. 18, 2000) [hereinafter UK DOCUMENT]; THE SWEDISH MINISTRY OF FOREIGN AFFAIRS, THE CONSULTATION PROCESS ON THE SIRUS PROJECT (Oct. 25, 2000) [hereinafter SWEDISH DOCUMENT]; THE PERMANENT REPRESENTATIVE OF THE UNITED STATES OF AMERICA TO THE UN AND OTHER INTERNATIONAL ORGANIZATIONS, COMMENTS ON THE SIRUS PROJECT (Jan. 11, 2001) [hereinafter UNITED STATES DOCUMENT]. These governmental documents were prepared in advance of the January 29-31, 2001, Jongny sur Vevey Meeting of the Experts on the SIrUS Project. The documents reflected each respective government's concern with the SIrUS Project's data, lack of transparency, and lack of adequate peer review. *Id*.; s*ee also Jongny sur Vevey Memorandum*, *supra* note 5, at 3 (noting that an invited expert, Ms. Vivienne Nathanson, of the British Medical Association—a staunch advocate of the SIrUS Project, in laying out criteria for a proper program, conceded a flaw in the SIrUS data). In that memorandum she stated:

> (a) analysis must be open and transparent to peer review;
> (b) the data is used to frame and test hypotheses;
> (c) the hypothesis must be rejected if the data is not supported; and
> (d) the hypothesis must be prepared and tested.
>
> All of these must be accomplished prior to publication. The ICRC met none of these requirements before it published its SIrUS Project Program in 1997. None were met following its May 1999 meeting of experts, despite the strong criticism it received at that time.

Id.

[85] COUPLAND, THE SIRUS PROJECT, *supra* note 4, at 22 (arguably the best database because it is the only database available).

wound." [86] The parameters measured include: the proportion of large wounds; mortality; the relative proportion of central and limb injuries; the duration of hospital stays, the number of operations required, the requirement for blood transfusion; and the extent of severe and permanent disability in the survivors.[87]

Conventional anti-personnel weapons other than anti-personnel land mines and incendiary weapons—an intentionally selective and artificial range, were considered as the baseline because, "up to now, neither law nor public opinion in general has wanted to prohibit these weapons because of their design-dependent effects."[88] SIrUS asserts that by collating its data with data from military publications, certain effects of conventional weapons have been quantified. The quantified data can be used to determine what is *not* "superfluous injury or unnecessary suffering."[89] A clear, and purportedly "objective," distinction is then drawn between the effects of conventional weapons and the effects of all other weapons. The SirUS Project proponents believe this distinction can be expressed in terms of criteria.[90]

A group of SIrUS Project experts defined the criteria. They said that the design-dependent, foreseeable effects of weapons should determine superfluous injury or unnecessary suffering.[91] Weapons would be deemed to cause superfluous injury or unnecessary suffering when they are used against human beings and cause:

> (1) disease, other than that resulting from physical trauma from explosions or projectiles; or
> (2) abnormal physiological state, specific abnormal psychological state other than the expected response to trauma from explosions or projectiles); or,

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[86] *Id*. at 7. Coupland notes:

> [T]he term 'conventional weapons' has no formal definition, but explaining SIrUS' use of the term to mean those conventional weapons which utilize projectiles or (non-nuclear) explosions and, as a function of their design, inflict physical injury by imparting kinetic energy but not foreseeably to a specific part of the body, the treatment requirements for such injury being well defined. Noting further that the data relating to 'point-detonating' anti-personnel mines show how the measured effects represent the foreseeable effects resulting from their design; these effects distinguish them from other conventional weapons. Therefore, the term 'the effects of conventional weapons' does not include the effects of anti-personnel mines.

Id.
[87] *Id*.
[88] *Id*. at 22.
[89] *Id*. at 8.
[90] ICRC, THE SIRUS PROJECT, *supra* note 4, at 2.
[91] *See* COUPLAND, THE SIRUS PROJECT, *supra* note 4.

(3) permanent disability specific to the kind of weapon (with the exception of the effects of point-detonated antipersonnel mines); or,
(4) disfigurement specific to the kind of weapon; or,
(5) inevitable or virtually inevitable death in the field (more than 22%) or hospital mortality level more than 5%; or,
(6) grade 3 wounds (as measured by the Red Cross wound classification) (among those who survive to hospital less than 10% had grade 3 wounds); or,
(7) effects for which there is no well-recognized and proven medical treatment which can be applied in a well-equipped field hospital.[92]

In the SIrUS briefings to support his criteria, Coupland categorized conventional weapons in the following manner:

Weapons (by effect on health)[93]

Health effects seen in recent conflicts	Health effects not commonly seen
Grenades	Electromagnetic
Mortars	Napalm/Chemical weapons Bombs
Mines	Lasers/Biological weapons
Shells	Flame throwers
Bullets	Acoustic
Missiles	

Some errors or distortions of fact and law are obvious in these categorizations. Napalm, flame-throwers, and other incendiary weapons are regulated *to protect civilians* by Protocol III, UNCCW.[94] Their use against combatants is not prohibited, and the international community has not concluded that they cause unnecessary suffering or superfluous injury of combatants.[95] Also, notwithstanding the lack of recent use of incendiary weapons, burn injuries are common to war, and there is extensive medical data on them.[96]

[92] *Id*. at 3.
[93] Parks Interview IV, *supra* note 46. Mr. Parks was privy to Dr. Coupland's use of this chart at the XXVIIth Conference of Red Cross and Red Crescent Societies in Geneva between October 31 and November 6, 1999, and again at the ICRC-hosted Expert Meeting on Legal Reviews of Weapons and the SIrUS Project in Jongny sur Vevey on January 30, 2001.. The headings over each column were added by Peter Herby of the ICRC's Mines-Arms Unit in his presentation at the latter meeting. *Id*.
[94] Interview with W. Hays Parks, Special Assistant to The Judge Advocate General of the Army, at Rosslyn, Va. (Mar. 5, 2001) [hereinafter Parks Interview III].
[95] For a history of the Incendiaries Protocol (Protocol III, UNCCW), see Parks, *supra* note 61.
[96] Parks, *supra* note 61, at 539.

All mines have not been prohibited, and anti-personnel mines have been regulated (or, per the Ottawa Convention, prohibited).[97] This regulation arose due to irresponsible use causing indiscriminate effects in some conflicts.[98] The regulation did not occur because the international community concluded that they cause unnecessary suffering or superfluous injury to combatants.[99] There is also a massive amount of medical data on mine injuries. These injuries are nothing if not "commonly seen."[100]

Consider the more "unconventional" weapons. For example, all lasers have not been prohibited. The Blinding Laser Protocol (Protocol IV, UNCCW) did not conclude that either blinding, or laser weapons *per se*, cause unnecessary suffering or superfluous injury.[101] Additionally, chemical and biological weapons have been restricted by arms control agreements. These restrictions are not due to any conclusion that either expressly or necessarily contravenes the prohibition on weapons that cause unnecessary suffering or superfluous injury.[102] There is no known data on either electromagnetic or acoustic weapons because no such weapons have been fielded.[103]

Finally, injuries "not commonly seen" suggests that if a nation has a weapon in its inventory, it must use it each time it engages in combat before such injuries are "commonly seen." This "use or lose" approach is not consistent with either military history or good military practice. For example, a flamethrower is a weapon of choice for the assault of fortified emplacements, but not for a high mobility war, or long infantry patrols. These examples illustrate the SIrUS Project's highly academic, yet impractical, approach.

A. Analysis of the SIrUS Project Criteria

As indicated above, the SIrUS Project believes that each criterion is an independent basis for determining whether a weapon causes unnecessary suffering or superfluous injury. In analyzing these criteria, the first four will be analyzed as a group; the remaining three will be analyzed separately.[104] A critique of the SIrUS Project as a whole will follow.

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[97] Rogers, *supra* note 61, at 521
[98] Parks Interview III, *supra* note 94.
[99] *Id*.
[100] *Id*.
[101] W. Hays Parks, *Memorandum of Law: Trauvaux Preparatoires and Legal Analysis of Blinding Laser Weapons Protocol*, ARMY LAW. June 1997, at 33-41.
[102] Parks Interview III, *supra* note 94.
[103] *Id*.
[104] COUPLAND, THE SIRUS PROJECT, *supra* note 4, at 22. Note that this information comes from COUPLAND, THE SIRUS PROJECT, not from the ICRC, THE SIRUS PROJECT. *Id*.

1. Criteria 1-4 - Specific Disease, Abnormal State, Disability, or Disfigurement

According to these criteria, any conventional weapon that causes any foreseeable disease, abnormal psychological or physiological effect, or disfigurement, would be illegal under international law.[105] Criteria 1-4 apply to chemical and biological weapons, most of which have already been prohibited by treaty law. They also apply to point-detonating anti-personnel mines, some of which SIrUS supporters claim have also been prohibited by treaty law. While these weapons may have been prohibited, it was not because the international community concluded that the injuries to combatants constituted unnecessary suffering or superfluous injury. Criteria 1-4 would also apply to weapons designed to cause a specific physical trauma, and weapons designed to disorient, confuse, induce calm or precipitate seizures or psychosis.[106] SIrUS is also targeting blinding laser weapons and all classes of non-lethal weapons.[107]

At a minimum, qualitative and quantitative limits for these criteria, especially regarding the duration and degree of impairment, should be defined. These criteria fail to take into account the risk to which a soldier is exposed on a conventional battlefield. The basic premise underlying the law of war and the legality of weapons is that soldiers may suffer death or serious bodily harm as a result of the lawful use of lawful weapons. As Colonel Alex Hawley, Chief of Staff, Army Medical Directorate, United Kingdom, explained at the Jongny sur Vevey meeting, the soldier's dilemma is that he may be required to take the life of another, or others, and he (or she) may have his life taken from him or her.[108]

As written, the criteria could lead to a categorical ban on these classes of non-lethal weapons before they are even developed. This could lead to perverse outcomes such as the decision to use a more lethal weapon with potentially more serious consequences to an enemy soldier. Moreover, if severe limitations were placed on the incapacitating effect of a weapon, individual soldiers would likely respond by firing more rounds at the enemy, causing greater wounds and an increased chance of death. Also, a more precise definition is needed for "disfigurement." Disfigurement frequently occurs from burn, penetrating, blast and other injuries inflicted by legal weapons.

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[105] *Id.* at 23 (stating "[t]hus a weapon which, for example, causes facial disfigurement as a foreseeable effect would give rise to the need for multiple reconstructive operations in a specialized facility [and thus c]riterion 1 would apply"). The SIrUS Project uses a very limited definition of conventional weapon.

[106] *Id.* (distinguishing normal foreseeable effects such as fear and stress from weapons designed to produce a abnormal effect such as confusion, calm, or disorientation).

[107] *Id.* at 25-26.

[108] *Jongny sur Vevey Memorandum*, *supra* note 5.

The criteria also draw an artificial distinction between the effects of lawful conventional weapons (except point-detonating anti-personnel mines and anti-materiel weapons) and the effects of all other weapons.[109] By doing so, the SIrUS Project ignores the treaty and customary law principles of military necessity and proportionality, and categorically bans all non-lethal weapons. Oddly, it is the non-lethal weapons that have the potential for dramatically reducing battlefield deaths.

These criteria fail to account for the reality of a pitched battle, where soldiers are exposed to a variety of lethal anti-personnel and anti-materiel weapons. In his recap of the famous October 3, 1993 battle in Mogadishu, Mark Bowden describes a Task Force Ranger who lost his leg to a rocket-propelled grenade.[110] These types of wounds, usually fatal, can be found described in current military medical literature.[111] Similar historical examples abound. A 20mm projectile decapitated a British soldier while fighting in France in 1944; Jock Lewes, co-founder of the British Special Air Service, died when struck in the leg by a German 20mm cannon shell that severed the main artery.[112] By excluding lawful wound-producing mechanisms common to the battlefield, and data related to their wounds or mortality rates, the SIrUS Project undermines its purported intent: to provide "objective" criteria for determining whether new weapons cause unnecessary suffering and superfluous injury.

Criterion 2 applies to exploding bullets, dum-dum bullets, and most incendiary weapons.[113] Once again, SIrUS ignores the fact that in some cases, after balancing military necessity against unnecessary suffering or superfluous injury principles, the use of a incendiary weapon, rather than a multitude of accepted conventional weapons, could actually save lives. The fallacy of this criterion, and its condemnation of incendiary weapons, is that governments, carefully weighing the value and risks of incendiary weapons at the original UNCWC conference (1978-1980), specifically rejected calls from a minority to prohibit their use against combatants.[114]

2. Criterion 5—Field and Hospital Mortality Rates

This criterion defines a weapon causing an injury that has a field mortality rate beyond 22 percent, or a hospital mortality rate above 5 percent,

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[109] COUPLAND, THE SIRUS PROJECT, *supra* note 4, at 23 (acknowledging that all weapons produce fear and stress—these reactions are neither specific nor abnormal).
[110] *See* MARK BOWDEN, BLACK HAWK DOWN 192 (1999).
[111] *See* MAJOR JAMES C. BEYER, MC, USA, WOUND BALLISTICS 410-11, 452-53, 456, 459-60, 468-69 (1962).
[112] *See* DERRICK HARRISON, THESE MEN ARE DANGEROUS 129 (1988); *see also* JOHN LEWES, JOCK LEWES – CO-FOUNDER OF THE SAS 240-241, 247 (2000).
[113] COUPLAND, THE SIRUS PROJECT, *supra* note 4, at 24.
[114] *See* Parks, *supra* note 61, at 550.

as causing unnecessary suffering and superfluous injury.[115] The mortality criterion is designed to encompass weapons that cause death in the field, as well as death following treatment in a medical facility.[116] The SIrUS Project does not consider that the level of medical expertise available, and the time it takes to evacuate an injured person from the field to a hospital, impacts the mortality rate. The ICRC accumulated its data on war wounded from field hospitals in less-developed countries.[117] However, it could not distinguish how many of these people were killed outright from war and perished before reaching a field hospital.

The mortality rate criterion depends on "well-equipped field hospitals," and, "well-recognized and proven treatment."[118] Unfortunately, neither is capable of being specified in a measurable way. Field hospital facilities, on which the mortality data are based, are not standardized. The availability of advanced military medical facilities will result in very different mortality rates from those suffered by a less well-equipped enemy. This may cause perverse implications with regard to a weapon's legality. In effect, the legitimacy of one side's weaponry would be tied to the medical expertise of its enemy.

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[115] COUPLAND, THE SIRUS PROJECT, *supra* note 4, at 24.

[116] *Id*.

[117] COUPLAND, THE SIRUS PROJECT, *supra* note 4, at 15 (noting the ICRC's wound database grew out of a simple system of data collection which was originally designed to give an indication of the activities of independent ICRC hospitals whose war-wounded patients had been admitted to ICRC hospitals in Peshawar and Quetta (Pakistan/Afghan border), Kabul (Afghanistan), Khao-I-Dang (Thai/Cambodian border), Butare (Rwanda) and Lokichokio (Kenyan/Sudenese border)). Coupland states:

> A data form filled out on their death or discharge from surgical wards was as part of the hospital routine. The database currently contains data relating to 26,636 patients, of whom (33.1%) were females, males less than sixteen years old or males of fifty years or more and hence were unlikely to have been combatants. Included in the information recorded for each patient is the cause of injury, the time lapse between injury and admission, the wound classification, the region or regions injured, whether the patient has died, in the hospital, the number of operations, the number of units of blood required, the number of days spent in the hospital, and whether the patient was discharged with amputation of one or both lower limbs. There are inevitably an unknown proportion of forms that are not filled out correctly; an enormous effort has been made to reduce this proportion to a minimum. The readiness of surgeons to score wounds according to the Red Cross wound classification is variable. Some patients lie about the cause of their injury to gain admission to hospital or may not have known exactly what injured them. Because [of] the constraints imposed on the collection of these data under field conditions, their 'validity' and 'reliability' have not been ascertained by formal independent means.

Id.

[118] *Id*. at 25.

Additionally, the medical data contains no information on the most critical period for survival–the time between field injury and hospital treatment. No time frames are specified when establishing the statistical basis for a legal judgment on the injury or mortality caused by weapons. The data could come from a single engagement, a battle, or an entire conflict. It is likely that very different results could emerge according to the time frame chosen. Nevertheless, SIrUS states, "the figures of 22 percent and 5 percent for field and hospital mortality respectively, are proposed as limits which are on the conservative side of the established baseline."[119]

Furthermore, in practice, it is virtually impossible to distinguish injuries and mortality caused by the inherent design-dependent effects of a weapon from those caused by the way it is used. No account is taken, for example, of weapons with high lethality, like sniper rifles, which are designed to be used in a highly discriminating way. Nor does the criterion contemplate a weapon's use across the spectrum of conflict where other wounding effects are likely to vary and impact mortality.

The ICRC percentages also do not account for other, historical factors. For example, the following casualty figures have been found for two World War II battles, one brief, one extended. The First Marine Raider Battalion landed on Tulagi on August 7, 1942, where it fought a two-day pitched battle against Japanese Special Landing Forces.[120] The Marines suffered thirty-eight killed and fifty-five wounded.[121] This represents a fatality rate of 37 percent. Of the Japanese force of approximately 350 men, all but three were killed—a near-100 percent fatality rate for the enemy force.[122]

In two parts of the New Guinea campaign (July 1942 to January 1943), the forces involved suffered the following casualties:

New Guinea (July 1942 to January 1943)[123]

Force	Wounded	Killed	% Killed to Wounded
United States	2,172	671	23.6
Australian	347	279	44.56
Japanese	3,000*	12,000	79.92

*estimated sick and wounded

[119] *Id*.
[120] JOSEPH H. ALEXANDER, EDSON'S RAIDERS—THE 1ST MARINE RAIDER BATTALION IN WORLD WAR II 102 (2001).
[121] *Id*.
[122] *Id.*
[123] *See* SAMUEL MILNER, VICTORY IN PAPUA 372 (1957); *see also* RAYMOND PAULL, RETREAT FROM KOKODA 229 (1958).

The high Japanese fatality rate may be attributed, in part, to the World War II Japanese philosophy of *gyokusai*—no surrender. It also may be attributed to the fact that jungle warfare involved battles at close range, which traditionally increase the percentage of fatalities *vis-à-vis* wounded in action.[124] Percentages of killed in action also are higher for forces engaged in offensive, rather than defensive, operations.[125] Thus, the SIrUS criterion does not account for many common variables found in combat situations.

This SIrUS criterion also assumes that the wounding mechanism causing death can be determined. This will not always be the case. Often, casualties will have so many wounds inflicted by multiple means—artillery and/or mortar fire, small arms, land mines, Claymores, and/or hand grenades–that it is impossible to determine the cause of death.[126] The cause of injury or death is often not ascertained or recorded. Understandably, medical personnel are more interested in treating the wound than being precise about the wounding mechanism. Also, in the interests of treatment, much of the wound data reports the location of the wound rather than the wounding mechanism. Not surprisingly, the greatest percentages of fatalities are in persons struck in the head or thorax.[127] This is the opposite of Coupland's experience in ICRC field hospitals where most patients were victims of antipersonnel landmines who suffered injury to the lower extremities.[128]

Because victims usually suffered multiple wounds, the leading fatality producing mechanism in World War II was the machinegun.[129] Even so, the cause of death cannot always be determined due to multiple wounds. This highlights another flaw in the SIrUS criteria—it fails to account for the synergistic effect of combined arms employment on the battlefield. It erroneously assumes that each soldier will be injured or killed by only one type of weapon. The law of war entitles a military commander to bring maximum power to bear on an enemy force. A major flaw in the SIrUS criteria is its ignorance, or intentional disregard, of this fact.

3. Criterion 6—Wound Classification

Criterion 6 involves any Grade-3 wound as measured by the Red Cross wound classification system.[130] This criterion defines any weapon as unlawful, which, without targeting a particular part of the body, simply inflicts

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[124] BEYER, *supra* note 111, at 271, and tbl. 52.
[125] *Id*. at 278.
[126] *Id.* at 308 at fig. 177 (depicting Japanese soldiers killed on the perimeter of Company F, 129th Infantry, 37th Division, in the World War II Bougainville Campaign).
[127] BEYER, *supra* note 111, at 258, 314-15.
[128] Parks Interview III, *supra* note 94.
[129] *Id*. at 271-72, 325, 379.
[130] COUPLAND, THE SIRUS PROJECT, *supra* note 4, at 24 (pronouncing Grade 3 as the threshold for defining injury as "unnecessary suffering or superfluous injury").

large wounds.[131] SIrUS states that conventional weapons produce less than 10 percent Grade 3 wounds, and that "this figure would be exceeded by any missile or wave form which carried much more energy and which foreseeably deposited this energy in the human body over a short track."[132]

An initial problem with this criterion is Coupland's use of "energy deposit," which has been challenged by leading experts on wound ballistics. As one expert has commented, "Any attempt to derive the effect of bullet impact in tissue using energy relationships is ill advised and wrong because the problem cannot be analyzed that way and only someone without the requisite technical background would try."[133] But Coupland and the ICRC used "energy deposits" anyway, exposing another flaw in their failure to submit SIrUS to peer review prior to publication.

Another problem with the wound classification scheme is that it fails to consider the relevant aspects of normal or intended weapon use. Under this criterion, exploding bullets and dum-dum bullets would be illegal.[134] However, any number of other legal weapons could also be deemed illegal or legal without considering whether the wound was produced within or outside of the weapon's intended use. Wounds vary according to the distance from which the weapon is fired. For example, .50 caliber weapons historically have been employed for anti-materiel and anti-personnel purposes. The heavy projectile weight and velocity enables it to engage targets up to 4,000 yards away.[135] An enemy soldier struck by a .50 caliber projectile at 150 yards would suffer a substantially more severe wound than one struck at 1,500 yards. Medically speaking, it would be easy to distinguish which soldier was the more severely wounded. However, the severity of the wound says nothing about the weapon's intended use.

Additionally, the analyses of wounds, especially bullet wounds, is complex. The size of the wound in and of itself may not be a good indicator of the scale of suffering inflicted or the probability of lethality. The effect of a wound caused by bullets entering the body will vary according to the elasticity of the tissue damaged.[136] Moreover, the wounding effect of any projectile will depend on where and what it hits in the body. Although SIrUS admits some lawful weapons can produce greater than Grade 3 wounds,[137] it doesn't seem to fully appreciate the arbitrary manner in which this particular criterion could be used. Weapon-specific conventions, those conventions that specifically

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[131] *Id*.
[132] *Id*.
[133] *See* DUNCAN MACPHERSON, BULLET PENETRATION: MODELING THE DYNAMICS AND THE INCAPACITATION RESULTING FROM WOUND TRAUMA 7 (1994).
[134] COUPLAND, THE SIRUS PROJECT, *supra* note 4, at 24.
[135] Parks Interview I, *supra* note 5.
[136] *See* EMERGENCY WAR SURGERY: SECOND UNITED STATES REVISION OF THE EMERGENCY WAR SURGERY NATO HANDBOOK 17 (Thomas E. Bowen & Ronald F. Bellamy, eds., 1988).
[137] COUPLAND, THE SIRUS PROJECT, *supra* note 4, at 24 (asserting that conventional weapons produce less than 10 percent Grade 3 wounds).

address a given weapon or weapon system, would avoid this pitfall. Medical experts participating in the second ICRC experts meeting at Jongny sur Vevey identified an error in Coupland's characterization of Class 2 and Class 3 wounds.[138] While the error was acknowledged in the ICRC meeting report, it was not corrected.[139]

4. Criteria 7—Absence of Recognized or Proven Treatment

This criterion states that a weapon causes unnecessary suffering or superfluous injury when it produces an injury for which there is no well-recognized or proven treatment.[140] It contemplates legality based on a race between weapons technology and medical technology. The criterion does not, however, specify a baseline for medical facilities—that is whether a developed or under-developed nation's baseline for medical facilities is used. As mentioned in criterion 5's analysis, regardless of which baseline is ultimately selected, it could be used by one party to seek a perverse advantage. Medical and legal experts attending the Jongny sur Vevey meeting challenged this criterion because no data could be produced by the SIrUS Project to substantiate it.[141]

B. Overarching SIrUS Project Critique

SIrUS proponents believe conventional weapons are an acceptable baseline (not producing any of the criterion above unless used unlawfully). After excluding certain lawful conventional weapons, SIrUS boldly claims, "Any other foreseeable effects of weapons would therefore constitute superfluous injury or unnecessary suffering."[142] The criteria are limited to design-dependent weapons. Thus, at the heart of SIrUS is the proposition that the health effects of a weapon should be considered before, if not instead of, its nature, type or technology.[143]

SIrUS acknowledges this view is a reversal of current thinking.[144] Accordingly, SIrUS remarks that in cases such as the dum-dum bullet and blinding laser weapon, it was the technology (intent of the bullet and laser) that was banned and not the effects on the human being. It further argues, "Bullets

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[138] *ICRC SIrUS 2001 Summary Report*, *supra* note 5, at 5. The report errs in stating that only one medical expert noted this error. Four medical experts, representing U.S., Sweden, Denmark, and United Kingdom, agreed on the error. Parks Interview III, *supra* note 94 (Mr. Parks participated in the meeting.).
[139] Parks Interview III, *supra* note 94.
[140] COUPLAND, THE SIRUS PROJECT, *supra* note 4, at 25.
[141] Parks Interview III, *supra* note 94.
[142] COUPLAND, THE SIRUS PROJECT, *supra* note 4, at 22.
[143] *Id.* at 7.
[144] *Id*.

causing large wounds should have been prohibited in 1899; intentional blinding as a method of warfare should have been prohibited in 1995."[145]

This bold assertion highlights a fundamental flaw with the Project—it claims that it knows what weapons should be prohibited better than governments do. Governments declined to prohibit "large wounds" and blinding as such. Following debate and full consideration, they determined such prohibitions were impractical.[146] Governments, not the ICRC, bear the responsibility for self-defense and maintaining world order, and governments, not the ICRC, have the responsibility for determining what weapons are lawful.[147] The prohibition of dum-dum bullets and blinding lasers weapons exposes a fundamental defect in this part of international law.[148] SIrUS offers itself as the objective fix to this so-called defect.

At first blush, and especially to those inexperienced in these matters, the ICRC's SIrUS Project, its criteria and arguments, seem credible. However, upon closer examination, it is clear that the SIrUS Project's foundation is based on flawed, inaccurate, and limited data. The criteria that flow from that flawed data could, if implemented, lead to perverse results. By and large, the Project is an unrealistic approach to determine which weapons cause unnecessary suffering or superfluous injury.

First and foremost, the ICRC's SIrUS Project does not account for customary international law principles and treaty-based laws regarding unnecessary suffering and superfluous injury determinations. It overly emphasizes unnecessary suffering and superfluous injury to the near exclusion of military necessity, and the logical point that, in war, suffering results from the lawful application of military force. The SIrUS Project, at best, fails to understand, or at worst, chooses to ignore, the other side of the unnecessary suffering or superfluous injury balancing equation.[149]

By omitting the military necessity principle from the balancing test, it fails to consider, for example, that bullets not intended to cause large wounds may do so, even when lawfully used. Also, the military necessity to use a particular weapon may exceed the SIrUS criteria, but save many lives in the process. The SIrUS Project probably intended to render as many weapons illegal as possible by effectively turning a blind eye to the military necessity principle. But, in doing so, it undermines its own credibility because it is acting in a manner wholly inconsistent with the customary practices of nations.

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[145] *Id*. at 14.
[146] Parks Interview III, *supra* note 94.
[147] Despite repeated efforts, the ICRC has received no mandate from governments for involvement in the determination of weapons issues. *See* Mk 211 Review 14 Jan 2000, *supra* note 20, at 5 (providing a brief history of the ICRC's failed efforts to obtain a mandate).
[148] *Id*.
[149] *See generally* The St. Petersburg Declaration of 1868, *supra* note 20, The Hague Convention No. IV, Protocol I, COMMENTARY ON PROTOCOL I, *supra* note 3; Meyrowitz Article, *supra* note 3.

Additionally, the SIrUS Project's entire foundation of health-based criteria depends upon the ICRC's wound database. The database is solely based on information from field hospitals in Third World Countries.[150] The casualty figures are primarily, if not exclusively, based on treatment of wounds in domestic disturbances or civil wars in the least developed of less-developed nations.[151] These wounds do not always reflect the multiple-source injuries found on the modern battlefield. Of the 26,636 casualties in its data bank, Coupland admitted that only one was documented as being wounded by more than one means.[152] This is hardly a reflection of modern warfare. Accordingly, the database fails to reflect either the wounds from actual warfare or the employment of modern medical facilities in a conflict.

The ICRC casualties and wound criteria do not account for the synergistic effect of combined arms employment on the modern battlefield. The United States Army's leading expert on this issue, Mr. W. Hays Parks, argues: "[The ICRC data] is basically talking about a gunfight that is going on in some third-world country between some civilians, which has nothing to do with how the military uses it weapons on the battlefield. In the SIrUS figures, when you get the 26,000, you don't know how many actually died."[153] He further notes that, without a valid rate of killed in action, it is impossible to know the true effect of a particular weapon.[154] Military, medical and legal experts attending the ICRC-hosted meeting at Jongy sur Vevey also found the wound database insufficiently valid and too limited to be credible.[155]

Finally, as mentioned previously, the ICRC is a private non-governmental organization located in a neutral country. Its mandate comes from governments, which have repeatedly declined to give it what it wants with respect to weapons issues. Its expertise is not in the area of weapons employment and warfighting, yet it continues to sponsor the SIrUS Project. To further its one-dimensional view of injury and suffering, the SIrUS Project ignores or omits all other relevant factors applicable to the determination of the lawfulness of weapons that are not of a medical nature.[156] The following proposal is a way in which the ICRC and its SIrUS Project might realistically, and positively, reduce unnecessary suffering or superfluous injury in future conflicts.

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[150] *See supra* note 117.
[151] *Id*.
[152] *Id*.
[153] Andrew Koch, *Should War Be Hell?*, JANE'S DEFENSE WEEKLY, May 10, 2000, at 24 (quoting, in his own words, "a renowned scholar and recognized legal expert in the field of weapons legality," Mr. W. Hays Parks, Special Assistant to the United States Army, Judge Advocate General).
[154] *Id*. at 25.
[155] Trip Report 19 May 1999, *supra* note 46, at 7.
[156] COUPLAND, THE SIRUS PROJECT, *supra* note 4, at 26-27.

IV. PROPOSAL: AN ICRC SHIFT IN FOCUS

In May 1999, the ICRC hosted the first of two meetings of medical, legal, and military experts to comment on the SIrUS Project.[157] Although some medical associations had endorsed the SIrUS Project,[158] the invited experts did not. Thus, SIrUS remains a highly controversial undertaking that is strenuously opposed by many governments, international law scholars, and other legal and medical professionals in the international community.[159] The invited experts challenged the Project's underlying assumption that the "twentieth century has seen enormous human suffering caused by [unlawful] weapons."[160] The experts offered that the real problem is not unlawful weaponry, but the misuse of lawful weapons as witnessed in Cambodia, Rwanda, Kosovo, East Timor, Sierra Leone, and other third world nations.[161] Moreover, several experts agreed, including one from the United States, that the problem is too few parties to Protocol I, which requires a formal weapons review program,[162] are meeting that obligation.[163] As previously stated, of the 154 parties to Protocol I, less than ten were known to have complied with this obligation. The ICRC argues that SIrUS would give states with limited resources a set of objective criteria to help meet this requirement.[164]

The ICRC's response places the cart before the horse. Governments not complying with the mandate should be assisted and encouraged to establish a weapons review program based on law of war principles before exposure to the SIrUS Project. Otherwise, many countries, especially the underdeveloped ones, may be misled. These governments could mistakenly believe that the SIrUS criteria represent the current law of war standards. One expert summed it up best noting that Sweden has had a weapons review program since 1972—she saw no need for the SIrUS criteria.[165] Several other countries agreed and stated that the ICRC's weapon effort is a misplaced priority.[166]

The ICRC made cosmetic revisions to the SIrUS Project following its first experts meeting. At its second experts meeting, Coupland acknowledged

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[157] Trip Report 19 May 1999, *supra* note 46, at 7.
[158] *ICRC, The SIrUS Project*, *supra* note 4, at Annex 2.
[159] Trip Report 19 May 1999, *supra* note 46, at 7 (stating that at the ICRC's meeting of experts held in Geneva May 10-11, 1999, near-consensus was reached among the invited experts that the SIrUS criteria are flawed, either as a result of questionable data or ambiguous standards).
[160] COUPLAND, THE SIRUS PROJECT, *supra* note 4, at 7.
[161] Trip Report 19 May 1999, *supra* note 46, at 1. *See Massive Evacuation from Borneo Set*, WASH. TIMES, Feb. 24, 2001, at A-7. Daniel Cooney, *Thousands Flood Ship to Flee Borneo After Ethnic Attacks*, THE WASH. TIMES, Feb. 25, 2001, at A-8.
[162] Protocol I, art. 36, *supra* note 3.
[163] Trip Report 19 May 1999, *supra* note 46, at 4.
[164] *Id.* at *5*. As previously indicated, the number of States Parties to Protocol I has increased to 158 without any increase in the number of States with weapons review programs. *See id.*
[165] *Id*. at 4.
[166] *Id.* at 2.

that SIrUS remained fundamentally unchanged.[167] Consequently, it remains fundamentally flawed. Many nations, including the United States, Germany, Sweden, Canada, Denmark, and the United Kingdom—all traditional supporters of the ICRC, and among its largest contributors—cannot support the Project in its current unrealistic format for assistance in weapons reviews.[168] However, some nations note the Project could potentially provide useful information to the medical community for treatment of war wounds in general.[169] Accordingly, in order to address these concerns, the ICRC should shift the focus of its efforts to promoting implementation of weapons review.

The ICRC shift should start with education and strong encouragement to comply with the weapons review mandate of Article 36, Protocol 1. It should also offer a weapons review template for countries to model. In this light, the United States' weapons program now will be examined. It will be proposed as the model for nations who do not now comply with Article 36 to implement their own weapons review procedures.

A. The United States Weapons Review Program

Based upon lessons learned from our experience in the Vietnam War, the Department of Defense (DoD) promulgated its first formal directive on training and other implementation of its law of war responsibilities.[170] At the same time, it promulgated its first instruction implementing the weapons review program.[171] That instruction was further implemented through separate regulations in each of the three military departments.[172] Experience showed that while many weapons were receiving the required legal review, a "stand alone" directive did not ensure that all program managers or acquisition commands were aware of the requirement.[173] Consequently, in 1996, the requirement was incorporated into the DoD Acquisition Directive.[174] Also in

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[167] *Jongny sur Vevey Memorandum*, *supra* note 5, at 2.
[168] See the FINLAND, FMOD, UK, SWEDISH; and UNITED STATES DOCUMENT, all *supra* note 84.
[169] *Id*.
[170] Parks Interview I, *supra* note 5.
[171] *See* U.S. DEP'T OF DEFENSE INSTR. 5500.15, REVIEW OF LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW, (Oct. 16, 1974) [hereinafter DOD INSTR. 5500.15].
[172] *See* U.S. DEP'T OF AIR FORCE INSTR. 51-402, WEAPONS REVIEW DEFENSE, (May 13, 1994) [hereinafter AFI 51-402]; U.S. DEP'T OF ARMY, REG. 27-53, LEGAL SERVICES: REVIEW OF LEGALITY OF WEAPONS UNDER INTERNATIONAL LAW, (Jan. 1, 1979) [hereinafter AR 27-53]; U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5000.2B, IMPLEMENTATION OF MANDATORY PROCEDURES FOR MAJOR AND NON-MAJOR DEFENSE ACQUISITION PROGRAMS AND MAJOR AND NON-MAJOR INFORMATION TECHNOLOGY ACQUISITION PROGRAMS, (Dec. 6, 1996) [hereinafter SECNAV INSTR 5000.2B].
[173] Parks Interview I, *supra* note 5.
[174] *See* DOD DIR. 5100.77, *supra*, note 6, at para. 2.3 ("[I]n further implementation of this Directive, that part of the law of war relating to legal reviews of the development, acquisition, and procurement of weapons and weapons systems for the DoD components is addressed in DoD Directive 5000.1 . . . ."); U.S. DEP'T OF DEFENSE, DIR. 5000.1, DEFENSE ACQUISITION,

1996, the DoD instituted its program for the development of non-lethal (or "less lethal") weapons.[175] The procedural and substantive components of the weapons program will now be examined.

1. The Procedural Aspects of United States Weapons Review Program

In order to understand the procedural aspects of the weapons review program, a brief explanation of the United States' weapons acquisition process is necessary.[176] The U.S. military acquires a weapon or munition to meet an expressed, detailed, stated requirement.[177] Comprehensive testing and evaluation to ensure that the weapon or munition meets performance specifications set forth in the operational requirement precede acquisition.[178] This testing, evaluation, and acquisition is conducted under the supervision of a program manager for the object in question. A program manager is an employee of the department or command responsible for acquiring the weapon or munitions.[179]

(15 Mar. 1996) [hereinafter DOD DIR. 5000.1] replaced by DOD DIR 5000.1, DEFENSE ACQUISITION (23 Oct. 2000) [hereinafter DIR. 5000.1]. Note that the language referenced in DOD DIR. 5100.77 is currently found in U.S. DEP'T OF DEFENSE, INS. 5000.2, DEFENSE ACQUISITION (23 Oct. 2000) [hereinafter DOD INSTR. 5000.2] para. 4.7.3.1.4 (appointing the general counsel and alternatively the service judge advocate general responsible for reviewing the legality of weapons in international law). This paragraph states:

> DoD acquisition and procurement of weapons and weapon systems shall be consistent with all applicable domestic law and all applicable treaties, customary international law, and the law of armed conflict (also known as the laws and customs of war). The Head of each DoD Component shall ensure that all Component activities that could reasonably generate questions concerning compliance with obligations under arms control agreements to which the United States is a party shall have clearance from the USD(AT&L), in coordination with the General Counsel, DoD, and the Under Secretary of Defense (Policy), before such activity is undertaken. The Head of each DoD Component shall ensure that the Component's General Counsel or Judge Advocate General, as appropriate, conducts a legal review of the intended acquisition of a potential weapon or weapon system to determine that it is consistent with U.S. obligations. The review shall be conducted again before the award of a system development and demonstration contract for the weapon or weapon system and before the award of the initial production contract. Files shall be kept permanently. Additionally, legal reviews of new, advanced or emerging technologies that may lead to development of weapons or weapon systems are encouraged.

[175] *See* U.S. DEP'T OF DEFENSE, DIR. 3000.3, POLICY FOR NON LETHAL WEAPONS, (Jul.9, 1996) [hereinafter DOD DIR. 3000.3].
[176] DOD INSTR. 5000.2, *supra* note 174.
[177] *Id*. at para. 1.1.
[178] *Id*. at para. 1.3.
[179] *Id*. at para. E2.1.17.

It is the program manager's responsibility to comply with DoD directives.[180] Failure to comply can result in termination of the particular program,[181] which would certainly adversely impact the manager's job performance evaluation. Hence, there is an incentive to comply and cooperate with defense acquisition requirements, including the requirement for a legal review. Likewise, if a private defense contractor wishes to sell his product to the military, it is in his or her interest to cooperate with the program manager and the office conducting the legal review of the weapon.

Simply stated, if there is a requirement for a weapon or munition, and a defense contractor wishes to sell a product to the DoD to meet the requirement, a legal review must be conducted before a purchase is approved and the contractor is paid. The remaining sections will describe who conducts the weapons review, when the review takes place, and the subject of the review.

a. Who Conducts the Weapons Review?

The Judge Advocate General of the military department with primary responsibility for weapon or munition acquisition is responsible for conducting the legal review.[182] If more than one military department is acquiring the weapon or munition, the review is prepared by the Judge Advocate General for the military department with primary responsibility for its acquisition.[183] It must then be coordinated with its relevant counterpart offices.[184] For example, a legal review for a weapon or munition that may raise a significant question of law must be coordinated with each of the Offices of the Judge Advocates General, the General Counsel, Department of Defense and, if appropriate, with the Office of the Legal Advisor, Department of State.[185]

The legal review must be accomplished by an individual with the proper qualifications. He or she must have a thorough working knowledge of the law of war and arms control, and a substantial working knowledge of weapons and military doctrine (this includes an equally substantial knowledge of military history).[186] The legal review of a new weapon or munition cannot be conducted in a vacuum. The individual must also have a working relationship with other experts, such as engineering and medical experts, who

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[180] *Id*.
[181] *Id*.
[182] *Id.* at para. 4.7.3.1.4.
[183] *See* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM, *supra* note 44 at para. 4.1. For an example of such a review, see Memorandum, Office of the Judge Advocate General of the Army, International and Operational Law, to The Judge Advocate General of the Army, Subject: Legal Review of Mk.211, MOD O, Cal. .50 Multipurpose Projectile, (17 Jan 1999) [hereinafter Multipurpose Projectile Review].
[184] *See* U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM, *supra* note 44, at para. 4.1.
[185] *Id*.
[186] *Id*.

can assist in collecting relevant information for preparation of the legal review.[187]

Not all reviews require the advice of outside experts. Some examples include reviews of an improved artillery system[188] or an anti tank system.[189] Neither weapon system offers any unique law of war questions. However, where a weapon or munition does pose unique questions, it may be necessary to consult experts in other fields of endeavor. For example, the legal review of the United States Army's new lead-free 5.56mm M855 cartridge (NATO SS109) required meetings with environmental experts, wound ballistics experts, and medical experts, to determine the possible toxicity of a tungsten-cored projectile.[190]

It is important that the information in the review be complete. For example, documentation for a less-lethal version of the M118 Claymore, which used rubber projectiles, initially did not indicate what steps had been taken to ensure that the projectiles were detectable by x-ray. If they were not detectable, the weapon would violate Protocol I of the 1980 United Nations Conventional Weapons Convention (prohibiting non-detectable fragments). [191] A discussion with the program manager confirmed that the projectiles were coated with five percent barium sulfate, thus complying with Protocol I. More importantly, a weapon or munition acquisition can be delayed indefinitely, or cancelled, if the information provided to conduct the legal review is not deemed sufficient for an adequate review.[192] The bottom line is that a weapon or munition cannot be acquired unless and until it receives a favorable legal review.

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[187] For an example of such a review, see Memorandum, Office of the Judge Advocate General of the Army, International and Operational Law, to The Judge Advocate General of the Army, Subject: Lead-free, Tungsten Cor 5.56mm Ammunition (15 Mar. 1999) [hereinafter Tungsten Core 5.56mm Review] (on file with author).

[188] For an example of such a review, see Memorandum, Office of the Judge Advocate General of the Army, International and Operational Law, to The Judge Advocate General of the Army, Subject: Crusader Weapon System (12 Jul. 1999) [hereinafter Crusader Weapon System Review] (on file with author).

[189] For an example of such a review, see Memorandum, Office of the Judge Advocate General of the Army, International and Operational Law, to The Judge Advocate General of the Army, Subject: Line-of-Sight Anti-Tank Weapon System (8 Jun. 2000) [hereinafter Tank Weapon System Review] (on file with author).

[190] Tungsten Core 5.56mm Review, *supra* note 187.

[191] Conventional Weapons of 1980, *supra* note 59, at Protocol I. For an example of such a review, see Memorandum, Office of the Judge Advocate General of the Army, International and Operational Law, to The Judge Advocate General of the Army, Subject: Modular Crowd Control Munition (13 Oct. 1998) [hereinafter Modular Crowd Control Review] (on file with author).

[192] For an example of such a review, see Memorandum, Office of the Judge Advocate General of the Army, International and Operational Law, to The Judge Advocate General of the Army, Subject: Bounding Non-Lethal Munition (7 Jan. 1999) [hereinafter Bounding Non-Lethal Review] (on file with author) (having been informed of legal requirements, the project manager determined compliance would not be cost effective) .

b. When the Weapon Review Takes Place

For obvious reasons, the weapons review must take place early in the acquisition process. The DoD acquisition system contains "milestones."[193] These are "gates" in the acquisition process where a weapon or munition passes through research, development, testing, and evaluation before the decision is made to place a contract to purchase it. The legal review comes early in this milestone process to ensure compliance with law of war principles and to prevent waste of government resources. If substantive changes in the weapon or munition occur as it passes through this process, a follow-on legal review is accomplished.[194]

c. What is Subject to a Weapons Review?

All weapons and weapons systems require review. Weapon platforms, however, are generally excluded from review.[195] Recognizing the role that new technologies may play in weapons or munitions development, the DoD directive encourages legal reviews of "new, advanced or emerging technologies that may lead to development of weapons or weapons systems."[196] This paper will now turn to the substantive aspects of the weapons review.

2. The Substantive Aspects of the United States Weapon Review Program

The substantive aspects of the review program relate directly to the law of war treaties to which the United States is a party. Customary law principles are also part of the substantive evaluation. The overarching treaty provision applicable to the United States is found in Article 23(e) of the Annex to the Hague Convention IV of 1907–"weapons that are calculated to cause unnecessary suffering."[197] For parties to Protocol I, the 1907 Hague IV norm is stated in Article 35. Article 35 updated, but otherwise did not amend, the

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[193] DOD INSTR. 5000.2, *supra* note 174, at para. 4.5.1
[194] *Id*. at para. 4.6.1.4.
[195] *See* U.S. DEP'T OF AIR FORCE POL'Y DIR. 51-4, COMPLIANCE WITH THE LAW OF ARMED CONFLICT, PARA. 6.5 (26 APR. 1993) [hereinafter AFPD 51-4] (defining the term "weapon" for the purpose of the policy directive and expressly excluding "aircraft, intercontinental ballistic missiles, and other launch platforms" from that definition). Note that weapon reviews are required under Additional Protocol I for weapons such as rifles, ammunition, and other instruments of warfare and their target or guidance hardware, not for weapons platforms such as planes, tanks, and ships. In the acquisition directives, the term weapons system is used interchangeably to describe weapons as well as weapon platforms.
[196] DOD INSTR. 5000.2, *supra* note 174.
[197] The Hague Convention No. IV, *supra* note 3.

requirement stated in Article 23(e) of the 1907 Hague Convention IV.[198] Each weapons review contains an analysis of the current legal standard. The review, including the discussion of the current standard, is the result of considerable research and experience, and has been coordinated with legal experts in each of the other military departments, the DoD General Counsel, the Office of the Legal Adviser, Department of State, and counterpart offices in other governments.[199]

The substantive aspects of a weapons review include detailed analysis of three fundamental areas:

- the weapon's mission and military advantage and, if relevant, its accuracy;
- the weapon's nature (taking into consideration of the prohibition contained in Article 23(e) of the Annex to Hague Convention IV of 1907, to include medical, scientific, and environmental effects); and
- the weapon's applicability (or non-applicability) to specific international law (law of war or arms control) rules or prohibitions.[200]

During the substantive portion of the weapons review process, each area listed above is broken down into additional factors and subfactors for evaluation. These subfactors primarily relate to the injury the weapon causes and its intended uses. This section will present and discuss these additional relevant factors.[201]

a. The Weapon's Military Mission and Advantage

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[198] Protocol I, *supra* note 3.

[199] Parks Interview I, *supra* note 5.

[200] *See* Memorandum, Office of the Judge Advocate General of the Navy International and Operational Law, to Commandant of the Marine Corps, subject: Legal Review of 40mm Rubber/Foam Rubber Multiple Baton/BeanBag/Wood Multiple Baton Rounds (30 Jan. 1995) [hereinafter Navy Review of 40mm Rounds] (on file with author). The review explains the extent of what the weapons review must cover:

> (1) whether the weapon causes suffering that is needless, superfluous, or disproportionate to the military advantage reasonably expected from the use of the weapon:
> (2) whether the weapon is capable of being controlled so as to be directed against a lawful target—not indiscriminate in their effect; and
> (3) whether there is a specific rule of law prohibiting its use in the law of armed conflict.

Id. at 2, 3.

[201] Recall that the SIrUS Project made no reference to this entire area of consideration in its proposal to determine which weapons produce unnecessary suffering or superfluous injury. Its determinations were completely effect-based and ignored the weapon's military utility or advantage.

The specific aspects of the weapon under review are examined during the acquisition process. The substantive part of a weapons review requires a determination that the weapon is legal under the international law standard of "superfluous injury or unnecessary suffering." This determination requires a balancing of the weapon's military necessity against the injury it produces. This balance is subjective in nature and complex. That is why the individual responsible for conducting the legal review must be an expert in international law obligations, and seek assistance from an array of multi-disciplinary experts, when necessary. The relevant factors considered and balanced under the military necessity standard include: the degree of injury the weapon may cause, the weapon's intended use, the threat posed by the potential enemy, and the weapon's enhanced utility.[202]

In the weapon review, the weapon's intended use is balanced against the military advantage afforded and the injury caused. This factor includes specific findings on the intended use of the weapon, whether it serves as a non-lethal alternative to other wounding mechanisms, and whether the injury caused by the weapon is incidental or collateral to its intended use.[203]

Balancing injury against military necessity to determine a weapon's legality under international law requires an analysis of the threat posed by the potential enemy. A specific threat may justify producing a specific type of weapon or munition, consistent with the law of war and arms control obligations of the United States. The nature of the threat opposed is key to the analysis.[204]

Consideration is given to the enhanced utility of a particular weapon—whether the weapon provides a unique or enhanced feature unavailable in other weapons. The enhanced utility, if any, is balanced against the weapon's military necessity and injury equation.[205]

The weapons review must consider the international law principle of distinction. Essentially, this is the user's obligation to consider a weapon's accuracy. For example, an artillery shell offering increased range but

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[202] Parks Interview I, *supra* note 5.

[203] For an example of such a review, see Memorandum for the Staff Judge Advocate, U.S. Special Operations Command, The Judge Advocate General of the Army, subject: Legal Review, Selectable Lightweight Attack Munition (SLAM) (2 May 1997) [hereinafter Army SLAM Review] (on file with author).

[204] For an example of such a review, see Memorandum for the Staff Judge Advocate, U.S. Special Operations Command, The Judge Advocate General of the Army, subject: Legal Review, Special Operations Forces Use of Hollow-Point Handgun Ammunition (27 March 1996) [hereinafter Army Hollow Point Review] (on file with author).

[205] For an example of such a review, see Memorandum for the Commander, Marine Corps Systems Command, The Judge Advocate General of the Army, subject: Legal Review, Joint Service Combat Shotgun Program (24 Jan. 1997) [hereinafter Army Combat Shotgun Review] (on file with author).

diminished accuracy as compared to existing, lawful artillery shells, would raise legal issues regarding discrimination.[206]

b. Degree of Injury the Weapon May Cause

To determine whether a weapon's military advantage outweighs the injury it causes, the weapons review assesses the degree of injury it produces. The degree of injury includes the trauma a weapon will cause, how that trauma measures against other weapons that perform similarly, and a determination of whether the weapon has been enhanced from a previous legal weapon to heighten its lethality.[207] It is within this section of the weapons review that the SIrUS Project's information, if verifiable and credible, could greatly assist nations using this or a similar model to conduct their weapons reviews.

c. Specific International Law Prohibitions

A final factor considered in a weapons review is whether the weapon is already prohibited by international law. This determination includes treaty-based limitations on the use of a particular weapon, whether contained in the law of war or arms control agreements.[208]

In sum, the United States weapons review program complies with all international law requirements. It specifically considers the prohibition of weapons calculated to cause "unnecessary suffering and superfluous injury." In its present, flawed form, the ICRC's SIrUS Project contributes nothing to the weapons review process. It would do well to study and replicate the United States' weapons review program for dissemination to parties to Additional Protocol I, rather than trying to "re-invent the wheel" with a program which has dubious credentials. The United States has offered to assist the ICRC in this endeavor,[209] even briefing its weapons review program at the Jongny sur Vevey experts meeting in January 2001, at the invitation of the ICRC. It remains to be seen whether the ICRC will take advantage this offer.

The SIrUS Project could be useful to the medical community if it redirects its focus to developing medical protocols for treating injuries. The ICRC's primary resources should be spent helping other nations implement weapons review programs (as well as other portions of the codified law of war,

[206] Parks Interview III, *supra* note 94. For an example of such a review, see Memorandum for Picatinny Arsenal, AMSTA-AR-GC, The Judge Advocate General of the Army, subject: Legal Review 155mm High Explosive, M795 Projectile (22 June 2000) [hereinafter Picatinny Review] (on file with author).
[207] Parks Interview III, *supra* note 94.
[208] For an example of such a review, see Memorandum for Commandant, U.S. Marine Corps, The Judge Advocate General of the Navy, subject: Legal Review of Sticky Foam (6 Feb. 1995) [hereinafter Navy Sticky Foam Review] (on file with author).
[209] Parks Interview III, *supra* note 94.

most particularly the four 1949 Geneva Conventions). This shift in focus would be more aligned with the ICRC's claimed role of "guardians" of the Geneva Conventions and the mandate provided by governments financing its operations.

V. WHOSE BAILIWICK IS IT ANYWAY?

Each sovereign national government is independently responsible for meeting its international humanitarian law obligations. The ICRC role, as a non-governmental organization, is to assist and encourage nations to meet these obligations.[210] The ICRC has always had a close and special relationship with international humanitarian law.[211] It reported on the problems it has encountered, and on that basis, has made practical proposals for the improvement of international humanitarian law.[212] However, regarding its sponsorship of the SIrUS Project, the ICRC is outside both its mandate and its expertise.

The SIrUS Project's goal is a treaty-regulated objective "health-based approach" to determine which weapons cause "unnecessary suffering and superfluous injury." The Project seeks to ban certain weapons categorically based upon criteria extracted from the ICRC field hospital database. The constraints imposed on collection of the data have made the data impossible to

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[210] *See* YVES SANDOZ, THE INTERNATIONAL COMMITTEE OF THE RED CROSS AS GUARDIAN OF INTERNATIONAL HUMANITARIAN LAW 6 (1998) [hereinafter ICRC GUARDIAN OF IHL] (explaining the ICRC's less well-know role as "guardian" of international humanitarian law).

[211] *Id.* Sandoz describes further

> "the 'guardian' role encompasses the following five functions:
>
> (1) the "monitoring" function – i.e., constant reappraisal of humanitarian rules to ensure that they are geared to the reality of conflict situations, and preparing for their adaptation and development when necessary;
> (2) the "catalyst" function – i.e., stimulating, especially within groups of governmental and other experts, discussion of problems encountered and possible solutions, whether such solutions involve changes to the law or otherwise;
> (3) the "promotion" function – i.e., defending international humanitarian law against legal developments that disregard its existence or might tend to weaken it;
> (4) the "direct action" function – i.e., making a direct and practical contribution to application of the law in situations of armed conflict;
> (5) the "watchdog" function – i.e., raising the alarm, first among the States and other parties directly concerned in an armed conflict, and thereafter among the international community as a whole, whenever serious violations of the law occur.

Id.

[212] *Id.* at 7.

validate. Consequently, the data underlying the criteria is unreliable and ill-suited for such an undertaking.

Military, medical and legal experts who attended each of the ICRC's expert meetings were uniformly critical of the ICRC database and the "health-based" approach to determining the legality of weapons. At the second expert meeting, British Colonel Alen Hawley pointedly commented, "War is a social problem, not a health problem."[213] Even if the data was credible, Article 36 of Protocol I puts the obligation on *States* to determine whether a weapon, means or method of warfare, would in some or all circumstances, be prohibited by the Protocols or by any other rule of international law applicable to the party.[214]

Article 35(2) does not define "unnecessary suffering" or "superfluous injury."[215] Article 36 of Protocol I does not regulate what criteria or norms should be applied when reviewing new weapons.[216] However, this does not give the ICRC a mandate to create binding definitions or establish binding criteria. The ICRC does not have the international mandate to create those norms because sovereign nations understand that the ICRC, as an institution, lacks the expertise for such an undertaking. States Parties have neither asked nor provided the ICRC with the mandate to undertake the SIrUS Project.

Although the SIrUS Project presupposes that "unnecessary suffering and superfluous injury" are absolute terms capable of measurement, it is implicit in Protocol I that these terms are relative, recognizing that some degree of suffering is an unavoidable part of war. The prohibition on "unnecessary suffering" constitutes the acknowledgment that, in war, there is such a thing as "necessary suffering" on the part of combatants, including death. British Colonel Hawley noted this by identifying "the soldier's liability:" to sometimes use lawful violence to take life and, on occasion, to be killed.[217] The law of war prohibits neither. Moreover, "superfluous" and "unnecessary" can only be reasonably interpreted in a specific military context. Whether a weapon is not "of a nature to cause superfluous injury or unnecessary suffering" depends upon careful review and the exercise of judgment by individuals with the requisite knowledge and expertise, appointed by their governments for this task.

As guardians of the law of Geneva, the ICRC has a mandate to assist and encourage governments to comply with their law of armed conflict obligations. Most nations are not implementing the weapons review requirement contained in Article 36, Protocol I.[218] The ICRC could make a significant contribution in this area. Instead, it is risking the erosion of central concepts of international humanitarian law with its flawed SIrUS Project.

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[213] *Jongny sur Vevey Memorandum*, *supra* note 5, at 4.
[214] Protocol I, *supra* note 3.
[215] *Id*.
[216] *Id*.
[217] *Jongny sur Vevey Memorandum*, *supra* note 5, at 4.
[218] Trip Report 19 May 1999, *supra* note 46.

Although well intentioned, the ICRC and the SIrUS Project appear to be trying to solve a problem that does not exist. There is no evidence showing a proliferation of illegal weapons. The contrary is true.[219] The international community meets regularly—at least every five years, to consider whether there is a basis to ban or regulate certain conventional weapons. The ICRC is permitted to attend these meetings solely as an observer.[220] Only States Parties to the UNCCW may vote to create or amend protocols. Governments have opted for the UNCCW, and other specific conventions, because they work.

The real problem regarding "unnecessary suffering" is the illegal use of lawful weapons.[221] That is what the ICRC has seen and reported on in recent years. The result of such misuse of weapons in war is cause for concern; however, the problem is mainly caused by certain underdeveloped countries and a handful of rogue nations engaging in civil-type wars and choosing brutality over humanity. As horrible as they are, the gross cases of civilian murders in Angola, Bosnia, Sierra Leone, Kosovo, and East Timor have no relationship to the lawful use of lawful weapons by conventional military forces in international armed conflict. The best SIrUS can do at this stage of its development is provide some useful information concerning treatment of the wounded.

The issues relating to the use of weapons that cause superfluous injury and unnecessary suffering are of great importance. However, there is a significant risk that the SIrUS Project could gain support, particularly among those with the least to lose, without it ever demonstrating that its proposals are workable. Nations with long records of failure to implement or respect the law of war treaties to which they are party, undoubtedly would delight in using SIrUS' flawed criteria.

These nations could try to prevent a nation such as the United States, with its long record of respect for the law of war, from developing, acquiring, and using legitimate weapons with which it can fight and win. That would surely undermine the responsibility of States to review the legality of weapons, means and methods of warfare, set out in Article 36 of Protocol I. It introduces a potential element of international arbitration into determining the legality of a weapon. Rather than achieving a universal improvement in the way force would be applied, the likely effect of SIrUS would be to increase the disparity in behavior and application of legal constraints between states and military organizations that are conscientious about humanitarian concerns and those that are not.

In sum, it is not the ICRC's, or any NGO's duty or responsibility to determine what weapons are lawful under international humanitarian law. Nor is it the ICRC's responsibility to define what constitutes "unnecessary

[219] Parks Interview III, *supra* note 94.
[220] *Id*.
[221] *Id*.

suffering or superfluous injury." Currently, both responsibilities rest squarely on sovereign nations. They should remain there unless and until these same nations indicate a willingness to give the ICRC a mandate.

VI. CONCLUSION

At the introductory section of this article questions were propounded. The answers are as follows:

(1) Should the determination of "unnecessary suffering or superfluous injury" be assessed solely with regard to so-called "objective health-based criteria" espoused by the SIrUS Project? Why SIrUS?

- No, the determination of "unnecessary suffering or superfluous injury" should not be assessed solely with regard to the so-called objective health-based criteria espoused by SIrUS. SIrUS is unnecessary; it is a flawed solution to a non-existent problem.

(2) Is the problem developing weapons that may cause "superfluous injury or unnecessary suffering," or the illegal use of lawful weapons, as in Kuwait (by Iraq), Angola, the Balkans, Sierra Leone, East Timor, and elsewhere?

- The problem is the illegal use of lawful weapons.

(3) Is there a clearly identified problem of illegal use of weapons in international armed conflict? Or, is SIrUS an ICRC expression of frustration with the anarchy of post-Cold War collapse of governments (Somalia, the Balkans), ethnic violence (the Balkans, East Timor), and violence against civilians in less-developed nations' internal conflicts (Angola, Eritrea, and elsewhere)?

- There is no clearly identified problem of illegal use of weapons in international armed conflict, but rather an illegal use in internal conflicts in less developed nations. This ethnic violence and violence against civilians in less developed nations' internal conflicts is outside of the scope of the ICRC's mandate.

(4) Should weapons reviews continue to make "unnecessary suffering or superfluous injury" determinations according to objective principles of military necessity, distinction, proportionality, and humanity applied subjectively by sovereign nations?

- Yes, the unnecessary suffering or superfluous injury determination in weapons reviews should continue to be assessed in accordance with the objective principles of international humanitarian law applied in good faith by sovereign nations.

(5) Currently, the trend is for nations to come together at Weapons Conventions to outlaw specific weapons. They do not use objective criteria, and the vote to outlaw is by consensus. Is this effective?

- Yes, the current trend of nations coming together at Weapons Conventions to consider the prohibitions or restrictions on certain specific conventional weapons without objective criteria and with voting by consensus is effective.

(6) What is the best approach to fill the "unnecessary suffering or superfluous injury" vacuum left undefined by treaty and customary international law? Is a more stringent adherence to Protocol I-mandated weapons review programs (similar to that of the United States') a better approach than the implementation of the SIrUS Project?

- A more stringent adherence to Protocol I mandated weapons review programs similar to the United States' is a better approach than international endorsement and implementation of the flawed SIrUS Project. Within the United States weapons reviews, (arguably the most transparent of those nations who conduct the reviews) unnecessary suffering is defined, and to date no issue from any source has critiqued or opposed it.[222]

(7) Whose bailiwick is it anyway? In other words, who should be responsible to determine whether a particular weapon causes "unnecessary suffering or superfluous injury," governments, NGOs, or the UN?

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[222] *See* Mk 211 Review 14 Jan. 2000, *supra* note 20, at 17:

> [T]he prohibition of *unnecessary suffering* constitutes acknowledgement that *necessary* suffering to combatants is lawful, and may include severe injury or loss of life. There is no agreed definition for unnecessary suffering. Whether a weapon or munition causes unnecessary suffering is ascertained by determining whether the injury (including death) to combatants is manifestly disproportionate to its stated purpose(s), that is, its intended uses(s), and the military advantage to be gained from its use. In conducting the balancing test necessary to determine a weapons' legality, the effects of the weapon cannot be viewed in isolation. They must be examined against comparable, lawful weapons in use on the modern battlefield, and the military necessity for the weapon or projectile under consideration.

- It is the ultimate responsibility of sovereign nations to determine whether a particular weapon causes unnecessary suffering or superfluous injury, not NGO's like the ICRC, or the UN.[223]

[223] Isabelle Daoust, *ICRC, Expert Meeting on Legal Reviews of Weapons and the SIrUS Project*, 842 INT'L REV. RED CROSS 539-542 (June 30, 2001). The ICRC held an Expert Meeting on Legal Reviews of Weapons and the SIrUS Project (Jongny sur Vevey, Jan. 29-31, 2001) in response to the Plan of Action adopted at the 27th International Conference of the Red Cross and Red Cresent (Geneva, 1999). The Plan of Action called for a process of consultation between States and the ICRC on legal reviews of weapons and how the findings of the SIrUS Project could be taken into account. However, at the January 2001 meeting, the experts did not adopt conclusions or recommendations. The ICRC's proposals were not broadly accepted in the form presented in the SIrUS Project. However, the experts acknowledged the need for particularly rigorous and multidisciplinary weapons reviews, especially when weapons injure by means other than explosives, projectile force, or burns and have unfamiliar effects. The finding is extremely important to the ICRC's support and efforts with regard to the SIrUS Project given the potential injury mechanisms of future weapons. As such, it appears the true essence of ICRC's SIrUS Project has been handed a near death blow; but, it is well-known that the Phoenix tends to rise from the ashes.

ON THE CHOPPING BLOCK: CLUSTER MUNITIONS AND THE LAW OF WAR

MAJOR THOMAS J. HERTHEL [*]

I. INTRODUCTION:

"Well, we did not build those bombers to carry crushed rose pedals."[1]
General Thomas S. Power

Later this year, delegates to the 2001 Review Conference of the United Nations (UN) Convention on Certain Conventional Weapons[2] (Conventional Weapons Treaty) will meet in Geneva to consider, among other issues, a proposal by the International Committee of the Red Cross (ICRC) to amend the Conventional Weapons Treaty and regulate "remnants of war."[3] The proposed Protocol attempts to address some of the problems caused by unexploded munitions, including unexploded submunitions from cluster bombs.[4]

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[*] *Major Herthel (B.S., Northern Arizona University; J.D., Cumberland School of Law, Samford University; LL.M., The Judge Advocate General's School, United States Army) is an instructor, International and Operational Law Division, The Air Force Judge Advocate General School, Maxwell AFB, Alabama. He is a member of the Alabama State Bar.* *The author would like to thank Squadron Leader Chris Hanna, Royal Australian Air Force, and Major Jeanne Meyer, USAF, for their assistance in preparing this article.*

[1] THE MILITARY QUOTATION BOOK 115 (James Charlton ed, 1990).

[2] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols), Oct. 10, 1980, _ stat._, 1342 U.N.T.S. 137 [hereinafter Conventional Weapons Treaty]. *See generally* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 177-98 (Dietrich Schindler & Jiri Toman eds. 1988) [hereinafter THE LAWS OF ARMED CONFLICTS].

[3] Although what comprises "remnants of war" is the subject of debate, it generally includes unexploded ordnance and undetonated landmines remaining on the battlefield at the conclusion of an armed conflict. The United States Department of Defense (DOD) defines explosive ordnance as "all munitions, weapon delivery systems, and ordnance that contain explosives, propellants, nuclear materials, and chemical agents. Included in this definition are bombs, missiles, rockets, artillery rounds, ammunition mines, and any other similar item that can cause injury to personnel or damage to material." Unexploded ordnance, according to the DOD, consists of the above listed items "after they (1) are armed or otherwise prepared for action; (2) are launched, placed, fired or released in a way that cause hazards; and (3) remain unexploded either through malfunction or design." US Government Accounting Office (GAO), *Unexploded Ordnance: A Coordinated Approach to Detection and Clearance Is Needed*, GAO/NSIAD-95-197 (Sept. 20, 1995).

[4] The ICRC proposes a four-pronged approach. First, they would require those countries that use cluster munitions to be responsible for their clean up after the conflict. Second, to

Until recently, the international community focused primarily on the issue of anti-personnel landmines—desiring to ban their use in armed conflict.[5] Images of injured woman and children, the result of unintended landmine detonations, took center stage and attracted many notable celebrities to the cause, including Princess Diana.[6] The ICRC's efforts, along with those of hundreds of non-governmental organizations (NGOs), culminated in 1997 in Ottawa, Canada, when much of the international community affirmatively banned the use of anti-personnel landmines.[7]

With the battle to outlaw landmines under control, many anti-landmine advocates have turned their focus on another "remnant of war," unexploded cluster munitions delivered by cluster bombs.[8] Described as a "close relative" of the landmine,[9] critics of cluster munitions allege they are indiscriminate and cause superfluous injury.[10] Many NGOs are in this camp that criticize cluster

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facilitate clearance of unexploded munitions, the ICRC would require users of cluster munitions to provide the weapons' technical data to NGOs. Third, the proposal would require those who use cluster munitions, or any ordnance likely to have long-term effects, to warn the civilian populations of the dangers of such unexploded ordnance. Finally, the ICRC proposes to outlaw the use of cluster munitions against military objectives located near the civilian population. *See* International Committee of the Red Cross, *Preparatory Committee for the 2001 Review Conference of the United Nations Convention on Certain Conventional Weapons, at* ://www.icrc.org (Dec. 14, 2000) (on file with the Air Force Law Review).

[5] *See generally* Alert News, *UK Anti-Landmine Group Seeks Ban on Cluster Bombs, at* http://www.alertnet.org/resources/147016 (Aug. 8, 2000) (on file with the Air Force Law Review); Mennonite Central Committee, *Drop Today, Kill Tomorrow: Cluster Munitions as Inhumane and Indiscriminate Weapons, at* http://www.mcc.org/clusterbomb/drop_today/index.html (last visited Oct. 8, 2001) (on file with the Air Force Law Review).

[6] Peter Ford, *New Crusade Targets Cluster Bombs*, CHRISTIAN SCI. MONITOR (Sept. 8, 2000) *available at* http://www.csmonitor.com/durable/2000/09/08/p1s1.htm (on file with the Air Force Law Review).

[7] *See* INTERNATIONAL CAMPAIGN TO BAN LANDMINES, LANDMINE MONITOR REPORT 1999 1-6 (1999). The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and On Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 [hereinafter Ottawa Treaty], took effect on March 1, 1999. At that time, 135 countries had signed the treaty. *Id.*

[8] *See* Ford, *supra* note 6. According to Ford:

> Once, the world's armies used land mines as an essential weapon in their armories. But a grass-roots campaign, bolstered by the late Diana, Princess of Wales, achieved an international ban. . . . Now another weapon is being targeted. Building on the momentum and moral foundation created by the land-mine effort, humanitarian groups are turning their sights to the cluster bomb, a munition central to the US and NATO military strategy.

Id.

[9] Mennonite Central Committee, *supra* note 5.

[10] *See* 145 CONG. REC. S10070-71 (daily ed. Aug. 3, 1999) (statement of Sen. Leahy) (arguing that cluster bombs are inaccurate and indiscriminate); ERIC PROKOSCH, *Cluster Weapons, in* PAPERS IN THE THEORY AND PRACTICE OF HUMAN RIGHTS, NO. 15, at 10-15 (1995); Carmel

munitions. They claim the North Atlantic Treaty Organization's (NATO) recent air campaign over the former Yugoslavia illustrates the need for a ban, or at least regulation, of the use of cluster munitions.[11] During that conflict, NATO forces dropped an estimated 1,600 cluster bombs, each containing between 147 and 202 submunitions, on targets in Serbia and Kosovo.[12] Despite these, and other recent criticisms, many governments, including those of the United States and Britain, view cluster munitions as both militarily important and lawful when properly employed.[13]

Capati, Note and Comment, *The Tragedy of Cluster Bombs in Laos: An Argument for Inclusion in the Proposed International Ban on Landmines*, 16 WIS. INT'L L.J. 227, 240-43 (1997); Ford, *supra* note 6; Mennonite Central Committee, *supra* note 5; Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law* (2000) (unpublished article) (on file with author). Under current international law, weapons are illegal if they are, in fact, indiscriminate and/or cause unnecessary suffering or superfluous injury. Generally, the term "indiscriminate" means that the weapons *cannot* be directed at a lawful military target, even if employed properly. *See generally* Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 51(4), June 8, 1977, 16 I.L.M. 1391, *available at* http://www.icrc.org [hereinafter Geneva Protocol I] (on file with the Air Force Law Review). For a detailed discussion of the principles of discrimination, unnecessary suffering, and superfluous injury, see *infra* Parts III - IV.

[11] *See* Titus Peachey and Virgil Wiebe, *Cluster Munitions-The Bombs That Keep On Killing, at* http://www. icbl.org/lm/2000/report/LMWeb-60.php3 (last visited Feb. 3, 2001) (on file with the Air Force Law Review); BBC News, *Call for Cluster Bomb Ban, at* http://news.bbc.co.uk/hi/english/uk/newsid_870000/870644.stm (Aug. 8, 2000) (UK Working Group on Landmines); Human Rights Watch, *Cluster Bombs: Memorandum For Convention on Conventional Weapons Delegates, at* http://www.hrw.org/hrw/about/projects/arms/memo-cluster.htm (Dec. 16, 1999); Mennonite Central Committee, *supra* note 5; *Moratorium on Cluster Bombs Urged*, WASH. POST, Sept. 5, 2000, *available at* http://www.iansa.org/news/ 2000/sep_00/mora_clus.htm [hereinafter *Moratorium*] (last visited Nov. 26, 2001) (on file with the Air Force Law Review).

[12] Human Rights Watch, *supra* note 11 (stating that during Operation Allied Force, the US military dropped 1100 CBU-87 cluster bombs, each containing 202 submunitions, while British forces dropped approximately 500 RBL-755 cluster bombs, containing 147 submunitions each).

[13] *See* US DEPARTMENT OF DEFENSE, *Report to Congress: Kosovo/Operation Allied Force After-Action Report* (2000) [hereinafter *KOSOVO/OPERATION ALLIED FORCE AFTER-ACTION REPORT*]. According to the Report, combined effects cluster munitions are

> an effective weapon against such targets as air defense radars, armor, artillery, and personnel. However, because the bomblets are dispensed over a relatively large area and a small percentage of them typically fail to detonate, there is an unexploded ordnance hazard associated with this weapon. These submunitions are not mines, are acceptable under the laws of armed conflict, and are not timed to go off as antipersonnel devices.

Id. According to military experts, cluster munitions are particularly effective at covering wide areas and dispersed targets, such as armor columns in transit. Major John Scotto, Remnants of War Conference at The Judge Advocate General's School of the Army (Feb. 20, 2001) (notes

This article examines whether the use of cluster munitions, when properly employed, violates international law. More specifically, it considers the legal basis for regulating anti-personnel weapons, reviews their legality under current treaty law, and specifically examines whether cluster munitions are per se indiscriminate or cause unnecessary suffering and superfluous injury. Part II defines cluster munitions and looks at their developmental history from World War I to present.[14] Part III examines the development of international law, as it pertains to both landmines and cluster munitions. Finally, Part IV evaluates the various arguments regarding cluster munition use and examines their legality under current international law.

II. CLUSTER MUNITIONS

Cluster munitions are not, by definition, landmines.[15] Nonetheless, those who advocate their ban often rely on the similarities in effect between landmines and cluster munitions to justify their position.[16] Specifically, some argue that undetonated cluster munitions, like landmines, can hide themselves in the terrain and lay dormant until disturbed.[17] In reality, however, properly working cluster munitions are far more akin to traditional air-dropped munitions as both are designed to explode at or near impact.[18] Nonetheless,

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on file with author) [hereinafter Weapons Briefing]. *See also* Ford, *supra* note 6 (quoting Pentagon spokesman Lieutenant Colonel (LT COL) Vic Warinsky stating "cluster bombs are a useful munition that serve a valuable military purpose").

[14] It is important to note that the term "cluster munitions" includes not only air delivered cluster bombs, but also artillery and missiles that employ cluster technology. This article, although occasionally referencing ground-based cluster delivery systems, focuses primarily on air-dropped cluster bombs.

[15] By definition, cluster bombs are guided or unguided air-delivered munitions consisting of a container capable of carrying and dispensing various types of submunitions over wide-area targets. Mennonite Central Committee, *supra* note 5 (on file with the Air Force Law Review) (according to the authors, "[c]luster weapons and landmines are different in design and intended function. Both weapons can be delivered by air, but only landmines are intended to rest in the soil indefinitely and blow up when disturbed."). While the GATOR mine system is also said to be in the CBU family, this paper focuses on those weapons designed to detonate on impact or shortly thereafter.

[16] *See* Mennonite Central Committee, *supra* note 5. "Despite [the] differences in technology and design, cluster weapons are very similar to landmines in their actual effect. The failure rate for cluster munitions has been placed between 5 percent and 30 percent, insuring that any use of these weapons will result in the reckless and unregulated creation of minefields." *Id*. *But see* Weapons Briefing, *supra* note 13 (stating that, depending on the type of weapon, cluster bomb dud rates range from 1-7%). The term "dud" includes not only live unexploded cluster munitions, but also those submunitions that have either self-exploded or are incapable of detonating because its battery died. Weapons Briefing, *supra* note 13.

[17] Mennonite Central Committee, *supra* note 5.

[18] If functioning properly, cluster bombs should detonate on impact or shortly thereafter. *See* DEPARTMENT OF THE AIR FORCE, Air University, *Cluster Bombs*, *at* http://www.au.af.mil

cluster submunitions, like other ordinance, can and do malfunction and fail to detonate as planned.[19] Until detonated or removed, these submunitions, like other unexploded ordnance, pose a danger to anyone who enters the immediate area.[20] Cluster munition critics argue that, because unexploded munitions are similar in nature to landmines, regulation in the same manner is appropriate.[21] One must understand both the development and use of landmines and cluster munitions to fully appreciate the error in this analogy.

A. Landmines

By definition, an anti-personnel mine is a "mine primarily designed to be exploded by the presence, proximity, or contact of a person and that will incapacitate, injure or kill one or more persons."[22] Usually, anti-personnel mines are hand-placed and typically require a degree of pressure applied to the mine's trigger for detonation.[23]

/database/projects/ay1996/acsc/96-004/hardware/docs/cluster.htm (last visited Nov. 11, 2000) [hereinafter Air University] (on file with the Air Force Law Review).

[19] *See generally* Human Rights Watch, *Ticking Time Bombs-Report 1999*, *at* ://www.igc. org.hrw/reports/1999/nato2/nato995-02.htm (last visited Feb. 3, 2001) (on file with the Air Force Law Review); Mennonite Central Committee, *supra* note 5.

[20] *See* Human Rights Watch, *supra* note 19; Mennonite Central Committee, *supra* note 5.

[21] According to the Mennonite Central Committee:

> [W]hile cluster weapons are different in design from landmines, experience demonstrates that their effects are nearly identical. Cluster weapons kill and maim civilian populations, and continue to do so long after hostilities cease. The rationale that led the international community to stand with the survivors of landmine injuries and enact a ban on anti-personnel landmines, also applies to cluster weapons.

Mennonite Central Committee, *supra* note 5.

[22] On Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II as Amended on 3 May 1996) Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Article 2(3), *available at* http://www.unog.ch/frames/disarm/distreat/mines.htm [hereinafter Amended Mine Protocol] (on file with the Air Force Law Review). Note that the Ottawa Treaty adds the following additional language: "Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped." Ottawa Treaty, *supra* note 7. *See also* Efaw, *supra* note 24, at 90. For a more detailed discussion of these definitions, see *infra* Parts III and IV.

[23] *See* Efaw, *supra* note 24, at 91-92. Today, there are many variants of landmines. Modern landmines are typically characterized by their mode of operation and activation or by their method of deployment. Generally, landmines have three primary modes of operation: (1) blast, (2) fragmentation, and (3) bounding (a secondary charge lifts the mine to a desired height before the main charge detonates). While they most often detonate by direct pressure, landmines may also activate by a tripwire or proximity fuze (a fuze that detonates the mine

Although the use of rudimentary landmines on the battlefield dates back to as early as 1191, when Richard I used them in his attack on French fortifications during the battle of Acre, [24] landmines, as we know them today, trace their genesis to World War I, where they were employed to counter early battletanks.[25] The need for landmines arose when it became apparent that "tanks were virtually immune to small-arms fire and could traverse contested land between entrenched armies while providing cover for advancing infantry troops."[26] Militaries responded to the armor threat by developing high explosive anti-tank mines.[27] The large anti-tank mines, however, were easily spotted and could be removed by enemy personnel. The need for anti-personnel mines to protect the larger anti-tank mines became obvious to military planners.[28] Thus were born the first modern anti-personal landmines.

B. Cluster Munitions

Cluster munitions, in contrast to landmines (which are designed to lay dormant until disturbed), are "a group of smaller bombs which are dropped together" from aircraft,[29] and they are designed to explode at or near impact. Cluster munitions, also known as Cluster Bomb Units or "CBUs"[30] in the U.S. military, resemble, in size and weight, other unguided bombs.[31] Cluster bombs are made up of three main components: (1) a dispenser, often called a tactical munitions dispenser (TMD); (2) fuzes to control the weapon; and (3)

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when something passes within a certain distance of the mine). Deployment methods also vary. In addition to hand emplacement, the military can deploy mines mechanically or remotely via aircraft or artillery. *See* MCGRATH, *supra* note 24, at 17-19 (providing a detailed discussion of landmine characteristics).

[24] JOHN HEWITT, ANCIENT ARMOUR & WEAPONS 1980 (1996); CPT Andrew C.S. Efaw, 159 MIL. L. REV. 87, 87-88 (1999). Other historians, however, trace the origin of landmines to the American Civil War, where primarily the Confederate forces employed them. *See* RAE MCGRATH, LANDMINES AND UNEXPLODED ORDNANCE, 1-2 (2000); Jack H. McCall, Jr., *Infernal Machines and Hidden Death: International Law and the Limits on the Indiscriminate Use of Land Mine Warfare*, 24 GA. J. INT'L & COMP. L. 229 (1994).

[25] MCGRATH, *supra* note 24, at 1-2.

[26] *Id.* at 1.

[27] *Id*. *See also* Efaw, *supra* note 24, at 87-89.

[28] MCGRATH, *supra* note 24, at 1. Armies protected their anti-tank mines with anti-personnel mines and anti-handling devices so that the anti-tank mines were difficult to relocate. Anti-personnel mines became stand-alone weapons once military planners recognized their utility. *See generally id*.

[29] ERIC PROKOSCH, THE TECHNOLOGY OF KILLING, A MILITARY AND POLITICAL HISTORY OF ANTIPERSONNEL WEAPONS 82 (1995).

[30] MCGRATH, *supra* note 24, at 21.

[31] *See generally* DEPARTMENT OF THE AIR FORCE, ARMAMENT PRODUCT GROUP MANAGER, 1999 WEAPONS FILE 6-1-13 (1999) [hereinafter WEAPONS FILE]; PROKOSCH, *supra* note 29, at 84-85; Air University, *supra* note 18.

submunitions, sometimes called bomblets[32] or "bombies."[33] "Once released, CBUs fall for a specified amount of time or distance before their dispensers open, allowing the submunitions to effectively cover a wide area target."[34]

An internal fuse tells each submunition when to detonate—either "above ground, at impact, or in a delayed mode."[35] Submunitions generally have an anti-tank, anti-material, or anti-personnel function.[36] While older variants contained only one type of submunition, new generation cluster bombs, called Combined Effects Munitions, engage an enemy in a variety of ways.[37] For example, the US Air Force's BLU 97/B Combined Effects Bomb combines "anti-armor, incendiary, and fragmentation effects, making it 'effective' against light armor and personnel."[38] To illustrate why cluster munitions are militarily significant, it is important to understand their history and development.

While landmine warfare against opposing armies began in the twelfth-century, the British designed cluster munitions during World War I for the purpose of incendiary attacks against the Germans.[39] By World War II, the United States and other nations were using cluster bombs that delivered fragmentation, chemical, and incendiary payloads.[40] Dubbed "wicked little weapons," by Brigadier General George C. Kenney,[41] the military extensively employed incendiary cluster munitions (mostly napalm) during bombing runs on Tokyo.[42] At the time, however, military planners did not consider cluster munitions very successful due to restrictive delivery devices and an inability to control submunition disbursement patterns.[43]

Following World War II and the conflict in Korea, the United States Navy undertook to develop more accurate cluster munitions by utilizing a

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[32] *See* Air University, *supra* note 18.
[33] Capati, *supra* note 10, at 231. One must be clear that cluster bomb is the composite of these three parts—it is the submunition, many of which are contained in a cluster bomb, that is dispersed and actually detonates. It is undetonated or unexploded submunitions that critics attack.
[34] *See* Air University, *supra* note 18.
[35] *Id.*
[36] *Id.*
[37] *See* CPT Kelly Leggette, *The Air Force's New Cluster Weapon, The Combined Effects Munition*, USAF FIGHTER WEAPONS REV., Spring 1986, at 24-32, *cited in* Mennonite Central Committee, *supra* note 5.
[38] Edmond Dantes, *CBU-87 Combined Effects Munition: The Pilots Weapon of Choice*, ASIA DEFENCE J., March 1991, at 82, *quoted in* Mennonite Central Committee, *supra* note 5.
[39] PROKOSCH, *supra* note 29, at 82; Capati, *supra* note 10, at 227. *See also* PROKOSCH, *supra* note 10, at 1.
[40] PROKOSCH, *supra* note 29, at 82; Capati, *supra* note 10, at 231.
[41] PROKOSCH, *supra* note 29, at 82.
[42] *Id.*
[43] TOM CLANCY, FIGHTER WING: A GUIDED TOUR OF AN AIR FORCE COMBAT WING 140 (1995).

newly conceived munitions dispenser.[44] The new dispenser, which began development in July 1959,[45] was known as the "Eye-series."[46] Among the most successful in the series was the MK 20 Rockeye. The ordnance, complete with Mk 7 dispenser, Mk 339 time delay fuze, and 247 M118 anti-tank submunitions,[47] disbursed and scattered submunitions in "an elongated, doughnut-shaped pattern whose size [was] controlled by the release height of the bomblets."[48] The Navy successfully completed the project by the mid-1960s. The Air Force also adopted it.[49]

By this time, the United States was deeply involved in the war in Vietnam[50] where use of cluster munitions proved particularly attractive. In Vietnam, US aircrews were especially susceptible to attack by anti-aircraft artillery (AAA), as well as the newly employed, Russian designed, surface-to-air missiles (SAM).[51] Because of the AAA and SAM threat, aircrews found it difficult to engage and neutralize the Vietnamese air defenses from altitudes that allowed using single bombs accurately and effectively.[52] Cluster munitions provided the solution; used as a flak-suppression weapon, they could deliver literally hundreds of bomblets with a singe pass, thereby

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[44] *Id.* The dispenser, called the Mk 7, served as the vehicle to carry a load of submunitions. The dispenser had a fuze that would, at a preplanned altitude, detonate and cause the dispenser to break apart and release its payload of submunitions. A second charge then ignited, forcing the submunitions into the desired pattern and onto their target. *Id.*

[45] PROKOSCH, *supra* note 29, at 115 (citing a 1982 US Naval Weapons Center fact sheet on the development of the Eye-series bombs). Because the Navy feared more modern aircraft could not successfully employ outdated World War II style bombs, the Bureau of Ordnance requested the development of "new free-fall bombs and bombing systems that would improve the Navy's air-attack capability against a wide variety of tactical targets." *Id.*

[46] *Id.* According to Prokosch, the Eye-series bombs consisted of, in part, the "Bigeye" (nerve gas dispenser), the "Gladeye" (fragmentation dispenser), the "Rockeye" (antitank cluster bomb), the "Deneye" (aerial mine dispenser), the "Weteye" (chemical bomb), the "Fireye" (fire bomb), and the "Briteye" (flare system). *Id.*

[47] CLANCY, *supra* note 43, at 140. According to Clancy, the M118 submunition looked much like "hypodermic syringes." *Id.*

[48] *Id.*

[49] *Id.*

[50] *See generally* GEORGE C. HERRING, AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM 108-31 (2d ed. 1986). In February 1965, the US military began striking targets over North Vietnam. Originally, bombing began as a reprisal (Operation Flaming Dart) for a Vietcong attack on the US Army barracks in Pleiku. However, within two days, President Johnson decided to escalate the bombing, and Operation Rolling Thunder was underway. *Id*. at 129-30.

[51] TOM CLANCY AND GENERAL CHUCK HORNER, EVERY MAN A TIGER: THE GULF WAR AIR CAMPAIGN 89-95 (2000).

[52] *See id*. at 89-91. In addition, many of the aircraft used by both the Air Force and Navy were poorly equipped to bomb in bad weather. Both services relied on cluster bombs to "compensate for the lack of all weather capability." MAJ Gregory C. Kane, *Air Power and its Role in the Battles of Khe Sanh and Dien Bien Phu* (1997) (unpublished Research Paper, Air Command and Staff College) (on file at Air University Library, AU/ACSC/0344/97-03).

eliminating the need for aircrews to fly at lower altitudes or over the same target more than a single time.[53]

By the mid-1960s, cluster bomb technology had come a long way. According to Eric Prokosch, an expert on anti-personnel weapons, "[t]here were three main areas of innovation: techniques for enhanced fragmentation and other refinements in design of small high explosive munitions; techniques to disseminate submunitions from aircraft-carried cluster bombs; and the adaptation of cluster technologies to other weapon platforms."[54] Essentially, enhanced fragmentation meant that planners could design cluster munitions to break into smaller, more controlled, and more lethal bomblets.[55] Better dispensers and the addition of fixed and folded tail fins ensured that the submunitions more accurately hit their targets.[56] Additionally, during the Vietnam War, the military developed new weapons platforms to deliver cluster bombs[57] including artillery,[58] naval guns,[59] and surface-to-surface missiles (SSMs).[60] Advances in cluster technology also led to other innovations, such as the ability to employ landmines (as opposed to cluster bombs) by both aircraft[61] and artillery.[62] By the conclusion of the conflict in Southeast Asia, cluster munitions came in many varieties, were disseminated from various types of dispensers, and could be used to attack a wide range of targets—including personnel.[63]

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[53] *See* PROKOSCH, *supra* note 29, at 83-84. Major General Evans, Air Force Director of Development and Special Assistant for Counterinsurgency, stated in 1968 that "[f]or flak suppression we developed a weapon which could be delivered in a dive mode and released above the zone of intense ground fire. . . . Although this was developed as a flak suppression weapon, its area target applications [are] obvious." *Id*. *See generally* CLANCY, *supra* note 43, at 140.

[54] PROKOSCH, *supra* note 10, at 3.

[55] *Id*.

[56] *Id*. at 5. Additionally, according to Prokosch, Vietnam-era cluster munitions compared to those used in World War II with an equivalent payload, "produced two to three times as many effective fragments . . . ." *Id*.

[57] *Id*. at 6.

[58] The military designed bomblet-filled artillery shells for 105mm and 155mm howitzers, as well as for 8-inch guns. *Id*.

[59] The Navy designed cluster munitions for its 16-inch coastal guns. *Id.*

[60] The Army fitted a cluster warhead on its Lance SSM. *Id.*

[61] The US employed three aerial-delivered anti-personnel mines during the Vietnam War. They included the "gravel mine," delivered from helicopters or airplanes, and tactical jets delivered the Dragontooth and Wide Area Antipersonnel Mine (WAAPM). *Id*.

[62] Artillery-delivered cluster munitions, the Area Denial Artillery Munitions (ADAM), contain 155mm shells with 36 anti-personnel grenades each. *See* PROKOSCH, *supra* note 29, at 108, 123 n.83.

[63] *Id*. at 82-83. One of the most extensive uses of cluster munitions occurred during the bombing efforts over Laos. In an effort to interdict Vietnamese supply lines, the US Air Force dropped more than two million tons of bombs on Laos. HERRING, *supra* note 50, at 240-41, 269. According to Congressman Dennis J. Kucinich (Ohio), many of the twenty-three million tons of bombs dropped on Laos were cluster bombs. He estimates that four million

Proliferation of cluster bomb technology was incremental following the conflict in Vietnam.[64] By 1978, only the United States, Britain, France, and Germany produced or developed cluster munitions.[65] However, by 1994, at least fourteen countries were producing or using cluster bombs.[66] By 1996, that number had increased by at least another ten.[67] This recent growth reflects cluster munitions' effectiveness on the modern battlefield. As production increased, so too did cluster bomb usage.[68] To date, cluster munitions have been used in at least fourteen armed conflicts around the world,[69] but Operations Desert Storm and Allied Force represent two of the more recent and extensive uses of cluster munitions, and the campaign to ban or regulate cluster munitions began to develop momentum in light of their use during Operations Desert Storm and Allied Force. Specifically, anti-cluster bomb advocates claim that cluster munitions violate the law of war because they are indiscriminate, cause unnecessary suffering and superfluous injury, or both.[70]

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unexploded bomblets remain in Vietnam, Laos, and Cambodia. *See* ___ CONG. REC. H6293 (daily ed. July 22, 1999) (statement of Rep. Kucinich) (House Amendment 341 to the 2000 Department of Defense Appropriations Act attempted to prohibit further funding for the procurement of cluster bombs). *See also* Capati, *supra* note 10, at 229-30.

[64] PROKOSCH, *supra* note 29, at 177-78.

[65] *Id*. According to Prokosch, Britain, France and Germany produced a combined five models of high explosive cluster bombs, compared to thirty-two models the US produced. *Id*. at 177.

[66] Chile, China, France, Germany, Iraq, Israel, Italy, Poland, Russia, South Africa, Spain, UK, US, and the former Yugoslavia. *Id*. at 178.

[67] Belgium, Brazil, China, the Czech Republic, Egypt, India, North Korea, South Korea, Sweden, and Turkey. JANE'S INTERNATIONAL DEFENCE DIRECTORY 961 (1996) *cited in* Wiebe, *supra* note 10, at n.34. The US DOD currently believes that sixteen countries, in addition to the United States, actively produce cluster munitions. They include Chile, China, France, Germany, Greece, Israel, Poland, Russia, Singapore, Slovak Republic, South Africa, Spain, United Arab Emirates, United Kingdom, and Former Yugoslavia. COL Paul Hughes, Cluster Munitions Briefing at the Judge Advocate General's School of the Army (Feb. 20, 2001) (handout on file with author) [hereinafter Hughes Briefing].

[68] *See generally* PROKOSCH, *supra* note 29, at 177-79.

[69] *See generally* Mennonite Central Committee, *supra* note 5. The Soviets used cluster bombs in Afghanistan, as did Israel in 1973 during their conflict with Egypt and Syria. *See* PROKOSCH, *supra* note 29, at 178-79. Additionally, the Mennonite Central Committee alleges that cluster munitions were also used in Angola, Azerbaijan, Bosnia (by Serbian forces), Chechnya (by Russia), Ethiopia, Georgia, Lebanon (by Israel), Nicaragua, Sierra Leone (by Nigeria), and Turkey (against Kurdish rebels). Mennonite Central Committee, *supra* note 5. In 1999, India reportedly dropped cluster bombs on Pakistani targets in the Kashmir region. Surinder Oberoi, *India Accepts Peace Talks with Pakistan but Continues Offensive*, AGENCE FRANCE PRESS, June 8, 1999, *cited in* Wiebe, *supra* note 10, at n.36.

[70] *See, e.g*., Mennonite Central Committee, *supra* note 5. *See also* Federal Republic of Yugoslavia, Federal Ministry of Foreign Affairs, *Aide Memoire on the Use of Inhumane Weapons in the Aggression of the North Atlantic Treaty Organization Against the Federal Republic of Yugoslavia*, May 15, 1999 (on file with author) (alleging cluster bombs are a "banned military means").

1. Operation Desert Storm

The 1991 Persian Gulf War saw the most extensive use of cluster munitions in history.[71] Of the approximately 250,000 bombs coalition forces dropped on Iraq and Kuwait, more than 61,000 were cluster bombs.[72] According to the statistics, the Air Forces' weapons of choice were the CBU-52B, CBU-58B, CBU-71A/B, and the CBU-87 (CEM)—all cluster munitions.[73] In all, the coalition extensively used cluster bombs in attacks on Iraqi radars, SAM sites, communications and transportation infrastructure, as well as dispersed armor, artillery and personnel carriers.[74] Like in Vietnam, however, the most significant problem noted with cluster bombs was a high dud rate.[75] During Operation Desert Storm, at least twenty-five US military personnel were killed by improperly handling submunitions fired by [coalition] forces."[76] In addition, unexploded submunitions delayed the Marines from their capture of the Kuwait City Airport.[77]

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[71] Human Rights Watch, *supra* note 19. In all, the United States dropped 57,421 cluster bombs on Iraq and Kuwait. THOMAS A. KEANEY & ELIOT A. COHEN, REVOLUTION IN WARFARE? AIR POWER IN THE PERSIAN GULF 280 (1995).

[72] Department of the Air Force, *Gulf War Air Power Survey (GWAPS)*, Vol. III, 235, *cited in* Human Rights Watch, *supra* note 19 (includes US and British-dropped CBUs, but excludes French and Saudi Arabian CBU usage during the operation).

[73] *Id.* Generally, CBU-52/58/71s are Vietnam-style cluster bombs carrying a payload of between 217 and 650 bomblets. *See* Air University, *supra* note 18. The CBU-52B dispenses 220 BLU-61/B (Bomb Live Units) bomblets in the shape of a donut. Military planners designed the weapon for employment against soft skin targets and troop concentrations. The CBU-58B dispenses 650 BLU-63/B bomblets, each weighing approximately one pound. Like the CBU-52B, the weapon disperses the bomblets in a donut-shaped pattern, with a hole in the center. The CBU-58B is effective on personnel and light armor. The CBU-71B is an anti-personnel and anti-material weapon that possesses an additional incendiary capability. It dispenses 650 BLU-86/B anti-personnel and anti-material bomblets with a time delay fuze. The CBU-87 CEM dispenses 202 BLU-97 shaped charge, fragmentary, and incendiary submunitions in a rectangular pattern. WEAPONS FILE, *supra* note 31, at 6-2 to 6-7. *See* CLANCY, *supra* note 43, at 141-42. The CBU-87 is a Combined Effects Munition that dispenses 202 bomblets over an 800 by 400 foot area. Air University, *supra* note 18. During the operation, the Air Force successfully employed the CBU-87 as an anti-armor and anti-personnel munition. *Id*.

[74] Human Rights Watch, *supra* note 19.

[75] *See* 145 CONG. REC. S10070-71, *supra* note 10 (statement of Sen. Leahy) (dud rates during the Gulf War were as high as 20%); Rachel Stohl, *Cluster Bombs Leave Lasting Legacy*, WEEKLY DEFENSE MONITOR, Aug. 5, 1999, *available at* http://www.cdi.org.weekly/1999/issue30.html (on file with the Air Force Law Review); Human Rights Watch, *supra* note 19, *at* http://www. igc.org.hrw/reports/1999/nato2/nato 995-02.htm (on file with the Air Force Law Review).

[76] US Government Accounting Office (GAO), *Operation Desert Storm: Casualties Caused by the Improper Handling of Unexploded United States Submunitions*, GAO/NSIAD-93-212

2. Operation Allied Force

Humanitarian groups paid significant attention to allied cluster munitions use during Allied Force, despite its being rather limited compared to Operation Desert Storm.[78] Like in the Gulf War, US pilots dropped CBU-87 Combined Effect Munitions, while the British Royal Air Force relied on RBL-755 cluster bombs.[79] Combined, NATO forces dropped 1632[80] cluster bombs on Kosovo and Serbia. Fewer than 50 of these were the US military's newer Joint Stand Off Weapon (JSOW)[81] and Tomahawk Land Attack Cruise Missiles (TLAM-C).[82] The Air Force's newest cluster munitions, the CBU-97 Sensor Fuzed Weapon, was not deployed during Operation Allied Force.[83]

(Aug. 1993). According to the GAO, ground movement was also significantly hampered by unexploded cluster submunitions and other unexploded ordnance. *Id*.

[77] *Id*.

[78] Cluster bombs represented only 6% of the total munitions dropped on Serb forces. Human Rights Watch, *supra* note 11.

[79] Amnesty International, *"Collateral Damage" or Unlawful Killings?: Violations of the Laws of War by NATO During Operation Allied Force*, n.76, *at* http://www.web.amnesty.org/ai.nsf/index/EUR700182000.htm (June 6 2000) (on file with the Air Force Law Review) (citing DOD News Briefing, 22 June 1999). The RBL-755 is a dual-role cluster munition similar to the US CBU-87. It carries 147 soda can sized bomblets, and can successfully attack both hard and soft targets. *See* Human Rights Watch, *supra* note 19.

[80] The US dropped 1100 cluster munitions, while British forces dropped 532 RBL-755 cluster bombs. Amnesty International, *supra* note 79; *see also* ANTHONY H. CORDESMAN, THE LESSONS AND NON-LESSONS OF THE AIR AND MISSILE CAMPAIGN IN KOSOVO 249 (2000) [hereinafter KOSOVO LESSONS].

[81] *See* William M. Arkin, *Fleet Praises JSOW, Lists Potential Improvements*, DEFENSE DAILY, Apr. 26, 2000, *cited in* Wiebe, *supra* note 10, at n.181. The Joint Stand Off Weapon (JSOW) provides greater safety to aircraft by allowing aircrews to launch the weapon from between fifteen and forty-five nautical miles from the target. The JSOW is equipped with an AGM-154A (Aircraft Guided Missile) dispenser that glides to the target area, carrying 145 BLU-97A/B anti-armor munitions. The first combat deployment of the JSOW occurred in January 1999, during Operation Southern Watch. During Operation Allied Force, the JSOW was used exclusively by the US Navy and launched from F/A-18 aircraft. *See* Mennonite Central Committee, *supra* note 5. *See also* KOSOVO/OPERATION ALLIED FORCE AFTER-ACTION REPORT, *supra* note 13, at 90.

[82] Tomahawk Land Attack Cruise Missiles (TLAM-C) are deployable with cluster munitions by the Navy via ship or submarine and by the Air Force via B-52 or F-16. When launched by aircraft, the TLAM-C is equipped with the BLU-106 anti-runway munition. *See* Carlo Kopp, *Analysis-Tomahawks, Submarines and the F-111*, *at* http://www.csse.monash.edu.au/carlo/archive/MILITARY/AA/tomahawk.html (Sept. 14, 2000) (on file with the Air Force Law Review). *See generally* US Department of the Navy, The United States Navy Fact File, *Tomahawk Cruise Missile*, *at* http://www.chinfo.navy.mil/navpalib/factfile/missiles/wep-toma.html (Nov. 28, 2000) (on file with the Air Force Law Review).

[83] DOD officials denied using Sensor Fuzed Weapons during Operation Allied Force. *See* Maj Gen Charles Wald, *Department of Defense News Briefing*, *at* http://www.defenselink.mil

Pentagon officials first acknowledged NATO's use of cluster munitions less than a month later following comments made by Senator Patrick Leahy on the Senate floor concerning possible aerial mining by NATO forces.[84] Later, on May 8, 1999, NATO came under fire when at least two cluster bombs missed their targets and "landed in two residential areas of Nis in Serbia, around the market place near the center of town and near a hospital several blocks away."[85] Collateral damage was significant; the error killed fourteen civilians and injured another thirty.[86] At the time of the mishap, NATO's

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/news/may1999/t05131999-t0513asd.html (May 13, 1999) [hereinafter DOD News Briefing] (on file with the Air Force Law Review).

> The CBU-97/B SFW is an anti-armor cluster munition to be employed by fighter/attack and bomber aircraft to provide multiple kills per pass against armored and support vehicle combat formations. The munition will be fielded as an all-up-round requiring minimal maintenance support. . . . SFW is currently delivered as an unguided, gravity weapon. After release, the TMD opens and dispenses the ten submunitions which are parachute stabilized. At a preset altitude sensed by a radar altimeter, a rocket motor fires to spin the submunition and initiate an ascent. The submunition then releases its four projectiles, which are lofted over the target area. The projectile's sensor detects a vehicle's infrared signature, and an explosively formed penetrator fires at the heat source. If no target is detected, the warhead detonates after a preset time interval.

Fiscal Year 1996 Report, Director, Operational Test and Evaluation, DoD, available *at* http://www.dote.osd.mil/ reports/FY96/96CBUSFW.html (on file with the Air Force Law Review). In short, the CBU-97, a precision guided cluster bomb, is designed as an anti-tank weapon and to blunt an enemy offensive while US forces regroup to conduct counter-offensive operations. *See* Weapons Briefing, *supra* note 13. Further, the US is developing several additional types of cluster munitions, including CBU-103/104/105 Tactical Munitions Dispensers, designed to modify CBUs-87/89. These systems add a Wind Corrections Munition Dispenser (WCMD) to the weapon. *See* Air Force News, *Sensor Fused Weapons Reach Operational Capacity*, *at* http://www.af.mil.news/Feb1997/ n19970225-970217.html (Feb. 25, 1997) (on file with the Air Force Law Review). The WCMD can be retrofitted to older, unguided cluster bombs, making the weapons much more precise.

[84] Mr. Kenneth Bacon, Pentagon spokesman, responded to questions about NATO's *alleged* use of GATOR mines during an April 14, 1999 press briefing. In denying such use, Mr. Bacon acknowledged that "[w]e have used CBU-87s, which are combined effects munitions, which are basically cluster bombs with bomblets, but we have not used the Gator." *Department of Defense News Briefing*, *at* http://www.defenselink.mil/news/Apr1999/ t04141999_t0414asd.html (Apr. 14, 1999) (on file with the Air Force Law Review).
GATOR mines (CBU-89Bs) are a type of cluster munition, designed to channel enemy forces and which deploy seventy-two anti-tank and twenty-two anti-personnel mines, each possessing a 72-hour self-destruct mechanism. WEAPONS FILE, *supra* note 31, at 6-8.

[85] Amnesty International, *supra* note 79. According to a Pentagon spokesperson, "a weapons malfunction" caused the incident at Nis. *Id.*

[86] *Id.*

targets were Serbian air defense systems and aircraft located at the Nis airfield.[87]

Because of the collateral damage at Nis, President Clinton issued a directive temporarily prohibiting the use of cluster munitions until a complete reevaluation of procedures.[88] Military leaders were quick to point out that the cluster munition use is "totally within the law of armed conflict, and [that] it's legal in the international community to use that weapon."[89] Although the US military's eventually resumed use of cluster bombs, the aerial engagement ended on June 10, 1999.[90] Nonetheless, cluster munitions critics alleged

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[87] *Id*.

[88] Mennonite Central Committee, *supra* note 5. In a letter from Marine Lieutenant General (LT GEN) C.W. Fulford, Jr., Director, Joint Staff, to Congressman Dennis Kucenich, LT GEN Fulford stated:

> [A]t an unclassified level, communications between the National Command Authorities (NCA) and the Commander in Chief, US European Command (USINCEUR) [occurred] on the use of cluster munitions. The decision to temporarily halt the United States use of cluster munitions during the NATO air campaign in FRY [Federal Republic of Yugoslavia] was made by the NCA following two incidents of off-target impacts of cluster munitions. The moratorium was verbally imposed during a regularly scheduled teleconference between the NCA and USCINCEUR. The use of cluster munitions later resumed following a review of US procedures.

Id. According to Human Rights Watch, in suspending the use of cluster munitions, "the president [sic] has set a precedent for restricting bomb use." Human Rights Watch, *supra* note 11. Further, in that the suspension of cluster bomb usage was only temporary, the US was acting as a matter of national policy rather than international legal requirement. Despite Washington's halt, the British continued to use cluster bombs until the conflict ended. *See* Mennonite Central Committee, *supra* note 5.

[89] *See* DOD News Briefing, *supra* note 83. According to General (GEN) John Jumper, Commanding General, US Forces Europe:

> We always match the weapon with the effect. We take in -- the circular error probable is the calculation you go through, and we use the appropriate weapon for what the target is. It's a calculation we go through for every target, and it's the same for CBUs. And the precision of these things, we're able to put these down in fairly tight clusters. No, they are not guided, but we are also using unguided Mk-82s, also with considerable success, off of conventional airplanes. So I would say that the process is the same. The accuracy is the same. It doesn't mean mistakes don't happen. I have no idea what the events will unfold before us today. I will tell you, though, that there is no weapon we use that we don't put through the same calculated and careful process.

GEN John Jumper, *Department of Defense News Briefing*, May 14, 1999, *at* http://www.defenselink.mil/news/ may1999/t05141999-t0514asd.html (on file with the Air Force Law Review).

potential violations of the law of armed conflict and began calling for an end to their use.[91] Before examining claims that cluster munitions violate the law of war because they are indiscriminate, cause unnecessary suffering and superfluous injury, or both, it is important to have an understanding of the laws governing armed conflict, and more specifically, antipersonnel weapons.

III. THE LAW OF ARMED CONFLICT

> *If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.*[92]
>
> *Professor H. Lauterpacht*

International law is generally far more complex than domestic law.[93] Unlike in a sovereign state like the United States, where Congress makes the laws and the President executes them, there are no international political bodies with the ability to unilaterally create and enforce legal norms.[94] Rather, international law primarily derives from nations waiving sovereignty, in part, and agreeing to abide by a set of international rules.[95] As such, "the sources of international law cannot be equivalent to those in most domestic laws."[96] There are two primary sources of international law—treaties and customary law.[97]

Treaties, by definition, are formal written agreements between sovereign states.[98] According to one international legal scholar, "international agreements are thought to be legally binding because they have been

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[90] Amnesty International, *supra* note 79. *See also* US Department of Defense, Operation Allied Force, *at* http://www.defenselink.mil/specials/kosovo/index.html (June 21, 1999) (on file with the Air Force Law Review) (stating that the initial attack against Serbia began at 1400 EST on Mar. 24, 1999 and ended at 1000 EST on June 10, 1999).

[91] Alert News, *supra* note 5 (UK Working Group on Landmines); Human Rights Watch, *supra* note 11; Mennonite Central Committee, *supra* note 5; New Zealand Campaign Against Landmines, *The Curse of Cluster Bombs - Statement By The NZ Campaign Against Landmines (CALM), at* http://www.protel.co.nz/calm/cluster-sep.html (last visited Nov. 17, 2001) (on file with the Air Force Law Review); *Moratorium*, *supra* note 11.

[92] H. Lauterpacht, *The Problem of the Revision of the Law of War*, BRITISH YEARBOOK OF INT'L LAW 382 (1952) *quoted in* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 2 (1996).

[93] THE LAWS OF WAR: A COMPREHENSIVE COLLECTION OF PRIMARY DOCUMENTS ON INTERNATIONAL LAWS GOVERNING ARMED CONFLICT xix (W. Michael Reisman & Chris T. Antoniou eds., 1994) [hereinafter THE LAWS OF WAR].

[94] *See id*.

[95] *See generally id*. at 4-6.

[96] MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 4 (2d ed. 1993).

[97] Treaties are also known as international agreements or conventions. *Id.* at 5; *see* THE LAWS OF WAR, *supra* note 93, at xix; US DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF ARMED CONFLICT, para. 4 (1956) [hereinafter FM 27-10].

[98] THE LAWS OF WAR, *supra* note 93, at xix.

concluded by sovereign states consenting to be bound."[99] While treaties make up much of the law of armed conflict today, they have not fully supplanted the customary practices of nations and are not the only source of law in this area.[100]

The second primary source of international law, with respect to armed conflict, is customary international law.[101] Like treaties, international law recognizes custom as a source of law regarding armed conflict.[102] The International Military Tribunal at Nuremberg succinctly captured this point:

> The law of war is to be found not only in treaties, but also in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists, and practiced by military courts. This law is not static, but by continual adaptation follows the need of a changing world.[103]

The theory behind customary international law is that "states in and by their international practice may implicitly consent to the creation and application of international legal rules."[104] Customary international law, however, is not based solely on the historical practices of nations, as there is a "psychological" element as well.[105] According to the *Restatement (Third) of the Foreign Relations Law of the United States*, customary international law is developed by state practice only when done out of a "sense of legal obligation."[106] As such, for customary international law to be binding, states must act not only in a consistent manner, but also out of a sense of legal duty.[107] Hence, in examining the laws of war as they pertain to cluster munitions, one must recognize that it is not merely state practice that, in addition to treaties, dictates

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[99] Most international legal scholars view treaties as the strongest reflection of international law. For example, the Statute of the International Court of Justice, in deciding the state of the law, first considers "international conventions . . . establishing rules expressly recognized by consenting parties." JANIS, *supra* note 96, at 10.

[100] *See* FM 27-10, *supra* note 97, at para. 4-6; THE LAWS OF WAR, *supra* note 93, at xix-xxi.

[101] THE LAWS OF WAR, *supra* note 93, at xix.

[102] *Id*.

[103] 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 221 (1947). *See also* THE LAWS OF WAR, *supra* note 93, at xix.

[104] JANIS, *supra* note 96, at 42.

[105] *Id*. at 46.

[106] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). *See* JANIS, *supra* note 96, at 46. According to the United Nations International Court of Justice, "States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not itself enough." North Sea Continental Shelf Cases (F.R.G. v. Denmark), 1969 I.C.J. 3.

[107] JANIS, *supra* note96, at 46-47. The binding effect of customary international law differs from that of treaties. Generally, treaties are binding only on those who sign and ratify them. Customary law, on the other hand, is binding on all states. *See generally* CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 113-14, (Roy Gutman & David Rieff eds. 1999) [hereinafter CRIMES OF WAR]; FM 27-10, *supra* note 97, at para. 6.

acceptable norms in international law, but only those state practices followed from a sense of legal obligation.

Today, the law of war, including its historical development and current practice, is solidly established in treaties and customary international law. While a certain amount of brutality is inevitable in all armed conflicts, the idea of regulating the methods of conducting warfare, in an effort to minimize human suffering, has existed for centuries.[108] Clear evidence exists that philosophers, as well as military, political, and religious leaders sought to "alleviate the sufferings of war."[109] These principles guide modern nations today and provide the framework for codification of the law of war.[110]

The first *modern* international attempt to codify the laws of war occurred with the first Geneva Convention in 1864, following the horrific Battle of Solferino, in northern Italy, in 1849.[111] In 1864, Switzerland, along with eleven other nations, signed the Geneva Red Cross Convention, designed to protect medical personnel on the battlefield.[112] Since that time, the nations of the world have repeatedly attempted to codify the laws of armed conflict.[113]

One of the first, and still a significant attempt was the St. Petersburg Declaration of 1868.[114] Described as "the cornerstone of the laws of war,"[115] the St. Petersburg Declaration of 1868 was the first successful attempt to regulate modern weaponry.[116] While the purpose of the Declaration was to renounce the use of exploding bullets weighing less than 400 grams, the Declaration also made broad statements about how nations should conduct

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[108] ROGERS, *supra* note 92, at 1. According to Rogers, the first documented "code of war was that of the Saracens and was based on the Koran." *Id*. *See* JANIS, *supra* note 96, at 162 (stating that legal rules regulating war date back to the ancient civilizations of India, China, Israel, Greece, and Rome). *See generally* J.H. HUANG, SUN TZU: THE NEW TRANSLATION (1993) (Sun-tzu, in the 4th century B.C., created one of the first known sets of rules governing the conduct of war).

[109] ROGERS, *supra* note 92, at 1.

[110] *See generally* THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 6 (Michael Howard et. al. eds. 1994) [hereinafter CONSTRAINTS ON WARFARE IN THE WESTERN WORLD]. Interestingly enough, in the Middle Ages, there were attempts to outlaw the crossbow as inhumane and firearms as unfair. *See id*.

[111] *Id.* The first codification of the law regulating land warfare was Dr. Francis Lieber's United States Army General Order No. 100, *Instructions for the Government of Armies of the United States in the Field*. *Id. See also* ROGERS, *supra* note 92, at 1-2. Dr. Lieber's General Order 100 can be found at THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 3-23.

[112] JANIS, *supra* note 96, at 164.

[113] ROGERS, *supra* note 92, at 1-3. *See also* JANIS, *supra* note 96, at 164-65 (providing a chronological listing of several regulatory treaties).

[114] The Declaration of St. Petersburg, Nov. 29, 1868, 1 A.J.I.L. (Supp.) 95-96.

[115] PROKOSCH, *supra* note 29, at 164 (quoting the Stockholm International Peace Research Institute).

[116] The Declaration of St. Petersburg, Nov. 29, 1868, 1 A.J.I.L. (Supp.) 95-96. *See also* THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 101-03.

warfare.[117] In its Preamble, three important concepts emerged: the principles of military objective, distinction and humanity:[118]

> [T]he only legitimate object which states should endeavor to accomplish during war is to weaken the military force of the enemy . . . for this purpose, it is sufficient to disable the greatest possible number of men . . . this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable . . . the employment of such arms would, therefore, be contrary to the laws of humanity . . . .[119]

While the international community still recognizes its prohibition against expanding bullets, the Declaration is now more of historical than practical significance.[120] Its rationale is important because it serves as the guiding principles for the modern law of armed conflict.[121]

In practical effect, the current law of armed conflict is found primarily in the Hague Conventions of 1907,[122] the Geneva Conventions of 1949[123] and

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[117] *See generally* CONSTRAINTS ON WARFARE IN THE WESTERN WORLD, *supra* note 110, at 119; THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 101-03; THE LAWS OF WAR, *supra* note 93, at 35-36.

[118] *See* PROKOSCH, *supra* note 29, at 164-65. *See generally* ROGERS, *supra* note 92, at 7.

[119] The Declaration of St. Petersburg, *supra* note 116. *See also* THE LAWS OF WAR, *supra* note 93, at 35-36.

[120] *Id.* at 35. Thirty-one years later, the Hague Declaration Concerning Expanding Bullets of 1899, prohibited, in international armed conflict, the use of "bullets which expand or flatten easily in the human body." *See* The Hague Declaration Concerning Expanding Bullets, July 29, 1899, 1 A.J.I.J. 157-59 (Supp.); THE LAWS OF WAR, *supra* note 93, at 49. *See also* W. Hays Parks, *Joint Service Combat Shotgun Program*, 1977 ARMY LAW 16, 22-23 (1977).

[121] THE LAWS OF WAR, *supra* note 93, at 35.

[122] Hague Convention No. III Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, T.S. 598 [hereinafter Hague III]; Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 [hereinafter Hague Convention IV]; Hague Convention No. IX Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2314 [hereinafter Hague Convention IX]. Collectively, I will refer to these as the Hague Conventions. The US is a party to each of these conventions. *See* FM 27-10, *supra* note 97, at para. 5.

[123] The 1949 Geneva Conventions are The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Sick and Wounded]; The Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Shipwrecked]; The Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva POW]; The Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Civilians]. The US is a party to all of the 1949 Geneva Conventions. *See* FM 27-10, *supra* note 97, at para. 5.

its 1977 Protocols,[124] and the Conventional Weapons Treaty of 1980[125] along with its Protocols.[126] The Geneva Conventions and its Protocols generally focus on protecting victims and other noncombatants in war, such as the wounded and sick,[127] the shipwrecked,[128] prisoners of war,[129] and civilians.[130] While the United States has ratified neither of the 1977 Protocols to the Geneva Convention, it generally considers Protocol I reflective of customary international law.[131] On the other hand, the Hague Conventions, along with the Conventional Weapons Treaty, regulate the means and methods of warfare; they focus on the weapons of war and their employment.[132]

The totality of treaty and customary international law produces four basic principles to guide military planners—military necessity, distinction,

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[124] The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, 16 I.L.M. 1391 [hereinafter Geneva Protocol I and Geneva Protocol II, respectively]; *see* THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 605-732.

[125] Conventional Weapons Treaty, *supra* note 2. *See also* THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 177-98. The US is a party to the Conventional Weapons Treaty because it has signed and ratified two or more of the Protocols. Specifically, the US ratified Protocols I (non-detectable fragments) and II (mines, booby-traps, and other devices) on Mar. 24, 1995, however, it made a reservation with respect to Article 7, para. 4, concerning the application of the treaty to internal armed conflicts. On May 24, 1999, the US ratified Amended Protocol II (Amended Mines Protocol). *See* Conventional Weapons Treaty, *supra* note 2 (Amended Mines Protocol); MAJ Michael Lacey, *Passage of Amended Protocol II*, 2000 ARMY LAW. 7, 7 and n.3 (2000) (providing a detailed description of the Amended Mines Protocol); Efaw, *supra* note 24, at 116-131.

[126] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols), Oct. 10, 1980, 1342 U.N.T.S. 137, 19 I.L.M. 1523. The Protocols include: Protocol on Non-Detectable Fragments (Protocol I), Oct. 10, 1980 [hereinafter Non-Detectable Fragments Protocol]; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Oct. 10, 1980 [hereinafter Landmine Protocol]; Protocol on the Prohibitions or Restrictions on the Use of Incendiary Weapons, Oct. 10, 1980 [hereinafter Incendiary Weapons Protocol]; Protocol on Blinding Laser Weapons, Oct. 13, 1995 [hereinafter Blinding Lasers Protocol]; Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, May 3, 1996 [hereinafter Amended Mines Protocol]. For a detailed description of the Amended Mines Protocol, see Lacey, *supra* note 125.

[127] Geneva Sick and Wounded, *supra* note 123; s*ee also* THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 373-99.

[128] Geneva Shipwrecked, *supra* note 123; s*ee also* THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 401-22.

[129] Geneva POW, *supra* note 123; s*ee also* THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 423-93.

[130] Geneva Civilians, *supra* note 123; s*ee also* THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 495-556.

[131] *See* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987).

[132] *See* ROGERS, *supra* note 92, at 4-5.

proportionality, and humanity[133] Military necessity holds that armies should not attack targets unless they gain a military advantage by doing so, and even then, they may attack only military objectives.[134] Next, the principle of distinction states that states should wage wars "against the enemy's military forces, not its civilian population."[135] The principle of proportionality recognizes that there will be civilian casualties and destruction of civilian property during armed conflict, but calls upon military planners to balance the needs of the military against likely collateral damage, and to proceed to attack only when the military necessity outweighs likely collateral damage.[136] Finally, the principle of humanity dictates that military planners should minimize unnecessary suffering.[137] If a means or method of warfare is not outlawed it is legal. Accordingly, in analyzing the legality of cluster munitions, these four principles govern exclusively, absent any more restrictive international agreements. In other words, as there are no existing treaties restricting the use of cluster munitions, their use must violate one or more of these four guiding principles to be unlawful under the current international legal regime.

IV. LAW AND ANALYSIS

Cluster munitions critics raise several issues and concerns. Their arguments, however, can be broken down into three distinct propositions.[138] First, at least one nation has affirmatively stated that the use of cluster bombs

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[133] *See id.* at 1-26 (providing a detailed analysis of each principle of the law of war).

[134] *See* Geneva Protocol I, *supra* note 124, Art. 52. In other words, there must be some military necessity in attacking a particular target. ROGERS, *supra* note 92, at 6. FM 27-10 defines military necessity as "that principle which justifies those measures not forbidden by international law which are *indispensable for securing the complete submission of the enemy* as soon as possible." FM 27-10, *supra* note 97, at para. 3a (emphasis added). According to Rogers, however, "the reference to the complete submission of the enemy . . . is probably now obsolete, since war can have a limited purpose . . . ." ROGERS, *supra* note 92, at 5. Rather, "in every case destruction must be *imperatively* demanded by the necessities of war, and must not merely be the outcome of a spirit of plunder or revenge." *Id*. at 6 *quoting* L. OPPENHEIM, INTERNATIONAL LAW, Vol. 2, 414 (7th ed. 1952).

[135] *See* Geneva Protocol I, *supra* note 124, Art. 48-51. *See also* ROGERS, *supra* note 92, at 7. According to Rogers, "Attacking civilians is not normally a military requirement, because it does not weaken the military forces of the enemy . . . [s]ince military operations are to be conducted against the enemy's armed forces, there must be a clear distinction between the armed forces and civilians, or between combatants and non-combatants, and between things that may legitimately be attacked and things protected from attack." ROGERS, *supra* note 92, at 6-7.

[136] *Id. See also* ROGERS, *supra* note 92, at 7.

[137] *See* ROGERS, *supra* note 92, at 6-7.

[138] *See generally* Amnesty International, *supra* note 79; Human Rights Watch, *supra* note 19; International Committee of the Red Cross, *supra* note 4; Mennonite Central Committee, *supra* note 5.

is a per se violation of current international law.[139] A second group of critics argues that the weapons are illegal because they are inhumane; in other words, they cause unnecessary suffering and superfluous injury.[140] Finally, the argument most often expressed by critics is that cluster munitions are illegal because they are indiscriminate.[141] This last argument has two prongs: (1) cluster munitions are indiscriminate because they cannot be accurately employed;[142] and (2) cluster bombs are indiscriminate because many of their bomblets do not detonate as designed, creating fields of duds, incapable of distinguishing between combatants and noncombatants.[143] The delegates to the 2001 Conventional Weapons Review Conference, scheduled to take place later this year, may raise these arguments.[144] The 2001 Conference, however, will not be the first time the international community addressed the issue of cluster munitions.[145] In the past, States have considered whether to impose restrictions on cluster bomb usage and opted against imposing such restrictions.[146] Accordingly, neither treaty nor customary international law limits how states might employ cluster munitions during future armed conflict.

1. Treaty Law: Landmines and Cluster Munitions Are the Use of Cluster Munitions in Violation of Existing International Treaties or Agreements?

a. Previous Regulation Attempts: Lucerne & Lugano

As the United States was embroiled in war in Southeast Asia, the International Committee for the Red Cross Conference of Government Experts on Weapons that May Cause Unnecessary Suffering or May Have

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[139] *See* Federal Republic of Yugoslavia, *supra* note 70 (alleging that NATO used weapons banned by international law, such as cluster bombs and depleted uranium). Interestingly enough, the Former Yugoslavia is a current producer of cluster munitions. Specifically, they produce two models, the KB-1 and KB-2, each delivered by either rocket or artillery. Further, the Former Yugoslavia possesses air-dropped cluster bombs purchased from the United Kingdom. *See* Hughes Briefing, *supra* note 67.

[140] *See e.g.*, Mennonite Central Committee, *supra* note 5.

[141] *See e.g.*, 145 CONG. REC. S10070-71, *supra* note 10 (statement of Sen. Leahy); Mennonite Central Committee, *supra* note 5. Many, such as the ICRC, want to enforce their belief that cluster munitions are illegal weapons through an additional Protocol to the Conventional Weapons Treaty or other international agreement.

[142] *See* 145 CONG. REC. S10070-71, *supra* note 10 (statement of Sen. Leahy) (alleging that cluster bombs are often dropped from high altitudes and miss their intended targets).

[143] *Id.* According to Sen. Leahy, "cluster bombs do not discriminate. NATO peacekeepers are not immune. Children are not immune. Approximately 5 Kosovars each day are killed by unexploded ordnance, mostly U.S. cluster bombs." *Id*.

[144] *See* International Committee of the Red Cross, *supra* note 4, *at* http://www.icrc.org(on file with the Air Force Law Review).

[145] *See* PROKOSCH, *supra* note 29, at 148-63.

[146] *See id*. at 163.

Indiscriminate Effects (Lucerne Conference) met in 1974 to consider possible bans or restrictions on certain antipersonnel weapons.[147] Sweden, along with six other countries concerned about many of the antipersonnel weapons used by the United States in Vietnam, initiated the conference that eventually led to the formulation of the Conventional Weapons Treaty several years later.[148] Among the weapons examined were "cluster warheads with bomblets which act through the ejection of a great number of small calibered fragments or pellets . . . ."[149] In addition to cluster munitions, delegates to the Conference explored possible bans on incendiary weapons, delayed-action weapons,[150] small-caliber projectiles,[151] weapons producing flechettes,[152] and fuel-air explosives.[153]

At Lucerne, as is the case today, proponents of a ban on cluster munitions alleged that "the weapons under consideration had a wide area coverage and, hence, could easily affect combatants and civilians without discrimination; they also caused unnecessary suffering."[154] Critics of cluster munitions claimed the weapons caused unnecessary suffering by inflicting multiple wounds.[155] On the other hand, other experts believed cluster munitions were "an improvement from the humanitarian point of view over weapons with random fragmentation."[156] The conference ended with no resolution on this issue of cluster munitions and did not, in any way, outlaw or regulate their use.[157]

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[147] *Id.* at 148.

[148] Egypt, Mexico, Norway, Sudan, Switzerland, and Yugoslavia. A number of doctors, as well as Departments of Defense and State personnel, represented the United States. *Id*. at 149.

[149] INTERNATIONAL COMMITTEE OF THE RED CROSS, CONFERENCE OF GOVERNMENT EXPERTS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS (SECOND SESSION-LUGANO) 1999 (1976) [hereinafter LUGANO CONFERENCE] (summarizing the previous conference at Lucerne); *see also* PROKOSCH, *supra* note 29, at 149.

[150] Generally, delayed-action weapons included landmines and booby-traps. *See* LUGANO CONFERENCE, *supra* note 149, at 12-13.

[151] At Lucerne, "small-caliber projectiles [were] those having a substantially smaller calibre than the 7.62 mm rounds which had been in common use since the turn of the century." This included the US military's new 5.56 mm round used in the M-16 rifle. Critics of the 5.56 mm round claimed that the bullet "tumbled very early in the wound track, causing three times as many large wounds than did the 7. 62 mm ones." *Id*. at 13-15.

[152] Flechette is French for "dart." Generally, they are needle-like weapons with fins on the tail. PROKOSCH, *supra* note 29, at 4. For a detailed discussion of flechettes, see *id*. at 44-47.

[153] The Committee focused on the use of napalm. *Id.* at 151.

[154] LUGANO CONFERENCE, *supra* note 149, at 17.

[155] *Id.*

[156] *Id.*

[157] PROKOSCH, *supra* note 29, at 155. According to Prokosch, who was a conference observer, "there was no meeting of the minds at Lucerne. Summing up the results, the president of the conference was able to say only that it had 'contributed to an increase in knowledge and understanding of the subject' and that a second conference could usefully be convened." It is interesting to note that despite the extensive use of cluster bombs by the US in Vietnam, the

The debate over cluster munitions continued two years later in Lugano, Italy, at the second International Committee for the Red Cross Conference of Government Experts on Weapons that May Cause Unnecessary Suffering or May Have Indiscriminate Effects (Lugano Conference).[158] Like at Lucerne, little agreement existed on the issue.[159] Further, to gain some common ground, the delegates agreed to exclude combined effects munitions from debate altogether.[160] While discussions of the alleged indiscriminate effects of cluster munitions occurred, the focus of the conference, with regard to cluster bombs, centered on the issue of unnecessary suffering.[161] Experts opposed to cluster munition regulation waged a three-pronged attack.[162] First, they pointed out that banning cluster munitions would require the military to use more high explosive ordnance to accomplish the same results over a wide area, potentially causing more damage and suffering than typically done by cluster bombs.[163] Second, they argued that several types of other weapons have fragmentation effects, such as artillery shells, aircraft bombs, landmines, and hand grenades, and that the military needs these types of weapons, including cluster bombs, for defensive operations to cover large areas and for attacking anti-aircraft emplacements.[164] Finally, the experts pointed out that controlled cluster munitions caused less suffering than did random fragmentation weapons.[165] In the end, the Report of the General Working Group did little more than inconclusively restate both propositions:

> Such weapons were considered, so it was explained, to cause undue suffering because of the multiplicity of the wounds they might inflict on individuals; they were also considered to lend themselves to uses that could particularly easily be indiscriminate, whether intentionally or inadvertently. By way of counter-argument to the contention about multiple injuries, reference was made to a comprehensive study that had been undertaken of wounds inflicted by fragmentation munitions of the controlled or pre-fragmented type and of the older uncontrolled type. While it appeared true from this study that the former type tended to cause a higher proportion of multiple injuries among casualties, than the latter, higher mortality rates were found among casualties caused by the latter. Though the degree of pain in each case could not be quantified, the comparison thus suggested that, on

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head of the North Vietnamese delegation opposed banning cluster munitions, stating "[i]n the hands of a liberation fighter, it is a sacred tool." *Id.*

[158] The conference met from January 28 through February 26, 1976. *See* LUGANO CONFERENCE, *supra* note 149, at 1.

[159] *See id*. at 120. *See generally* PROKOSCH, *supra* note 29, at 155-60.

[160] *See* LUGANO CONFERENCE, *supra* note 149, at 119-20.

[161] *See generally id*. at 120-21.

[162] *See generally id*. at 69-80.

[163] *Id.* at 72.

[164] *Id.* at 73.

[165] *Id.* at 71-72.

> one criterion, the newer types of fragmentation munition caused less suffering than the older.[166]

While thirteen countries supported an outright ban on the use of antipersonnel cluster munitions, the proposal to outlaw the weapon failed.[167] As one expert noted, "[a]ll weapons could cause extremely serious, excruciating injuries. War by its very nature [is] cruel. The most convincing way for governments to observe their humanitarian obligations therefore [is] to pursue a consistent policy of peace . . . ."[168]

b. The Conventional Weapons Treaty and the Ottawa Treaty[169]

As with the Lucerne and Lugano Conferences, the Conventional Weapons Treaty (Protocol II) did nothing to limit the use and employment of cluster munitions.[170] While the Lucerne and Lugano Conferences generated momentum to regulate non-detectable fragments, landmines, and incendiary weapons that carried over to the formulation of the 1980 Conventional Weapons Treaty, for the most part, the Treaty ignored cluster munitions.[171]

As stated earlier, the Land Mine Protocol to the Conventional Weapons Treaty regulates the use of landmines and booby-traps.[172] The treaty also

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[166] *Id*. at 120.

[167] The thirteen countries supporting CDDH/IV/201 (the proposal) were Algeria, Austria, Egypt, Lebanon, Mali, Mauritania, Mexico, Norway, Sudan, Sweden, Switzerland, Venezuela, and Yugoslavia. *Id.* at 198-99.

[168] *Id.* at 25.

[169] Ottawa Treaty, *supra* note 6.

[170] PROKOSCH, *supra* note 29, at 163.

[171] *Id*. at 160-63. The Non-Detectable Fragments Protocol prohibits the employment of any weapon "the primary effect of which is to injure by fragments which in the human body escape detection by x-rays." Non-Detectable Fragments Protocol, *supra* note 126. To the extent that cluster munitions might have used non-detectable fragments, the Non-Detectable Fragments Protocol regulates them. However, according to one expert, "Protocol I, in fact, bans a weapon which does not exist and is not even likely to be developed." PROKOSCH, *supra* note 29, at 161. The Incendiary Weapons Protocol also failed to include cluster munitions, as the Protocol specifically excluded:

> Munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, *fragmentation shells, explosive bombs and similar combined-effects munition in which the incendiary effect is not specifically designed to cause burn injury to persons*, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities.

Incendiary Weapons Protocol, *supra* note 126, at Art. 1(b)(ii) (emphasis added). As stated earlier, the US ratified the Non-Detectable Fragments Protocol and the Land Mine Protocol, but has not agreed to the Incendiary Weapons Protocol. Later, in 1995, the Conventional Weapons Treaty delegates adopted the Blinding Laser Protocol. For a detailed analysis of the

regulates, but does not ban, remotely delivered mines, including those deployed using cluster technology.[173] The signatories of the Land Mine Protocol specifically left out cluster bombs from the treaty's scope.[174]

In May 1996, at the first review conference of the Conventional Weapons Treaty, the delegates drafted and approved the Amended Mine Protocol.[175] Like its predecessor, the Amended Mine Protocol excludes cluster bombs from regulation.[176] Unlike the original Land Mine Protocol, however, the Amended Mine Protocol includes a definition for an "anti-personnel mine."[177] According to Article 2(3), "'[a]nti-personnel mine' means a *mine primarily designed* to be exploded by the presence, proximity or contact of a

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Blinding Laser Protocol, *see* W. Hays Parks, *Trauvaux Preparatoires and Legal Analysis of Blinding Laser Weapons Protocol*, 1997 ARMY LAW. 33 (1997).

[172] *See* Land Mine Protocol, *supra* note 126. Generally, the Land Mine Protocol prohibited directing landmines against civilians or the civilian population or using landmines indiscriminately. The Land Mine Protocol adopted Geneva Protocol I, Art. 51(3)'s definition of "indiscriminate," discussed in detail *infra* Part IV.B.3. Further, the Land Mine Protocol mandated recording the location of minefields. *See* Land Mine Protocol, *supra* note 126, at Art. 7; PROKOSCH, *supra* note 29, at 161-62.

[173] Land Mine Protocol, *supra* note 126, Art. 5. Remotely delivered landmines, as defined by the Protocol, are mines "delivered by artillery, rocket, mortar or similar means or dropped from and aircraft." *Id*. at Art. 2(1). They are prohibited unless: (1) their location is accurately recorded; (2) they possess an effective self-neutralizing or self-destructing mechanism or a remote control to detonate or deactivate the mine; and (3) effective advanced warning is given to any affected civilian area, unless the circumstances do not permit. *Id*. at Art. 5. For a more detailed analysis of remotely delivered landmines, *see* Peter J. Ekberg, *Remotely Delivered Landmines and International Law*, 33 COLUM. J. TRANSNAT'L L. 149 (1995).

[174] *See* PROKOSCH, *supra* note 29, at 163. The Land Mine Protocol defined "mine" as "any munition placed under, on or near the ground or other surface area and *designed* to be detonated or exploded by the presence, proximity or contact of a person or vehicle." Land Mine Protocol, *supra* note 126, at Art. 2(1) (emphasis added). The signatories effectively excluded cluster munitions because they are not *designed* to be detonated by a person or vehicle. According to Prokosch, "Protocol II gives the impression of having been written to satisfy the needs of military forces, which may later have to occupy a mined area, rather than to protect civilians . . . [while cluster bombs] remained untouched by any specific ban." PROKOSCH, *supra* note 29, at 162-63. For a detailed discussion of the Land Mine Protocol, *see* Lt Col Burris M. Carnahan, *The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 105 MIL. L. REV. 73 (1984); Efaw, *supra* note 24, at 107-117.

[175] Efaw, *supra* note 24, at 116. The primary differences between the original Land Mine Protocol and the Amended Mine Protocol are that the latter applies to internal armed conflicts and "requires that all landmines be rendered detectable." *Id.* at 119. Further, the Amended Mine Protocol mandates that "at least ninety percent of unmarked anti-personnel mines must self-destruct within thirty days of emplacement. As an added precaution, if a mine is flawed and does not self-destruct, each mine must also be programmed to deactivate within 120 days of emplacement." *Id*. at 122.

[176] *See generally* Amended Mine Protocol, *supra* note 126, Art. 2-6; Efaw, *supra* note 24, at 107-17; Lacey, *supra* note 125, at 7-10.

[177] *See* Amended Mine Protocol, *supra* note 126, Art. 2(3).

person and that will incapacitate, injure or kill one or more persons" (emphasis added).[178] Cluster bombs are not included, however, since they are designed to be activated not by the target, but rather, by a self-contained fuze.[179] In its advice and consent to the treaty, the United States Senate specifically noted that it is:

> this characteristic . . . that distinguishes a mine from so-called unexploded ordnance or UXO. UXO is not covered by the Protocol, either the 1980 or the amended version. Unexploded ordinance is a result of a malfunction of a munition; UXO is not "designed" in any sense, and, in particular, is not designed to be detonated by the presence, proximity or contact of [sic] person. Although UXO presents a serious problem that requires concerted attention, it is a problem outside the scope of [the Amended Mine Protocol].[180]

Similarly, the Ottawa Treaty[181] does not ban or regulate the use of cluster munitions.[182] While the International Committee to Ban Landmines[183] attempted to include cluster munitions by drafting a definition of anti-personnel mine based on its effect, rather than its design, the NGOs' definition was rejected by the Treaty's signatories.[184] Rather, "the government experts . . . defined prohibited weapons by their design, not their effect."[185] Nonetheless, the International Campaign to Ban Landmines compromised their position and *supported* the current definition, which, like the Land Mine Protocol and the Amended Mine Protocol before it, focuses on how the weapon detonates.[186] According to the ICRC, "[t]he definition of an anti-personnel mine laid down in the Ottawa treaty . . . covers all 'person'-activated

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[178] *Id.*
[179] *See* Air University, *supra* note 18.
[180] S. EXEC. DOC. NO. 106-2, at 36-37 (1999). As noted, the US ratified the Amended Mine Treaty on May 24, 1999. *See* Lacey, *supra* note 125, at 7.
[181] Ottawa Treaty, *supra* note 7.
[182] *See* Rae McGrath, *Clearing the Clusters: Why Activists Earlier Failed to Ban These Bombs—And What Must be Done to Stop Their Use Now, at* http://newsweekinteractive.org/nw-srv/issue/05_99b/printed/int/eur/ov1905_1 (1999) (on file with the Air Force Law Review). For detailed information on the Ottawa Treaty, see Efaw, *supra* note 24, at 131-51.
[183] The International Campaign to Ban Land Mines is a coalition of over 1,300 NGOsthat received the Nobel Peace Prize in 1997 for their work in the area of disarmament. *See* LANDMINE MONITOR REPORT 2000, *supra* note 7, at back cover.
[184] *See* McGrath, *supra* note 182.
[185] *Id.*
[186] *Id.*

mines."[187] Therefore, the Ottawa Treaty does not ban or regulate cluster mines.[188]

As accusations flew that NATO was using illegal weapons during Operation Allied Force, the British Defense Minister, Mr. John Spellar, clearly stated that cluster bombs "are not landmines under the international convention . . . ."[189] On June 13, 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia agreed in its final report.[190] The Committee affirmatively stated "[there is] no specific treaty provision which prohibits or restricts the use of cluster bombs although, of course, cluster bombs must be used in compliance with the general principles applicable to the use of all weapons."[191]

2. Geneva Protocol I and Customary International Law: Do Cluster Munitions Cause Unnecessary Suffering and Superfluous Injury, as Prohibited by the Law of Armed Conflict?

Settled law holds that the means and methods employed by a military force to injure the enemy is not unlimited.[192] According to the 1907 Hague Convention (Hague II), "[i]t is especially forbidden . . . [t]o employ arms, projectiles, or material calculated to cause unnecessary suffering."[193] While earlier versions of the Hague Convention use the term "superfluous injury" in lieu of "unnecessary suffering," the two terms are generally considered synonymous.[194] More recently, Geneva Protocol I reaffirmed this proposition by adopting the language of both Hague Conventions.[195] According to Article

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[187] International Committee for the Red Cross, *Banning Anti-Personnel Mines: The Ottawa Treaty Explained*, *at* http://www.ircr.org (Feb. 1, 1998) (on file with the Air Force Law Review) (describing the treaty in detail).

[188] Nonetheless, the US is not a party to the treaty and, therefore, not bound by its terms. As of Jan. 30, 2001, 139 countries have signed or ratified the Mine Ban Treaty. Among the dozens of countries that have not signed the Mine Ban Treaty are China, Egypt, Finland, India, Israel, Pakistan, Saudi Arabia, Russia, Turkey, the United States, and Vietnam. Updated numbers are available on the International Committee to Ban Landmines' webpage *at* http://www.icbl.org (on file with the Air Force Law Review).

[189] BBC News, *supra* note 11.

[190] *See* International Criminal Tribunal for the Former Yugoslavia (ICTY): Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 I.L.M. 1257, 1264-65 (2000) [hereinafter ICTY Report].

[191] *Id*. at 1264.

[192] *See* Hague II, *supra* note 122, at Art. 22; FM 27-10, *supra* note 97, at para. 33.

[193] Hague II, *supra* note 122, at Art. 23(e).

[194] Parks, *supra* note 120, at 18.

[195] COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 [hereinafter ICRC COMMENTARY TO GENEVA PROTOCOL I] 409 (Yves Sandoz et. al. eds., 1987). The ICRC COMMENTARY TO GENEVA PROTOCOL I is available on-line *at* www.icrc.org.

35: "1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited. 2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."[196] Neither phrase, however, has been objectively defined.[197]

The very phrase "unnecessary suffering," implicitly recognizes that a degree of legitimate suffering accompanies any armed conflict.[198] In other words, some degree of necessary suffering is lawful and, therefore, a weapon is not unlawful simply because it produces a significant amount of suffering.[199] Rather, one must balance the degree and intensity of suffering against military necessity before a weapon is deemed to cause unnecessary suffering or superfluous injury.[200] Because military necessity is continually changing, there is no formula that is uniformly applicable to resolve this issue.[201] According to one scholar:

> [A] balancing test is applied between the force dictated by military necessity to achieve a legitimate objective vis-à-vis injury that may be considered superfluous to the achievement of the stated or intended objective (in other words, whether the suffering caused is out of proportion with the military advantage to be gained.)[202]

As such, necessary suffering is that degree of suffering, not otherwise prohibited by international law, required to accomplish a lawful military outcome.[203] When examining any weapon, one must consider the military necessity of the weapon; how and why the weapon is used.[204] Generally, military necessity is defined as "the necessity for measures which are essential to attain the goals of war . . . ."[205] One must weigh this factor against the suffering caused by cluster munitions.[206] However, the effects of cluster munitions cannot be looked at in isolation.[207] Rather, one must also consider the effects of other "comparable weapons."[208]

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[196] Geneva Protocol I, *supra* note 124, Art. 35.
[197] Parks, *supra* note 120, at 18.
[198] *Id.*
[199] *See generally* ICRC COMMENTARY TO GENEVA PROTOCOL I, *supra* note 195, at 407-09; CRIMES OF WAR, *supra* note 107, at 379-80; Parks, *supra* note 120, at 19.
[200] *See* ICRC COMMENTARY TO GENEVA PROTOCOL I, *supra* note 195, at 408. *See generally* Parks, *supra* note 120, at 18-19.
[201] *See generally* ICRC COMMENTARY TO GENEVA PROTOCOL I, *supra* note 195, at 407-09.
[202] Parks, *supra* note 120, at 18.
[203] *See generally id. at* 18-19.
[204] ICRC COMMENTARY TO GENEVA PROTOCOL I, *supra* note 195, at 392-96.
[205] *Id*. at 393.
[206] *See generally id*. at 392-96; Parks, *supra* note 120, at 18-19.
[207] Parks, *supra* note 120, at 19.
[208] *Id*.

Critics charge that cluster bombs cause unnecessary suffering and/or superfluous injury because they inflict multiple wounds and have a high lethality rate.[209] Cluster bombs, however, are not the only lawful weapons that cause multiple injuries or death to enemy forces.[210] For example, high explosive artillery and mortar rounds, fragmentation grenades, and other air-dropped munitions are no less lethal to the enemy soldier than are cluster munitions.[211] In a recent legal review, one expert noted:

> Wounding by more than one projectile is extremely common on the battlefield due to the various lawful fragmentation munitions in use, such as antipersonnel landmines, artillery and mortar fragments, canister rounds, Claymore mines, and hand or rifle grenades, as well as the extensive projection towards an enemy force of automatic and semiautomatic small arms fire.[212]

Each of these lawful weapons possesses the probability of inflicting multiple wounds, including lethal wounds, on an enemy.[213] In fact, arguably, cluster munitions may be more humane than other weapons, as they disperse pre-cast bomblets rather than fragmented shards of melted steel.[214]

Additionally, absent a consensus among nations, as is the case with poisonous gas, it is impossible to objectively define how much suffering constitutes unnecessary suffering.[215] The delegates to Geneva Protocol I recognized this significant issue, stating:

> From a strictly medical standpoint it seems impossible at the present stage of medical knowledge to objectively define suffering or to give absolute values permitting comparisons between human individuals. Pain, for instance, which is but one of many components of suffering, is subject to enormous individual variations. Not only does the pain threshold vary between human beings: at different times it varies in the same person, depending on the circumstances.[216]

As the Commentary goes on to explain, "in the eyes of the victim all suffering is superfluous and any injury is unnecessary."[217]

While cluster munitions inflict a degree of suffering on its victims, this does not end the analysis. To be unlawful, the suffering inflicted by cluster munitions must outweigh the legitimate military necessity prompting their use.

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[209] *See* Mennonite Central Committee, *supra* note 5.
[210] *See generally* Parks, *supra* note 120, at 19-22.
[211] *Id*.
[212] *Id*. (reviewing the legality of shotguns on the battlefields).
[213] *See id.*
[214] *See generally* LUGANO CONFERENCE, *supra* note 149, at 71-72. *See also infra* p. 30.
[215] *See generally* ICRC COMMENTARY TO GENEVA PROTOCOL I, *supra* note 195, at 408.
[216] *Id.*
[217] *Id*. at 407.

Causing suffering without legitimate military gain clearly violates international law.[218] However, the military necessity for the use of cluster munitions is significant.[219] Generally, cluster munitions are excellent area weapons.[220] In addition to their usefulness against AAA and SAM sites, cluster bombs are effective against armor, artillery, vehicles, and troops.[221] They minimize the risk and exposure of aircrews to enemy fire because they facilitate striking a target with a single sortie rather than by flying multiple aircraft over the same target a number of separate times.[222] Further, the use of cluster munitions may actually reduce collateral damage.[223] As pointed out at the Lugano Conference, without cluster bombs, air forces must use more high explosive ordnance to accomplish the military goal, creating the increased possibility of a weapon missing its target and causing unintended collateral damage.[224] Finally, cluster munitions are perhaps the most effective weapons at stopping or slowing an enemy assault.[225] For these reasons, the military necessity of cluster munitions is considerable; unitary bombs are not practical alternatives.

While cluster munitions, like many other weapon systems, are lethal and often cause multiple wounds, there are significant military advantages to using them. On balance, it is impossible to objectively say that cluster munitions cause unnecessary suffering or superfluous injury *as a matter of law*. The delegates to Geneva Protocol I recognized that "obstacles will be met in applying this principle [unnecessary suffering] to specific weapons . . .

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[218] *See* CRIMES OF WAR, *supra* note 107, at 379-80. An example of the type of weapon that causes unnecessary suffering is an explosive round filled with clear glass fragments. When the round detonates and glass penetrates the body, it is difficult for doctors to treat the wounded soldier because they cannot easily locate the clear glass. There is no military necessity in making the injuries more difficult to treat. Other weapons considered to cause unnecessary suffering include fragments undetectable by x-ray, poisoned bullets, and barbed bayonets. *Id*.

[219] *See infra*. pp. 29-30.

[220] LUGANO CONFERENCE, *supra* note 149, at 72-73. For example, one 500 lb. unitary bomb covers a 50-foot diameter, while a sensor fuzed cluster munition, delivered via a JSOW, will cover an area 500 feet by 1400 feet. *See* Weapons Briefing, *supra* note 13.

[221] *Id;* Weapons Briefing, *supra* note 13. *See also* Richard Norton-Taylor, *A Million Tiny Fragments With Each Impact*, THE GUARDIAN (June 23, 1999). According to a British Defense Minister, George Roberts, cluster bombs are "particularly effective against Serb forces deployed in the field in Kosovo, against tanks, armored personnel carriers, artillery, and 'troop concentrations.'" *Id*.

[222] *See infra*. p. 29.

[223] *See* LUGANO CONFERENCE, *supra* note 149, at 72. One study estimates that without cluster munitions, the Air Force would have had to use 10% more unitary bombs during Operation Allied Force. *See* Weapons Briefing, *supra* note 13.

[224] *Id.; see infra*. p. 29-30. To accomplish what cluster munitions can, the Air Force would have to use significantly more unitary bombs per target. The use of additional bombs also requires additional sorties per target, thus increasing the risk to both aircraft and aircrews. *See* Weapons Briefing, *supra* note 13.

[225] LUGANO CONFERENCE, *supra* note 149, at 73. *See also* Weapons Briefing, *supra* note 13 (CBU-97s are a key weapon during the halt or hold phase of the battle).

."[226] Further, as they point out, "[t]he Protocol does not impose a specific prohibition on any specific weapon. The prohibitions are those of customary law, or are contained in other international agreements."[227] As illustrated earlier, no such international agreements ban the use of cluster munitions. Additionally, in light of the recent proliferation of cluster munitions production and use, it can hardly be argued that customary law bans their current employment. There is no evidence that states are not refraining from using cluster munitions (state practice) or that they are doing so out of a sense of legal obligation. Accordingly, whether cluster munitions cause superfluous injury or unnecessary suffering can only be determined on a case-by-case basis and in light of current military necessity.

[226] ICRC COMMENTARY TO GENEVA PROTOCOL I, *supra* note 195, at 409.
[227] *Id*. at 399.

3. Are Cluster Munitions Indiscriminate Because They are Incapable of Being Accurately Deployed or Because Their Bomblets Do Not Always Detonate as Designed, and Thus Create Minefields Incapable of Distinguishing Between Combatants and Noncombatants?

As stated earlier, "the only legitimate object which states should endeavor to accomplish during war is to weaken the military force of the enemy."[228] By implication, if weakening the enemy's army is the only legitimate military objective, this grants the civilian population some form of immunity from attack.[229] While the 1949 Geneva Conventions reiterate the basic premise that noncombatants should be protected, Geneva Protocol I actually codifies the current rule of distinction.[230] According to Geneva Protocol I, Article 48:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[231]

Accordingly, before military planners can deem any target legally susceptible to attack, regardless of the type of weapon system employed, it must be a proper military objective[232] and must be distinguished from the civilian population and civilian objects.[233]

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[228] Preamble to the St. Petersburg Declaration. *See* THE LAWS OF ARMED CONFLICTS, *supra* note 2, at 102; THE LAWS OF WAR, *supra* note 93, at 35.

[229] *See* ICRC COMMENTARY TO GENEVA PROTOCOL I, *supra* note 195, at 598.

[230] *See* ROGERS, *supra* note 92, at 31-33. Once again, it is important to note that, while the US recognizes the following provisions of Geneva Protocol I to be generally reflective of customary international law, it is not a party to the Protocol. As such, its provisions are not binding. *See generally* Matheson, *supra* note 131, Janet E. Lord, *Legal Restraints in the Use of Landmines: Humanitarian and Environmental Crisis*, 25 CAL. W. INT'L L.J. 311, 322-25 (1995).

[231] Geneva Protocol I, *supra* note 124, Art. 48.

[232] According to Geneva Protocol I, *supra* note 124, at Art. 52, "military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage."

[233] *See generally* ROGERS, *supra* note 92, at 6-7. The term "civilian population" consists of all civilian persons. Geneva Protocol I, *supra* note 124, Art. 50. It is important to note, however, that while the US concurs with Geneva Protocol I's definition of a civilian, it disagrees with the circumstances under which immunity from attack is lost. Geneva Protocol I, Art. 51(3), states that a civilian loses protected status if he takes a "*direct*" part in the hostilities. The US, on the other hand, equates the loss of civilian immunity to situations when a civilian takes an "*active*" part in hostilities. While this might seem immaterial at first, consider the nonmilitary truck driver who hauls ammunition from the factory to the military on the front line. Under Geneva Protocol I's definition, the truck driver might still be immune from attack. This is not

While Geneva Protocol I permits attacks against military objectives, not surprisingly it prohibits attacks against civilians and the civilian population.[234] More specifically, Article 51 prohibits two types of attacks against the civilian population, direct attacks and indiscriminate indirect attacks.[235] In relevant part, Article 51 states:

> (2) The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population is prohibited . . . .
>
> (4) Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
>
> (5) Among others, the following types of attacks are to be considered as indiscriminate: (a) an attack by bombardment by any method or means which treats as a single military objective a number of clearly separate and distinct military objectives located in a city, town, or village, or other area containing a similar concentration of civilians or civilian objects; and (b) an attack which may be expected to cause incidental loss of civilian loss of life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.[236]

Accordingly, military planners may not target a legitimate military objective when the means and methods employed are of a nature to strike military objectives and civilians without distinction.[237] Article 51 provides two examples of such a situation: attacks whereby the city, town, or village *are* the target, and attacks which are *expected* to cause *excessive* collateral damage in relation to the military benefit anticipated.[238] Additionally, Geneva Protocol I, Article 57, provides military planners, for the first time, with enumerated

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true, however, when applying the US's interpretation to civilian immunity. *See* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1 (1990). *See generally* ICRC COMMENTARY TO GENEVA PROTOCOL I, *supra* note 195, Art. 51.

[234] *Id*. at 36-37.

[235] *See* Geneva Protocol I, *supra* note 124, Art. 51.

[236] *Id.*

[237] *See* ROGERS, *supra* note 92, at 21.

[238] *Id.*

precautionary measures they must take to avoid unnecessary collateral damage.[239] Article 57, in pertinent part, provides:

> In the conduct of military operations,[240] constant care shall be taken to spare the civilian population, civilians and civilian objects.[241]
>
> With respect to attacks, the following precautions shall be taken: (a) those who plan or decide upon an attack shall: (i) do everything feasible to verify that the objectives to be attacked are neither civilian nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; (ii) take all feasible precautions in the choice of means and methods of attack[242] with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects; (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (b) an attack shall be canceled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; (c) effective advanced warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.[243]

The culmination of these provisions reasserts several long-standing customary norms. First, military planners may not directly target civilians or the civilian population.[244] Second, attacks which are incapable of being directed against a military objective are indiscriminate and, therefore, prohibited.[245]

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[239] *Id.* at 56.

[240] ICRC COMMENTARY TO GENEVA PROTOCOL I, *supra* note 195, at 680 (defining military operations as "any movements, maneuvers, and other activities whatsoever carried out by the armed forces with a view toward combat").

[241] Geneva Protocol I, *supra* note 124, Art. 57(1).

[242] ICRC COMMENTARY TO GENEVA PROTOCOL I, *supra* note 195, at 682. Its important to note that, according to the Commentary, "this rule does not imply any prohibition of specific weapons." It specifically discusses an unsuccessful attempt to regulate mines and minefields, but choosing instead to leave those issues to the Conventional Weapons Treaty. *See id.*

[243] Geneva Protocol I, *supra* note 124, Art. 57(2).

[244] *Id.* at Art. 51(2); *see* ROGERS, *supra* note 92, at 7-14.

[245] Geneva Protocol I, *supra* note 124, Art. 51(4)(b); *see* ROGERS, *supra* note 92, at 19-24. According to Rogers, whether customary international law ever prohibited indiscriminate attacks is unsettled. ROGERS, *supra* note 92, at 19-20.

Opponents of cluster munitions rely on this second facet in alleging that cluster bombs are illegal.[246] Specifically, they argue that because of the large area covered by the weapon, it is incapable of being accurately controlled.[247] They further argue that cluster bombs "too often miss the target . . . ."[248] As referenced earlier, its fuze and the altitude at which the aircraft drops the munitions directly control the area coverage of cluster munitions, not any inherent error in the munition itself.[249] Generally, releasing the bomb at higher altitudes causes more dispersion of bomblets and, therefore, a wider area is covered; the converse is true for lower altitude drops.[250]

When evaluating a weapon's lawfulness based solely on its accuracy, it is important to remember that all munitions, from a single rifle round to a 2000 pound bomb, are incapable of being accurate 100% of the time.[251] Rather, the accuracy of all weapons depend on a multitude of factors: target intelligence, planning time, weather, crew experience, altitude at which the bomb is dropped, enemy defenses, and human factors such as fear, fatigue, mistake, and the "friction of war."[252] Despite the lack of any mandates by either custom or treaty, the US, as a matter of internal policy, often attempts to compensate for several of these factors with high-tech weaponry, such as precision-guided munitions.[253] In all cases, however, military planners evaluate each target for its legality, as well as attempt to determine the most

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[246] *See* Mennonite Central Committee, *supra* note 5.
[247] *Id*.
[248] 145 CONG. REC. S10070-71, *supra* note 10 (Sen. Leahy).
[249] *See infra* p. 8-9 and note 35.
[250] *See* Weapons Briefing, *supra* note 13. Some suggest, however, that the angle of the Tactical Munitions Dispenser, rather than the height of the drop, has more impact on bomblet dispersion pattern.
[251] *See generally* Parks, *supra* note 233, at 188-89.
[252] *Id.* at 182-202. Karl Von Clausewitz used the term "friction of war" to describe the uncertainties of combat. According to Clausewitz:

> If one has never personally experienced war, one cannot understand in what the difficulties mentioned really exist, nor why the commander should need any brilliance and exceptional ability. Everything looks simple; the knowledge required does not look remarkable, the strategic options are so obvious that by comparison the simplest problem of higher mathematics has an impressive scientific dignity. Once war has actually been seen the difficulties become clear; but it is extremely hard to describe the unseen, the all-pervading element that brings about this change of perspective.

CLAUSEWITZ, ON WAR 119 (M. Howard & P. Paret trans. 1976) *quoted in* Parks, *supra* note 233, at 182 n.540.
[253] *See generally* Parks, *supra* note 233, at 113.

accurate and effective weapon to employ in order to accomplish their lawful military goals.[254]

Military planners are capable of directing cluster munitions at lawful military objectives. Take, for example, the situation of a formation of tanks in an open field, or aircraft sitting on a runway preparing to take off.[255] To suggest that cluster munitions are incapable of accurately striking these targets is preposterous—history has shown otherwise.[256] Rather, the type of weapons contemplated by the delegates to Geneva Protocol I in drafting this definition of indiscriminate attacks were "primarily long-range missiles which cannot be aimed exactly at the objective."[257] Iraq's launching of uncontrolled SCUD missiles into Israel and Saudi Arabia, not the dropping of cluster munitions, were what the delegates contemplated.[258] On the other hand, the effective employment of cluster munitions against legitimate military objectives is possible; they are not indiscriminate by their very nature.

Nonetheless, improvements in technology are making cluster munitions even more accurate.[259] New guiding mechanisms make the CBUs much more accurate than unguided munitions, significantly reducing the possibility of unintended collateral damage. Reducing the likelihood that submunitions will fall outside the intended target area minimizes collateral damage. Given these factors, in light of the fact that cluster munitions are an "area weapon" designed to strike targets over a larger than normal geographic sector, it is impossible to objectively state that cluster munitions are incapable of being directed at a military objective. The fact that cluster munitions create a large battlefield footprint is not, by itself, reason to consider the weapon indiscriminate. Rather, this factor must be taken into account by planners during the normal targeting legal analysis.

The final types of indiscriminate attacks prohibited by Article 51 are those that "employ a method or means of combat . . . [that is] of a nature to strike military objectives or civilian objects without distinction."[260] This is where the comparison between antipersonnel landmines and cluster munitions

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[254] *See generally* US DEPARTMENT OF THE AIR FORCE, AIR FORCE PAMPHLET 14-210, USAF INTELLIGENCE TARGETING GUIDE (Feb. 1, 1998) [hereinafter TARGETING GUIDE].
[255] *See generally* ROGERS, *supra* note 92, at 21-22.
[256] The destruction of Iraqi armor columns on the "highway of death" in Kuwait is an example. *See generally* CLANCY, *supra* note 51, at 423.
[257] ICRC COMMENTARY TO GENEVA PROTOCOL I, *supra* note 195, at 621.
[258] *See Id*.; ROGERS, *supra* note 92, at 20-21. *But see* Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE H.R. & DEV. L.J. 143, 148 (1999). *See generally* RICK ATKINSON, CRUSADE: THE UNTOLD STORY OF THE PERSIAN GULF WAR 80-85 (1993).
[259] *See* Wind Corrected Munition Dispenser (WCMD), FAS Military Analysis Network [hereinafter FAS] *at* http://www.fas.org/man/dod-101/sys/smart/wcmd.htm (on file with the Air Force Law Review); What's New with Smart Weapons, FAS, at http://www.fas.org/man/dod-101/sys/smart/new.htm (on file with the Air Force Law Review).
[260] *See* Geneva Protocol I, *supra* note 124, Art. 51(5)(b).

emerge.[261] According to many critics of cluster munitions, if the weapon malfunctions and produces "duds," these duds, like landmines, are incapable of distinguishing between civilians and lawful combatants.[262] Arguably then, they are indiscriminate.[263] This argument, however, is flawed.

The Commentaries to Article 51 describe two ways that a weapon is, by its character, indiscriminate.[264] First, there are "methods which by their very nature have an indiscriminate character, such as poisoning wells."[265] The Commentators specifically point to bacteriologic warfare and poisoning drinking water as the types of means they envision being indiscriminate.[266] In accord with international law, the only way a weapon is determined to be indiscriminate, by its very nature, is by a consensus of sovereign nations through treaty or customary law.[267] With respect to cluster munitions, delegates to the Lucerne and Lugano Conferences addressed and rejected the very issue of a treaty to regulate cluster munitions.[268] Further, the current state practice of developing and using cluster munitions is contrary to the proposition of illegality.[269] Even landmines, *designed* to lay dormant and detonate later in time, are not considered per se indiscriminate by the world community, although some suggest that the *trend* is leaning toward that direction.[270] Rather, at Ottawa, it took a consensus of nations to determine that, as a matter of policy and/or domestic law, they choose to refrain from using landmines in the future. Customary international law, however, still recognizes their legality.[271]

Unexploded ordnance is not a new phenomenon unique to cluster munitions, as Europe was littered with UXOs following World War II.[272] All

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[261] *See* Mennonite Central Committee, *supra* note 5.

[262] According to the Mennonite Central Committee, cluster bombs are indiscriminate "because their high dud rates guarantee the creation of de facto landmine fields, they go on killing for decades after the battle is over." *See* Mennonite Central Committee, *supra* note 5.

[263] *Id.*

[264] ICRC COMMENTARY TO GENEVA PROTOCOL I, *supra* note 195, at 622-23.

[265] *Id*. at 623.

[266] *See id*.

[267] This goes back to the principle of state sovereignty. For a legal norm to exist, states either must expressly agree on the norm, through a treaty for example, or it must rise to the level of customary law. To be customary law, however, states must recognize the principle and believe they must abide by the norm out of a sense of legal obligation. *See infra* pp. 20-21.

[268] *See infra* pp. 27-31.

[269] *See infra* p. 13 and note 69.

[270] ICTY Report, *supra* note 190, at 1264.

[271] *Id.*

[272] *See* US GOVERNMENT ACCOUNTING OFFICE, UNEXPLODED ORDNANCE: A COORDINATED APPROACH TO DETECTION AND CLEARANCE IS NEEDED, GAO/NSISD-95-197 (1995). According to the GAO, in France, millions of UXOs from World War I must still be located and cleared. Further, both Germany and Britain have UXO problems resulting from World War II. *Id*. *See also* MAJ Vaughn A. Ary, *Concluding Hostilities: Humanitarian Provisions in Cease-Fire Agreements*, 148 MIL. L. REV. 186 (1995) (stating that since 1946, France has

weapon systems malfunction at various times.[273] While cluster munitions have a "dud rate" of between 5-7%,[274] it is important to remember that the "remnants of war" that critics complain of are the unintended, unexploded submunitions—not intentionally laid minefields.[275] According to Major General Wald:

> Now these cluster bombs . . . there are some duds in there. Very few. But when they are, it's like any other unexploded ordnance. This is not a mine. There's no proximity on it where if you walk by or make the ground rumble or anything like that it's going to go off. So they're just like any other unexploded ordnance any place in the world. But they are not a mine. They have no timers on them whatsoever or anything like that. I think it's just like a 500-pound bomb, except there are several of them in a cluster.[276]

Accordingly, in light of current customary international law, cluster munitions are not by their very nature indiscriminate.

The second way weapons can be indiscriminate, "does not depend on the nature of the weapons concerned, but on the way in which they are used."[277] The military can always use an otherwise lawful weapon unlawfully.[278] More specifically, when expecting an attack to produce excessive collateral casualties "in relation to the concrete and direct military advantage anticipated," it is indiscriminate.[279] In other words, collateral damage is disproportionate to military gain. It is important to note that enemy combatants are never collateral damage that one must consider. Accordingly, one need not weigh enemy combatant casualties against the "concrete and direct military advantage" as the destruction of the combatants themselves provides such advantage.

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collected and destroyed more than eighteen-million artillery shells, ten-million grenades, six-hundred-thousand aerial bombs, and six-hundred-thousand underwater mines left over from WWI and WWII).

[273] *See* Parks, *supra* note 233, at 189. According to Parks:

> One may always hope for a 'zero defect' environment . . . . Nonetheless, there will be occasions where bombs or other munitions are dropped or launched with honest expectation that they are directed at the intended target, only to find that they miss their target due to a malfunction in the aircraft, its bomb-aiming equipment or the munitions.

Id.

[274] Ron Laurenzo, *Cluster Bomb Dud Rates Cut, Army Says*, DEFENSE WEEK, June 1, 1999 at 3 (citing Francis Kosakowski, an Ogden Air Logistics Center spokesperson, commenting on the CBU-87).

[275] *See* Mennonite Central Committee, *supra* note 5.

[276] DOD News Briefing, *supra* note 83.

[277] ICRC COMMENTARY TO GENEVA PROTOCOL I, *supra* note 195, at 623.

[278] *See generally id.*

[279] *Id. See generally* ROGERS, *supra* note 92, at 14-19.

The principle of proportionality holds that military planners must take all feasible precautions to ensure that collateral damage to non-military objectives is proportionate to the potential and expected military gain and consistent with mission accomplishment.[280] According to Protocol I, Article 51(5)(b), "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" would be indiscriminate and therefore, in violation of international law.[281]

Military planners must evaluate whether the use of cluster munitions will cause collateral damage on a case-by-case basis.[282] Like every other target analysis, technical experts, with input from military lawyers, should consider, among other things, the lawfulness and military value of the target, as well as the feasibility, based on aircraft capabilities and enemy air defenses, to accurately strike the proposed target.[283] By doing so, commanders fulfill their legal and ethical obligations. As it pertained to Operation Allied Force, one military spokesperson wrote:

> Cluster munitions are governed by the same Law of Armed Conflict requirements that apply to the use of any other weapon in the military inventory. When considering a strike against a specific target, the military advantage is weighed against the collateral effects. If the expected collateral damage is judged to be excessive in relation to the military advantage, the attack does not take place. The task of "producing targets" was a laborious process involving lawyers, targeteers, and intelligence analysts, who were charged with reworking all attack plans for any target where more than 20 civilians might be killed.[284]

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[280] ROGERS, *supra* note 92, at 16.
[281] Geneva Protocol I, *supra* note 124, Art. 51(5)(b).
[282] *See* ROGERS, *supra* note 92, at 16-21.
[283] *See* TARGETING GUIDE, *supra* note 255; *see generally* ROGERS, *supra* note 92, at 19. Rogers lists several factors that military planners should consider. Among them are:

> the military importance of the target or objective, the density of the civilian population in the target area, the likely incidental effects of the attack, including the possible release of hazardous substances, the types of weapons available to attack the target and their accuracy, whether the defenders are deliberately exposing civilians or civilian objects to risk, the mode of the attack and the timing of the attack, especially in the case of a mixed target.

Id.
[284] Mennonite Central Committee, *supra* note 5 (quoting LT GEN Fulford's letter to Rep. Dennis Kucenich). *See also* KOSOVO/OPERATION ALLIED FORCE AFTER-ACTION REPORT, *supra* note 13, at 90 (stating that "Combined effects munitions remain and appropriate and militarily effective weapon when properly targeted and employed. However, the risk of collateral damage, as with any weapon, must be considered when employing these weapons.").

Accordingly, planners must balance expected collateral damage against the concrete and direct (as opposed to speculative) military value anticipated.[285] Should cluster munitions be the weapon of choice, weaponeers should consider all viable alternatives, i.e., dropping at various altitudes and with various spin rates, in an effort to best reduce civilian casualties, while placing aircrews at no additional risk. Mission planners should consider not only the direct and immediate consequences of a cluster munitions strike with respect to immediate collateral damage, but in light of the known dud rates, the fact that additional collateral damage is likely to occur in the future from UXOs.[286]

As with the use of any weapon, the likelihood of collateral damage increases when it is used in areas populated by civilians.[287] Magnifying this fact for cluster munitions is the sheer number of submunitions deployed by each bomb and the resulting large footprint. Even so, a large footprint, by itself, is not enough to render an otherwise lawful weapon unlawful. While prohibiting the use of cluster munitions in populated areas is unwarranted, military planners should proceed with extreme caution to ensure that a more precise weapon could not accomplish the desired military aim. Said another way, as a matter of policy, military planners should avoid the use of cluster munitions near populated areas unless the direct military benefit *clearly outweighs* the likely collateral damage, both during and after the conflict. Nonetheless, when used properly, cluster munitions are lawful under customary international law.

V. CONCLUSION

[285] *See* Parks, *supra* note 233, at 171-72.

[286] This is not to suggest that military leaders consider the "long term" effects of UXOs on the battlefield or be called on to speculate about when and how many civilians might enter an area targeted with cluster bombs or how much demining activities might take place before those civilians might be exposed the affected area. Further, commanders cannot possibly know the exact reliability rates of every weapons system they employ in all circumstances. The consideration of known dud rates is more appropriate during the legal review of new weapons (required by Geneva Protocol I, Article 36). Rather, commanders should recognize that deployed cluster munitions will leave *some* unexploded ordnance on the battlefield. Any proportionality analysis should calculate this factor. I'm not suggesting commanders *quantify* the amount of collateral damage likely to be caused, as this would be extremely speculative, but rather, only that they recognize the potential for additional collateral damage from UXOs. Some military experts have criticized the US for failing to complete such an analysis in the past. For example, according to Anthony Cordesman, "[s]aying that such weapons cause collateral damage but ignoring them in the assessment of collateral damage is just one more way in which NATO and the US failed to address the issue of collateral damage in realistic terms and with analytic integrity." KOSOVO LESSONS, *supra* note 80, at 250.

[287] *See generally* ROGERS, *supra* note 92, at 14-19.

Cluster munitions are versatile, effective, and lawful weapons, and current international agreements do not ban their use. Properly employed, they neither cause unnecessary suffering nor are indiscriminate. Despite the aspirational view of international law held by some, customary law does not prohibit the use of cluster munitions, and absent states refraining from using cluster munitions, out of a sense of legal obligation (rather than because of national policy), no such prohibition can exist.

Nonetheless, states are not free to employ weapons any way they choose. Military planners must strike a balance between military necessity and humanitarian requirements every time the decision to strike a particular military objective occurs. By its very nature, the result will be subjective. One must apply their best judgment, exercising good faith and common sense, and make a decision about whether a particular attack will be lawful in light of the principles of international law. Military commanders are best situated to do just that. They best know their strategic and tactical objectives, the capabilities and shortcomings of their available weapons, and the risks involved to the civilian population. To presume that military leaders will systematically disregard or dismiss humanitarian concerns is both unfair and historically inaccurate. Military members, perhaps more than anyone else, suffer during war. The military recognizes and appreciates humanitarian concerns. Likewise, military commanders recognize and appreciate the rule of law.

> *I've spent a lot of time with lawyers in the past on this. When I was a planner at the CAOC, we had a lawyer at the CAOC in 1994. In the Gulf War they had lawyers. Every target-type set is reviewed for legal approval. So it's part of the process. And I'm pretty proud of our government, the fact that we do spend a lot of time checking the legality of all types of things we do . . . .*
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> *Major General Charles Wald*[288]

[288] DOD News Briefing, *supra* note 83.

Guide to the Index:
The Air Force Law Review,
Volumes 21-49

This index supplements the index compiled by Captain E. Glenn Parr and his Editorial Board as an initial 20-year index of the *Air Force Law Review*. 21 A.F. L. REV. 6-284 (1979).

Following in the footsteps of Captain Parr and his Editorial Board, though just a bit beyond a 20-year cycle, it is my hope and desire that this index will make *The Air Force Law Review* more useful to its readers by assisting them in locating articles, authors, notes, comments, book reviews, or other material published in the *Air Force Law Review* in Volumes 21 to 49. Once this volume is published and made computer-accessible (through LEXIS and WebFLITE, DoD's Executive Agent for Computerized Research), our readers will be able to find these articles more quickly and be able to respond to pressing legal issues more authoritatively.

To provide some history and continuity, I offer the following background information on *The Air Force Law Review*, drawn largely from Captain Parr's initial Guide. This law review was first published as *The United States Air Force JAG Bulletin* (A.F. JAG BULL.). Beginning with Volume 6, Number 6, it became *The United States Air Force JAG Law Review* (A.F. JAG L. REV.). Volume 16 saw the publication take its current name, *The Air Force Law Review* (A.F. L. REV.). Volumes 1 through 10 contain six separately paginated issues and are cited by the month of issue as follows: 1 A. F. JAG BULL. 3 (Mar. 1959); 9 A.F. JAG L. REV. 26 (Sep.-Oct. 1967). Volumes 11-15 are paginated consecutively and are cited by volume and page number only: 14 A.F. JAG L. REV. 84 (1972). Volumes 16-18 each contain four separately paginated issues that are cited by season of the year as follows: 18 A.F. L. REV. (Spring 1976). Volumes 19-49 are paginated consecutively and are cited by volume and page number only: 20 A.F. L. REV. 22 (1978).

To maximize the utility of the index for those searching either this index or the previous 20-year index, this index will follow generally the same conventions employed by the index of the first twenty volumes, so the format of this guide draws heavily from Captain Parr's efforts. With a few exceptions, this table format index contains all writings published in *The Air Force Law Review* from Volume 21 to Volume 49 (2000).

Each item is indexed by one or more subjects, by author, and by title. The subject index groups the writings alphabetically by title under appropriate subject-matter headings, disregarding *a*, *an*, and *the*. The author index lists each writing in alphabetical order by the last name of the author. The rank of military authors is that held at the time the writing was published. Writings

having more than one author are listed under the name of each author. Two or more writings by the same author are grouped in alphabetical order by the first major word of each title, disregarding *a*, *an*, and *the*. Note that the author index includes book reviews indexed by the reviewer's name, not by the book's author. Book reviews are otherwise indexed separately by book title. The title index entries are listed alphabetically by the first major word of each title, disregarding *a*, *an*, and *the*. Each entry contains a numerical reference to the volume, number, if appropriate, and page where that particular item is published. I trust our efforts will assist you in your legal research.

DEL GRISSOM, Major, USAF
Editor, *The Air Force Law Review*

THE REVOLUTION IN MILITARY LEGAL AFFAIRS: AIR FORCE LEGAL PROFESSIONALS IN 21ST CENTURY CONFLICTS

COLONEL CHARLES J. DUNLAP, JR., USAF*

I. INTRODUCTION

For almost a decade now the American military has been in the throes of what is known as the Revolution in Military Affairs (RMA).[1] The progeny of the larger Information Revolution, the RMA describes the impact of microchip-based technologies—not just on military equipment, but also the doctrine, organization, and strategies of warfighting. The synergistic effect of these impacts has led the U.S. armed forces—and especially the Air Force—to achieve lopsided victories in Iraq, Serbia, and elsewhere.

Paralleling the RMA there is what might be called a Revolution in Military Legal Affairs (RMLA). In a sense, the RMLA is also much the product of the same technological changes as those that caused the RMA. As will be discussed below, advanced communications and other new capabilities already have significantly altered military legal practice and are poised to generate even more change in the future. However, technology has stimulated the velocity of the RMLA in ways beyond merely the mechanics of the practice of law and the organization and doctrine applicable to legal professionals.

Technology has made law, and especially the law of armed conflict (LOAC), a central consideration in modern war. Specifically, international newsgathering organizations equipped with powerful new communications capabilities bring the raw images of war—to include possible LOAC violations—almost instantaneously to publics around the world. Such pictures can have significant impact in democratic states, as well as nations that—if not "democracies" in the American sense—are nevertheless dependent upon

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* *Colonel Dunlap (B.A., St Joseph's University; J.D. Villanova University School of Law; graduate of Armed Forces Staff College, Air War College, Syracuse University National Security Studies Program, and distinguished graduate, National War College) is a Judge Advocate with the United States Air Force currently assigned as the Staff Judge Advocate of Air Education and Training Command. He is a member of the Pennsylvania State Bar.*

[1] For a discussion of "the revolution in military affairs" in the information age, *see generally, Select Enemy. Delete*., THE ECONOMIST, Mar. 8, 1997, at 21; Eliot A. Cohen, *A Revolution in Warfare*, FOREIGN AFFAIRS, Mar.-Apr. 1996, at 37; Andrew F. Krepinevich, *Cavalry to Computers: The Pattern of Military Revolutions*, THE NATIONAL INTEREST, Fall 1994, at 30; and James R. Fitzsimonds & Jan M. Van Tol, *Revolutions in Military Affairs*, JOINT FORCE QUARTERLY, Spring, 1994, at 24.

popular support to wage war. Professors W. Michael Reisman and Chris T. Antoniou explain:

> In modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people *believe* that the war is being conducted in an unfair, inhumane, or iniquitous way. [2]

In short, the ability of today's communications systems to transmit information to the body politic before leaders can censor or shape it has become one of the most salient features of modern war. In order to maintain the kind of public support the militaries need to prosecute a war, adherence to LOAC in fact and *perception* is essential. Both military and civilian leaders have come to accept that fighting lawfully is not just the proverbial "right-thing-to-do," it is a practical—even Machiavellian—*necessity*.

This phenomenon is a key stimulus for the RMLA. With lawfulness becoming more and more the measure of success of a combat operation, there is a need for professionals who not only know the law, but can apply it appropriately in that unique context. As discussed below, Air Force judge advocates (JAGs) and paralegals are filling that requirement in ways unprecedented less than a generation ago. Unsurprisingly, Air Force legal professionals were among the first to deploy in support of Operation Enduring Freedom's war on terrorism.[3] What the RMLA means in real terms is that today few Air Force commanders would go to war without a JAG. One might conclude, therefore, that the role of legal professionals is fully institutionalized within the armed forces and the Air Force especially.

In truth, the status of military lawyers and paralegals in operational matters is not yet as firmly established as one might expect at this stage. Despite flattering remarks by commanders and others in a variety of forums, there remains an underlying resentment if not hostility among many in the armed forces to the growing presence and, more specifically, the influence of lawyers in the conduct of modern conflicts. Critiques are not commonly articulated for the record, but do exist for operations from Desert Storm[4] to

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[2] W. MICHAEL REISMAN & CHRIS T. ANTONIOU, THE LAWS OF WAR xxiv (1994) (emphasis added).

[3] For information on the Air Force's role in Operation Enduring Freedom *see* Air Force Link, *Enduring Freedom*, a*vailable at* http://www.af.mil/news/efreedom/index.shtml (last visited Nov. 12, 2001).

[4] *See e.g.*, WILLIAMSON MURRAY, AIR WAR IN THE PERSIAN GULF 224-226 (1995) (criticizing the alleged role of Air Force lawyers with respect to a proposed bombing of a statue of Saddam Hussein). Murray's version of events is disputed by Colonel Scott L. Silliman, USAF (Ret.), the former Staff Judge Advocate of what was then known as Tactical Air Command (TAC). Murray contends that TAC legal advice that the statue was a protected cultural monument "was simply wrong." Silliman contends that no lawyer ever concluded that bombing the statue was illegal; lawyers only recommended that the target be carefully screened for conformance with existing legal standards. He believes the statue was removed

Allied Force,[5] and have already appeared for Enduring Freedom.[6] As the significance of law continues to grow in international affairs, we should expect such appraisals to become more frequent, penetrating, and potentially antagonistic.

Moreover, despite sporadic references in a number of doctrinal documents, Air Force legal professionals do not as yet have their own doctrine. Its absence produces practical, deleterious effects in that commanders and, just as importantly, planners, have no systemized way of conceptualizing the legal function into the Air Force's warfighting architecture. They are reduced to filling the void with *ad hoc* and idiosyncratic assessments of what is or is not an appropriate use of legal resources. In combat operations this can result in a hodgepodge of arrangements that are often personality-driven, and are therefore—almost by definition—fragile. Though workable solutions are sometimes stumbled upon, there is a real risk that for any number of reasons, in some future operations, legal considerations will not get the attention the exigencies of the RMLA requires. The result could be disastrous for the mission in a world where public perceptions are as important (and arguably *more* important) as battlefield success.

Fortunately, the Air Force does have an energetic effort underway to create doctrine for legal professionals in the operational arena.[7] The purpose of this essay is not to critique that effort. Instead, it will consider the hard-earned experiences of Air Force legal professionals to outline a 'way ahead' in light of the RMLA. How should we think about the role of JAGs and paralegals in tomorrow's conflicts? What do we need to do to ensure that those JAGs and paralegals called upon to perform in future operations have the type and depth of training they need to succeed? What are the challenges that will (and, to an extent, already have) emerged in the 21st century?

II. THE RISE OF AEROSPACE LAW

As already suggested, the involvement of JAGs and paralegals in operations is not, *per se*, especially new. They served in significant numbers

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from the target lists for unrelated reasons. E-mail from Scott L. Silliman to Colonel Charles Dunlap, Staff Judge Advocate, U.S. Strategic Command (Feb. 19, 1998, 10:20:23 EST) (on file with author).

[5] *See e.g.*, Richard K. Betts, *Compromised Command*, FOREIGN AFFAIRS, Jul.-Aug. 2001, at 126, 129-130 (review of WESLEY CLARK, WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT (2001)) (arguing that the role of lawyers in the Balkan air war was "alarming" and "constrained even the preparation of options" and marked by a lack of "understanding of operational problems").

[6] *See* Seymour M. Hersh, *King's Ransom*, THE NEW YORKER, Oct. 22, 2001 a*vailable* at http://www.newyorker.com/FACT/?011022fa_FACT1 (last visited Nov. 12, 2001).

[7] The draft doctrine is Air Force Doctrine Document 2-4.5 *Doctrine for Legal Support of Aerospace Operations* (draft). This effort is underway at the Air Force Doctrine Center *see* http://www.doctrine.af.mil/.

in Korea, Vietnam, and later at a variety of fixed overseas bases during the Cold War.[8] However, their function was largely confined to traditional support activities such as military justice, claims, and legal assistance. International law as practiced in the Air Force at the base level was principally concerned with foreign criminal jurisdiction, tax matters, and the occasional immigration issue.

The seeds of the modern concept of JAG operational support are found in Operation Just Cause, the successful 1989 military effort to oust Panamanian strongman Manuel Noriega. Then Colonel Bill Moorman, the 12th Air Force Staff Judge Advocate at the time, arranged to get JAGs into the operation center as well as the planning cells, all with good effect.[9] Later, during the Gulf War, JAGs built upon this success and became significant "players" in such operational matters as the evaluation of targets, the development of rules of engagement (ROE), [10] and other vital operational matters.[11] Since that time, a growing number of "steady state" deployments of legal professionals to the Middle East, the Balkans, and occasionally to Asia and elsewhere continue the tradition begun in the 1980s.

Although not well known today, the architecture and precedent for JAG deployments after the Gulf War was much the result of efforts by then Colonel Jim Swanson during his service as the staff judge advocate (SJA) for 9th Air Force (1993-96). Colonel (now Brigadier General) Swanson's advocacy for the inclusion of legal professionals in steady state and contingency deployments established a template for the Central Command Air Forces (CENTAF) Area of Operations (AOR).[12] This is especially significant as Southwest Asia became among the most common deployment locations for Air Force legal professionals.

Of particular note is General Swanson's establishment—as a result of his experiences during Operation Vigilant Warrior in 1994—of the SJA position at Joint Task Force Southwest Asia (JTF-SWA) as a full-time O-6 billet. The presence of an experienced senior lawyer in the midst of on-going combat operations planning and execution educated a generation of senior Air Force leaders to the contribution a military lawyer can make to mission

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[8] *See generally*, "Operations Law" in Office of the Judge Advocate General, THE REPORTER, Special History Edition, 1999, at 110-157.

[9] *See* Lt Col Terrie M. Gent, *The Role of Judge Advocates in a Joint Air Operations Center*, AIRPOWER JOURNAL, Sept. 1999, at 40-55 a*vailable at* http://www.airpowermaxwell.af.mil /airchronicles/apj/apj99/spr99/gent.html (last visited Oct. 27, 2001).

[10] *See generally*, Chairman, Joint Chiefs of Staff Instr. (CJCSI) 3121.01A, *Standing Rules of Engagement for US Forces* (Jan. 15, 2000).

[11] *See generally*, *Master Operation Lawyer's Edition*, 37 A.F.L. Rev. (1994) (containing several articles addressing the deployment of legal professionals, as well as the functions they performed).

[12] This includes much of the Middle East and the Horn of Africa. *See generally*, the U.S. Central Command website a*vailable at* http://www.centcom.mil/new_site/web/Default.htm (last visited Nov. 12, 2001).

accomplishment. It has also provided a cadre of senior JAG leadership with authentic operational credentials and a keen appreciation of personal and professional demands occasioned by practicing law in combat zones.

All of this serves to well position the JAG Department to meet the needs of the Expeditionary Air Force (EAF).[13] Although relatively small in numbers at any given moment in time, these deployments – along with those elsewhere - have over time involved a significant number of lawyers and a smaller but still considerable number of paralegals. From that experience a number of lessons emerge, not the least of which is that serving at the tactical level in a wing – where the vast majority of legal professionals find themselves when deployed – is substantively different than serving in a headquarters, and especially an air operation center (AOC). [14] The context of the two environments is sufficiently different so as to warrant the recent separation of the unit type codes (UTCs)[15] to reflect the important differences in the duties to be performed.

Still, both kinds of duty can be considered under the aegis of "aerospace law." Traditionally, everything that occurred in the deployed arena was lumped together as "operations law." At one time that might have been appropriate; however, as we now work to focus training to meet the bona fide needs of distinct UTCs, it is necessary to add more fidelity to the lexicon to accommodate the realities of the RMLA. Properly conceived, "aerospace law" embraces the entire spectrum of legal activities that in various ways are *directly* related to operations, and especially combat operations. Within that discipline, the wing level function can be characterized as the practice of "expeditionary law," while serving in an AOC represents engagement in "operations law."

Clearly, in the EAF, all uniformed legal professionals ought to prepare to practice expeditionary law. Indeed, one might fairly say that there are three kinds of JAGs and paralegals today: 1.) those that *are* deployed; 2.) those that *have* deployed; and 3.) those that *will* deploy. Just as all JAGs are expected to have basic advocacy skills and be qualified to prosecute and defend[16] courts-martial, so too must virtually the entire Department be expeditionary-ready. The same, however, is not necessarily true with respect to operations law. The requirement for such personnel will never be as large as for those

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[13] For a brief summary of the EAF paradigm and its implementing Aerospace Expeditionary Force structure, *see* Dep't of the Air Force, *America's Air Force Vision 2020* (2000) a*vailable at* http://www.af.mil/vision/vision.pdf (last visited Nov. 12, 2001).

[14] For a general discussion of the role of air operations centers in Air Force doctrine, *see* Dep't of the Air Force, Air Force Doctrine Document 2, *Organization and Employment of Aerospace Power*, Feb. 17, 2000 a*vailable at* http://www.doctrine.af.mil/.

[15] For more information about JAG and paralegal UTCs as well as AEF deployments, see the judge advocate portion of the AEF website a*vailable at* https://aefcenter.acc.af.mil/AEFC /functionals/JAlinks.htm (last visited Nov. 12, 2001).

[16] The Judge Advocate General must certify military lawyers before they perform the defense counsel function. *See* UCMJ art. 27(b) (2000).

expeditionary-qualified. Besides the enhanced knowledge of international law AOC work requires, all persons working in an AOC—to include legal professionals—need to learn specialized computer and communications systems. Thus, it simply does not make sense (nor is it feasible) to attempt to inject that kind of expertise across the Department. That said, there are—nevertheless—aspects of each kind of duty warranting further analysis.

III. EXPEDITIONARY LAW

"Expeditionary" law is a traditional "wing-level," comprehensive legal practice conducted in the deployed environment. In most, but not all, respects it mirrors the kind of law typically practiced at a continental United States' (CONUS) base but with some important differences, especially physical ones. Specifically, the expeditionary law practitioner must be prepared to effectively function in a sometimes austere and possibly hostile situation. This means that the legal team must have good physical conditioning and solid airmanship skills. These would include the ability to set up and maintain living and working facilities, demonstrated proficiency with the designated firearm, the capacity to survive and operate in an environment contaminated by chemical/biological weapons, and more.

Concerning legal personnel, the Department's concept is to deploy a JAG and a paralegal as a team, and has constructed its principal UTC to that effect.[17] No one would dispute that training together and building good working relationships pays dividends when deployed. Nevertheless, it is important to avoid having the teams become inflexibly idiosyncratic, that is, so dependent upon each other that the JAG and paralegal who compose it are unready to function separately should the need arise. Among other things, UTCs should not be built on the assumption that the respective team members will compensate for a partner's weaknesses. There may be many instances where the team is deliberately divided, or unexpected, last minute substitutions must be made. As important as the "team" concept is and should remain, the flexibility to rapidly reconfigure as required is an absolute must.

Though there is no consensus on this point, deployed offices are not necessarily intended to be "full service" affairs; that is, they should not be expected to do "legal brain surgery" in, for example, a two-person shop that may represent the total legal presence at a given location. The ratio of attorneys and paralegals to the deployed population will never match that found at a CONUS location. Consequently, there must be prioritization and allocation of resources that might result in certain services simply being unavailable. Thus, for example, such customarily provided services as the annual tax program may not exist in many contingency locations.

[17] The UTC XFFJ3 is composed of a JAG and paralegal.

Along these lines, our doctrine (along with other Air Force directives) needs to reflect the importance of predeployment legal planning. People cannot be forced to execute wills or powers of attorney, but they can be educated on the utility of such documents. Furthermore, they ought to be given ample opportunity to have them prepared in other than the chaos and pressure of an imminent overseas deployment. The way to accomplish this is for JAGs to be very proactive during the planned spin-up period for a designated Aerospace Expeditionary Force (AEF).[18] At some stage each individual should be counseled by a legal professional concerning potential issues that could arise while deployed. The member should be provided with the available options for addressing them.

Perhaps the most difficult, yet exceptionally important, aspect of expeditionary law is military justice. For many years military justice in the deployed environment meant little more than the occasional Article 15 or letter of reprimand. More serious cases (where court-martial was contemplated) typically resulted in the accused being returned to home station, usually CONUS. In the late 1990s, however, the legal and command infrastructure in contingency areas in the CENTAF AOR was sufficiently robust that more than a dozen cases were tried in-theater.

Philosophically, it is vitally important that the full-range of justice options, to specifically include trial by court-martial, be available to command *in situ*. Few things could be more destructive of morale and discipline than if the commission of misconduct were to become an avenue out of an arduous and possibly dangerous location. Although historically, trials have taken place in combat zones,[19] the rather ill-conceived predilection in recent years to civilianize the military justice system has taken its toll. Today evidentiary rules, representational precedents, and other developments meant to mirror the resources and processes available in CONUS civilian courts have made the conduct of military trials in remote foreign areas under austere conditions extremely difficult and sometimes impossible.

The RMLA should extend innovations to the administration of the disciplinary process at every level. Part of this may require something of a "back to the future" approach. For example, the typical practice today is to deploy defense counsel, military judges, and court reporters only when needed for specific cases. Unfortunately, however well this concept may work for steady-state deployments (and it is cumbersome and complex at best), it will seldom work consistently for dynamic, short-notice contingencies. Inserting unexpected personnel into the intra-theater transportation scheme in a relatively new operation is difficult and will become even more so as sorties

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[18] *See* note 13, *supra.*

[19] During the Vietnam War, a Marine Corps court-martial was conducted in an underground bunker in the midst of the dramatic siege of Khe Sanh. *See* GARY D. SOLIS, MARINES AND MARINE LAW IN VIETNAM: TRIAL BY FIRE 106-109 (1989).

get ever more carefully managed to fully book them with pre-existing requirements.

One solution may be to make the necessary policy (and statutory if needed) changes to allow the designation of military lawyers already in-theater to serve on a temporary basis as military judges and defense counsel. Admittedly, there would be challenges to ensure that such judges and defense counsel have sufficient independence in fact, but these issues are manageable. Further, some may argue that such an approach would undercut the appearance of impartiality of the judiciary and defense services.

In truth, however, there is virtually no data to demonstrate that the existing structure ever successfully created the desired perception of independence among the military's rank and file, or even—for that matter—accused who are presumably briefed in some detail on the elaborate structure set up for that purpose. The significant numbers of accused that seek civilian counsel would seem to be a melancholy testament to that conclusion. In other words, to the typical airman accused of misconduct, the new arrangement would likely be transparent in terms of his or her expectations. To the contrary, some accused may *prefer* representation by counsel drawn from deployed units because of the anticipated familiarity with the specific area and mission—compared to the potential negative effect of representation by outside counsel who lack such familiarity.

Other changes reflective of the technology that underpins the RMLA ought to be made. For example, evidentiary rules (and statutory underpinnings where appropriate) that take advantage of such new communications capabilities such as video teleconferencing are plainly overdue. Inevitably, such changes would be tested in the courts, but it is a mistake to assume—as is too often the case today—that they would be rejected. Constitutional standards applicable to the trials of members of the armed forces for uniquely military offenses (and those directly related *by their facts* to a specific military mission *in contingency areas* during hostile action) may very well permit the use of advanced communications means as a substitute for live testimony.

The RMLA would also seem to suggest changes in nonjudicial punishment actions. For example, persons assigned to naval vessels can be required to accept nonjudicial punishment even when they otherwise might wish to demand trial by court-martial.[20] An element for this practice lies in the special status of a ship's captain that comes from naval traditions. In the main, however, it reflects the logistical problems with trying cases aboard ship should the respondent refuse nonjudicial punishment. Today, however, the difficulty of trying such cases in some of the remote locations where an AEF may find itself will equal—if not exceed—the justification that warranted the rule for naval vessels in the first place. Thus, it may make sense to extend the policy to contingency locations under certain circumstances. In short, the

[20] 10 U.S. C. § 815(a) (1998).

entire Uniform Code of Military Justice[21] and associated administrative procedures need re-examination to facilitate its application—and relevance—in the deployed environment.

The differing issues presented by the administration of military justice constitute just one illustration of how "expeditionary" law within the aerospace law discipline differs from received wisdom of what constitutes "operations law." Another example that the JAG deploying with the typical AEF will find is that the expeditionary law practice requires in-depth knowledge of contracting and fiscal law principles. It has been the universal (albeit somewhat unexpected) experience of deployed JAGs that these matters present the thorniest issues. The natural tendency of commanders to make things happen quickly, the absence of contractors knowledgeable of government procurement procedures, and differing cultural orientations in host areas, are just a few of the things that make resolving these issues so difficult. In any event, addressing contract and fiscal law problems is central to the practice of the expeditionary law.

Of course, expeditionary law does require a general appreciation for international law, especially as it applies to status of forces agreements (or the absence thereof). The JAG must know, for example, the procedure for dealing with foreign criminal jurisdiction cases, as well as foreign claims. Concerning operational matters, the JAG should expect to provide rules of engagement training, along with LOAC instruction as needed. What the wing-level JAG typically will *not* do is review targets and operational plans. The vetting of those issues in-theater is the responsibility of the AOC legal team. Among other things, the JAG at the wing-level will rarely have access to the overall plan or the supporting intelligence to make a proper evaluation. However, if for whatever reason the JAG becomes concerned about a targeting or other LOAC matter, that concern should be immediately transmitted to the AOC's JAG cell.

The role of the paralegal in the expeditionary environment finds many parallels with that of a law office manager. This means the paralegal must be able to perform the range of tasks accomplished by paralegals in the typical, full-service wing legal office. Experience reveals, however, some areas worth special emphasis. For example, the paralegal should be familiar with report of survey procedures because the loss or damage of property is not uncommon in deployed areas. The paralegal must also know how to process a Foreign Claims Act[22] case. As previously mentioned, complicated contracts and fiscal law issues often arise during deployments. The paralegal should become expert in the instructions governing the use of appropriated and nonappropriated funds for health, welfare, and morale purposes.[23] This is

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[21] 10 U.S. C. §§ 801-946 (1998).

[22] *See* Foreign Claims Act, 10 U.S.C. § 2734 (1998).

[23] *See e.g*., *Appropriated Funds*, Op. JAG, Air Force, No. 23, (Apr. 1, 1999) (discussing appropriate funding sources for commanders' coins).

another issue that seems to frequently arise in deployed situations, and one which paralegals could provide great assistance in resolving.

A tremendous opportunity also exists for paralegals in military justice and other investigatory matters. Beyond the need to be able to fully process all kinds of military justice actions, it appears that the paralegal in future operations will need to have court-reporting skills. The Department's current reliance upon civilian court reporters volunteering as needed continues to be problematic[24] and can never provide the certainty those responsible for military planning demand. The nature of 21st century Air Force missions requires a cadre of *uniformed* court-reporters who can be directed to go into harms' way anywhere in the world, and who have the training and physical stamina to survive and function once there.

A key to developing this aspect of the RMLA is to take advantage of the new court-reporting technologies. With the right systems, mastering court reporting will not be the onerous task it has been in the past. Indeed, delays in court-martial transcriptions throughout the Air Force may be related to reliance on parochial legacy systems instead of newer, faster ones. Once this technology-facilitated skill is integrated into the paralegal community, it will be in demand not just in contingency areas, but at home stations as well. Empowered paralegals will likely find themselves part of the team supporting such activities as Accident Investigation Boards (AIBs) and the proliferating number of commander-directed investigations (CDIs).

With respect to the last topic, it would seem that paralegals are primed to fill a critical need in contingency locations (as well as home station): that of investigator. Counter-terrorism and force protection responsibilities have caused a steady erosion of investigative support from both the Air Force Office of Special Investigations (AFOSI) and Security Forces (SF) to the point that today investigative support of routine criminal matters is very much the exception. Paralegals are already familiar with the legal considerations involved, and some have learned, *ad hoc*, investigative techniques (often when assigned as defense paralegals). With some additional training, paralegals could be of immense assistance to those assigned to conduct CDIs, as well as to trial and defense counsel preparing cases for court. In certain instances, paralegals may themselves be the principal investigators. Clearly, the RMLA is not just a technological concept, but rather one that seeks to incorporate new ways of thinking to meet 21st century needs.

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[24] *See e.g.*, Lt Col Mary Beth Harney, *After-Action Report—Operation Southern Watch*, Oct. 6, 2001, at para 9a(1) ("The major obstacle [to conducting a court-martial] was finding a court reporter available to travel to the AOR.").

IV. OPERATIONS LAW

As described above, the integration of Air Force legal professionals into AOC operations is a process that now has some years experience upon which to draw. Conceptually, the issue is no longer finding an explicit rationale for access to AOCs and the planning process. Even if JAG support is not sought by a concerned commander (not likely in the RMLA era) both international law[25] and U.S. regulations[26] provide ample authority for getting military lawyers into the process (though more acculturation of planners and operators in this regard is always desirable). Today's problem is a practical one: determining exactly where and how to most efficiently and productively interface in the operational planning and execution process.

What is needed is an agreed upon template that assures and regularizes JAG input at various points in the air tasking order (ATO) cycle. The precise methodology for doing so may well be driven by the integration of such computer systems as the Theater Battle Management Core System (TBMCS), as well as the nature of the operation itself. It is important, however, that the importance of human interaction and physical presence not be underestimated. To the extent possible, JAGs working in AOCs ought to have *physical presence* in the strategy division, the Guidance, Apportionment, and Targeting (GAT) shop, among the Major Air Attack Plan (MAAP) developers, and the Information Operations (IO) shop, as well as the "battle cab" (or its equivalent).

Obviously, a JAG working in an AOC needs a solid understanding of the theory of the ATO process, along with the decision support systems that make it work. This knowledge must be placed in the larger context of warfighting, particularly at the strategic level. Today's savvy commanders very often welcome the JAG in the AOC, but they want the JAG to be a complete *military* officer. General Hal M. Hornburg captured the expanded expectations in a speech in June of 2001:

> [JAGs] need to understand the big picture. I was in the CAOC during Desert Fox. Who do you think was standing right behind me? It was my JAG. That person needs to know the law and the rules of engagement, but he or she also needs to understand things bigger than just the law. They've got to understand combat.[27]

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[25] *See e.g.*, Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, art. 82, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) (commonly known as Additional Protocol II).

[26] *See e.g.*, CJCSI 5810.01A, *Implementation of the DoD Law of War Program*, para. 6(c)(5) (27 August 1999) (mandating that "all operation plans . . . concept plans, rules of engagement, execute orders, deployment orders, policies, and directives are reviewed by the command legal advisor to ensure compliance with domestic and international law").

[27] General Hal M. Hornburg, *The Importance of Legal Professionals in the Air Force*, (June 27, 2001), *available at* http://www.aetc.randolph.af.mil/pa/Library/speeches/cc06.htm (last

This highlights the importance of professional military education (PME) for JAGs intending to practice operations law. Rarely would a JAG who has not completed intermediate service school be suitable to serve in a senior position on an AOC legal team. What is more is that the RMLA demands that Air Force legal professionals re-think the concept of "PME." No longer is it sufficient to assume that completing periodic formal courses is adequate. The Air Force legal professional must take on the unending responsibility for *self-education* in every aspect of the client's "business." This means studying military history, world politics and culture, Air Force weapons systems, grand strategy, the mechanics of combat operations, and much, much more. Unless the JAG has an understanding of the multiple dimensions of what General Hornburg calls the "big picture," he or she will never truly succeed as a legal advisor in combat operations.

Unlike the expeditionary law practitioner, the legal professional practicing operations law must have a thorough understanding of LOAC and related facets of international law. He or she must also be familiar with the interpretations given LOAC by such entities as the International Criminal Tribunal for the Former Yugoslavia.[28] Because the Air Force will usually operate within a coalition, understanding which coalition members are parties to what LOAC agreements is vital. In the context of the RMLA, JAGs working in AOCs must carefully distinguish between what the law mandates and what is merely prudent warfighting. For example, striking a particular target may be legally and morally permissible notwithstanding collateral damage, yet still not wise strategically in particular circumstances because of the political consequences. This, once again, underlines the importance of fully understanding the "big picture."

The AOC JAG also must be forensically adept. He or she must be able to rapidly and lucidly explain complex legal matters under circumstances of great stress. This includes the ability to very quickly draft cogent memoranda on a wide-variety of issues, and prepare equally as sound presentations that are visually effective. With respect to ROE, the AOC lawyer must not only be *the* expert, but also able to instruct operators on its application in a range of realistic combat situations. Additionally, the JAG will likely be tasked to draft, or assist in drafting, that part of the special instructions (SPINs) that concern ROE. Further, when collateral damage incidents do arise, the JAG may be called upon to marshal the evidence, analyze it, and "make the case" to the public if necessary. For all these reasons, the skills of the trial practitioner—and not necessarily the international law academic—will often be among the most desired traits of the operations law attorney.

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visited Oct. 22, 2001).

[28] *See e.g.*, International Criminal Tribunal for the Former Yugoslavia, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (13 June 2000) a*vailable at* http://www.un.org/icty /pressreal/nato061300.htm (last visited June 12, 2001).

How does the paralegal work into AOC operations? While there has been much written about the role of the JAG in the AOC, rather less has been discussed about the paralegal's function. This is still an evolving area, but it seems clear that the paralegal's importance in the AOC will only continue to grow. The paralegal's role need not, however, necessarily be interchangeable with that of the lawyer (though sometimes that may be the case). Ideally, it is a complimentary role, and one that builds on existing skills. Nevertheless, it will be necessary—just as with the attorneys—for paralegals to develop new capabilities.

The paralegal must have a working knowledge of the ATO process marked by a clear understanding of when and how legal analysis is typically injected. The reason for this is that the AOC paralegal, who must be an experienced NCO, should be the "triage" director, that is, responsible for tracking and managing the multiple demands on attorney time. The paralegal must have a sufficient understanding of international law and other AOC issues, not to resolve them *per se*, but to clarify and prioritize them for the attorneys. The paralegal also needs to be able to re-direct queries as appropriate, and to quickly assemble the relevant research materials.

In practical terms, the paralegal must have a "hands-on" technical capability with respect to the AOC computer systems. He or she must be able to help set up the system, understand its capabilities, and perform basic maintenance and repairs. In addition, the paralegal must know how to properly manage classified material, as well as have a substantive understanding of the foreign disclosure rules applicable to the particular operation. Although the AOC legal team usually would not be concerned with such combat support matters as legal assistance or claims, they inevitably arise among AOC personnel, and smart client relations dictates they be addressed promptly. The paralegal should be the principal point of contact for these issues, resolve them where possible (e.g., preparing a simple power of attorney or performing a notarization), and ensure proper referral to the supporting legal office when necessary.

The challenge today is to develop the right kind of training programs for Air Force legal professionals destined to practice operations law in AOCs. Given the Air Force's stated intention to treat the AOC as a weapons system, JAGs and paralegals should expect to attend many of the same formal programs that all AOC personnel must complete.[29] In addition, specialized training for lawyers and paralegals (already extant within Air Combat Command) is needed. Air Force legal professionals should expect a testing and certification regime, though it is vitally important that the ultimate

[29] These courses are conducted by the Air Force Command and Control Training and Innovation Group at Hurlburt Field, FL, *see generally* http://www2.acc.af.mil/afc2tig/ (last visited Nov. 13, 2001).

decision as to who is—or is not—qualified to practice law in an AOC (as well as anywhere else in the Air Force) be reserved to The Judge Advocate General.

V. REACHBACK AND THE RISE OF THE "VIRTUAL" OFFICE

A key feature of the emerging Air Force way of war is the notion of "reachback." This is keeping with the idea that the size of the forward deployed force will be kept as small as possible. Instead of having all the experts and other specialists go forward, people can remain at home stations and "participate" via computer, video teleconferencing, and other advanced communications links. AOCs are already engaged in this kind of high-tech leveraging of Air Force resources. By replacing people with "reachback" technology, a "light, lean, and lethal"[30] AOC can deploy much more quickly and thus begin air operations sooner.

Reachback is also a feature of the RMLA. In a sense, JAGs have been using reachback for years. The numerous resources available through the Federal Legal Information Through Electronics (FLITE) program bring all kinds of information and resources to JAG computer terminals everywhere. Of course, in certain deployed areas the communications "pipe" cannot always support or sustain access to FLITE (or access to other legal databases). Consequently, the International and Operations Law Division (HQ USAF/JAI), the Air Force Judge Advocate General School, and others record more and more materials onto CDs for ease and reliability of access.

Most significant is the growth of legal cells that are fully staffed during contingency operations at command posts in rear areas. It is very often the case that, notwithstanding distance or time zones, the forward-deployed JAG always has immediate access to another military lawyer, and frequently at multiple levels of command. In addition to greater access to legal resources in the rear area, the type of dynamic exchange that can take place among the lawyers linked in real time by modern communications systems can often solve problems more quickly and accurately than could a JAG otherwise isolated by time and distance.

Still, there is a fine line between reachback support and back channel "stovepipes." Although operators are becoming accustomed to the concept of reachback, its application to JAG activities is not yet always fully accepted. In part this is because there is the perception (and one not altogether bad) among many clients that a good lawyer can handle any issue. Consequently, it is not always readily understood that assistance in specialized areas of the law is required. Further, the sensitive nature of JAG business is such that command, and others, are often reluctant to share the information with higher

[30] The Air Force's development of the new AOC concept is part of a broader effort called Joint Expeditionary Force Experiment (JEFX). *See e.g.*, http://www.af.mil/news/airman /1199/world7.htm (last visited Nov. 12, 01).

headquarters. By law, JAGs are free to communicate "directly" with each other without intervention of the chain of command.[31] However, as a practical matter, JAGs need to engage command as to how JAG reachback can help accomplish the mission most efficiently.

Another aspect of the RMLA is the concept of the "virtual office." That is, a way of operating whereby the small footprint, forward deployed legal office has a different kind of relationship with the supporting office at higher headquarters. Specifically, the forward office would be principally responsible for serving immediate needs of clients, as well as spotting issues. When the deployed JAG is confronted with an issue not capable of immediate resolution, he or she would have the option of shipping it via e-mail, fax, or other means to a supporting legal office in the rear (usually the numbered Air Force).

Substantive research, to extend even to draft-opinion preparation when appropriate, would be accomplished and then re-transmitted to the contingency location. In other words, unlike the typical relationship in CONUS where the subordinate office is expected to exhaust their research and analytical capability before turning for assistance to higher headquarters, the higher headquarters JAG office itself forms a "virtual" research branch of the forward-deployed JAG. The creation of "virtual offices" through the exploitation of emerging communications capabilities will allow the delivery of very high-quality legal work to even the remotest locations.

VI. HOMELAND DEFENSE

Actually, the newest trend in aerospace law runs somewhat counter to the expeditionary concept emphasized in the Air Force in recent years. After the September 11 attacks, the Quadrennial Defense Review (QDR) [32] was rewritten to push "Homeland Defense" to the forefront. The use of military force in domestic situations has long raised complex legal issues. Since Colonial times Americans have been suspicious of the threat to liberty presented by military forces used for internal security purposes.[33] As a result, there are a plethora of statutes—the *Posse Comitatus* Act[34] foremost among them—that regulate the military's authority in CONUS to execute the laws. There are exceptions to these prohibitions,[35] but they should be read in a

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[31] 10 U.S. C. § 806(b) (1998).

[32] Dep't of Defense, Quadrennial Defense Review Rep. (Sept. 30, 2001) a*vailable at* http://www.defenselink.mil/pubs/qdr2001.pdf (last visited Oct. 29, 2001).

[33] *See* Charles J. Dunlap, Jr., *Revolt of the Masses: Armed Civilians and the Insurrectionary Theory of the Second Amendment*, 62 TENN. L. REV. 643, 646-653 (1995).

[34] 18 U.S. C. § 1385 (1998).

[35] *See generally*, Jeffrey D. Brake, *Terrorism and the Military's Role in Domestic Crisis Management: Background and Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE, Apr. 19, 2001.

limiting fashion—one that recognizes that there are few models in history where military forces were successfully used in both a domestic policing role and in an external warfighting mode.

Of particular concern is determining the legal parameters of domestic intelligence gathering, especially where U.S. citizens are involved.[36] The events of September 11 have, at least in the short term, diminished the once robust resistance in the public mind to such government surveillance. Moreover, as the Air Force—along with Americans generally—become more computer-dependent, cyberterrorism is another type of 21st century threat that mixes law enforcement and national security interests in ways not yet fully delineated. Nevertheless, significant limitations on the proper role of the armed forces remain in place—for good reason. It will be especially important in the coming years for Air Force legal professionals to ensure the letter and spirit of the restrictions are fully respected in domestic operations.

Such operations may also include CONUS counterair efforts. What is really unprecedented for the Air Force in the aftermath of the September 11 attacks is not enhanced CONUS air defense *per se*. Rather, it is the use of American fighters to possibly shoot down commercial airliners under the control of terrorists that is wholly unprecedented. Crafting appropriate ROE and SPINS for such situations is exceptionally challenging. Beyond this formidable task we should expect to see a multiplication of requests for support to civil authorities in situations where biohazards are suspected, as well as consequence management in the event of terrorist attacks having catastrophic impact. In the worst case scenario, Air Force legal professionals must be prepared to advise even on such previously unfathomable matters as martial law.

VII. FINAL OBSERVATIONS

Since the horrific events of September 11, 2001 many have expressed the view that nothing will ever be the same for Americans. In a very real way this is especially true for the Air Force Judge Advocate General Department. Already in the midst of the RMLA, the Department now has an abundance of aerospace law issues of first impression to address. We may be at the inception of a RMLA even greater than already discussed. In the future, the need for aerospace law practitioners for both deployed and homeland operations may require a re-allocation of the Department's resources.

For example, the Department's civilian lawyers may bear increasing responsibility for "steady state" taskings in specialized legal disciplines like labor, environmental, privatization, and more. These are areas of law best

[36] *See e.g.*, National Security Act of 1947, 50 U.S.C. §§ 401- 441d; the Intelligence Oversight Act of 1980, 50 U.S.C. § 413; Exec. Order No. 12333, U.S. Intelligence Activities, 46 Fed. Reg. 59941 (Dec. 4, 1981).

addressed by consistent representation over long periods of time. The uniformed part of the Air Force's legal team must be prepared to focus on aerospace law issues that by their very nature are peripatetic in scope, intensity, and duration. A division of labor that recognizes and accepts counsel availability as a factor in the efficient delivery of legal services may become a watershed in the RMLA.

For judge advocates, along with other military officers, the greatest responsibility in coming years may be to temper the emotions of the moment with reflective, professional advice. We will face opponents who will not shrink from using any method to inflict harm upon us, however bestial. Replacing emotionalism (and all the obtuse and undisciplined decisions it can generate) with the sort of cold fury that is eminently clear thinking and aggressively rational, may well be one of the most important contributions a military professional can make in 21st century conflicts. Only by doing so can we be assured that the effective use of armed force honors the legal and moral ideals that the American military exists to defend.

The following presentation is a synopsis of Brigadier General Pitzul's opening remarks for the United States Air Force Judge Advocate General School's Operations Law Course, May 1, 2001.

OPERATIONAL LAW AND THE LEGAL PROFESSIONAL: A CANADIAN PERSPECTIVE

BRIGADIER GENERAL JERRY S.T. PITZUL*

I. MANDATE OF THE CANADIAN FORCES JAG

The Canadian Forces JAG is, by statute, the legal advisor to the Government of Canada, the Minister and Deputy Minister of the

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* *Born in Montréal, Québec. Brigadier General Pitzul brings a diversified legal career in the Canadian Forces (CF) and the public sector to the position of Judge Advocate General (JAG).*

After joining the Canadian Forces as an officer cadet, General Pitzul earned his Bachelor of Administration degree in 1975 from the Collège militaire royal in St-Jean, Québec. He then moved on to Dalhousie University, where he received his Master of Business Administration in 1976 and his Bachelor of Laws in 1979. After graduating, he was appointed as Assistant Deputy Judge Advocate (DJA) for the CF Atlantic Region. In 1981, he was promoted to the rank of Major and appointed as DJA for the Prairie Region. In 1984, he was posted to National Defence Headquarters in Ottawa to the Directorate of Personnel Legal Services.

After being promoted to the rank of Lieutenant-Colonel in 1987, he was appointed Director of Law Prosecutions and Appeals in the Office of the JAG. In this position, he acted as Chief Crown Prosecutor for the CF, represented the Crown before the Court Martial Appeal Court, and advised senior authorities on all cases going before the courts involving criminal or disciplinary law. He also advised senior Department of Justice officials on all cases going before the Supreme Court of Canada, the Federal Court, and provincial superior courts.

In 1989, General Pitzul became a military trial judge and in 1993 the Minister of National Defence appointed him to the position of Deputy Chief Military Trial Judge. During his time as a military trial judge, General Pitzul conducted trials in both official languages in all the provinces of Canada and in various parts of Europe, including the former Republic of Yugoslavia. He became Special Assistant to the Judge Advocate General in November 1994. In 1995, General Pitzul retired from the Canadian Forces and accepted an appointment as the Director of Public Prosecutions for the province of Nova Scotia.

On the recommendation of the Minister of National Defence, General Pitzul was appointed as JAG by Order in Council on March 10, 1998. His appointment was effective 14 April, 1998.

Throughout his career, General Pitzul has also held various professional positions, including the Department of National Defence's Deputy Coordinator of the Special Voting Rules made under the Canada Elections Act, Director of the Atlantic and Eastern Region Ontario Advisory Board for the Canadian Scholarship Trust Fund, and member of the Board of Directors of the Amalgamated Credit Union in Edmonton, Alberta.

Brigadier General Pitzul is married with two children and resides in Ottawa.

Department of National Defence, the Canadian Forces and the Chief of Defence Staff on all issues respecting military law.

The Canadian Forces JAG is appointed by Cabinet and he is directly responsible to the Minister of National Defence. The Canadian Forces JAG is responsible for the superintendence and administration of the Canadian Forces military justice system, which includes an independent Director of Military Prosecutions, an independent Director of Defence Counsel Services, and independent judges.

II. CANADIAN FORCES JAG STRATEGIC OBJECTIVE: TO DELIVER EXPANDED AND ENHANCED SERVICES IN MILITARY LAW

This strategic objective includes the following aspects:

- Increasing the Canadian public's confidence towards the military justice system;
- Expanding the role of military lawyers;
- Developing an innovative management to the Office of the JAG;
- Strengthening allied interoperability by implementing legal arrangements (e.g. Status of Forces Agreements (SOFA));
- Developing Canadian Forces policies, regulations and directives related to operational law issues (e.g. production of an Operational Law Manual and contribution to the rewriting of the Canadian Forces Use of Force Manual);
- Continuing to train Canadian Forces personnel in the Law of Armed Conflict;
- Instituting a Legal Section at the Royal Military College in Kingston, Ontario;
- Continuing to deploy Legal Officers on Canadian Forces Operations; and
- Participating in coalition operations and training.

III. CANADIAN FORCES LEGAL-OPERATOR TEAM

By regulation, all Legal Officers holding a position on the Canadian Forces JAG establishment are, regardless of where they are employed, directly responsible to the Judge Advocate General for the performance of their duties. This Canadian Forces legal “command” structure in no way interferes with an extremely cooperative and effective team approach between operational personnel and lawyers. It also has the additional advantage of enhancing the provision of independent legal advice.

A. Strategic Level

At the strategic level of operations, the National Joint Staff (JStaff) is responsible for the staff effort related to the planning, conduct and coordination of Canadian Forces operations. The JAG is J5 Legal on the JStaff. The JAG and his staff are actively involved in all phases of the Operations Planning Process (planning, training, deployment and redeployment). The key areas of the process which require legal review at the strategic level are: legal basis/mandate for the mission, use of force, Rules of Engagement (ROE), SOFA, and Terms of Reference for Canadian Forces Task Force Commanders.

B. Operational and Tactical Levels

At both the operational and tactical levels, Canadian Forces Legal Officers are deployed whenever significant numbers of Canadian Forces personnel are deployed to theatres of operation. Legal Officers co-located with operational commanders fulfill much the same function as J5 Legal at the strategic level. They advise the operational commander on all legal issues related to the Operational Planning Process including the conduct of operations.

Also part of the mandate of these Legal Officers is advising on military justice issues, thereby assisting the chain of command in maintaining a disciplined and effective military force.

IV. OPERATIONAL LAW

"That body of law, both domestic and international, impacting specifically upon legal issues associated with the planning for and deployment of Canadian Forces in both peacetime and combat environments."[1]

Operational law is a very dynamic area of the practice of military law and of the profession of arms. As such, it is still developing and providing significant challenges to legal advisors and operators alike.

A. The Profession of Arms

"The function of the profession of arms is the ordered application of force in the resolution of a social problem." (General Sir John Hackett[2]*)*

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1 Canadian Forces JAG Directorate of Law/Operations working definition of operational law.

2 The late General Sir John Winthrop Hackett, one of Britain's honored WWII military professionals and soldiers, first Chancellor of the University of Western Australia, author of Third World War: August 1985, and editor of Warfare in the Ancient World.

This statement exemplifies and explains why the rule of law is important to the military operator. All members of the Canadian Forces belong to a profession, the profession of arms. Some specialist members, such as Legal Officers or Medical Officers, also belong to other professional organizations. It is very important for military personnel to understand and accept that as members of a profession they have an extremely vital role to play in promoting the supremacy of the rule of law in the conduct of armed forces operations.

B. Operational Legal Issues

Examples of the main operational legal issues that have arisen in Canadian Forces operations are:

- Legal basis / mandate;
- Use of force / ROE;
- Targeting;
- Review of operations plan;
- Legality of weapons / use;
- Investigation of alleged war crimes;
- Treatment of civilians / refugees;
- Instruction in Law of Armed Conflict (LOAC); and
- Negotiation of SOFA.

Even though the list is not exhaustive, these are vital areas of most modern peacekeeping or peace enforcement operations. These are some of the crucial issues that most often provide the greatest challenges and determine the success or failure of the mission.

C. Legal Framework of Canadian Forces Operations

Canadian Forces operations are governed by:

- International law;
- International human rights law;
- LOAC; and
- Canadian domestic law.

The Canadian Forces tend to use the terms International Humanitarian Law (IHL) and the LOAC to describe the general legal framework in which the Canadian Forces operate when deployed internationally. These terms have proved useful and meaningful to legal advisors and operators alike.

1. International Law

a. Customary International Law

Customary International Law (CIL) is perhaps the most difficult area to grasp for both lawyers and operators. CIL, like the common law, is based on legal concepts which have been developed and supported in court cases, academic writings and, sometimes, domestic legislation. In essence CIL represents the Community of Nations' acceptance of a legal principle or precept. Although not all nations may accept the principle, if the majority of nations accept it then it is considered international law and binding on all nations. Occasionally, such principles are so universally accepted that they become what is known as *JUS COGENS*—the Latin term to describe a principle which is so fundamental to the Community of Nations as to be uncontroversial. Examples of legal concepts that have become *JUS COGENS* are the right of self-defence, the right to life, the right not to be subjected to torture and the responsibility to prevent genocide.

b. Conventional or Treaty Law

The second key area is conventional or treaty law. Such law is somewhat easier to identify, as it exists in a written or codified format. In many cases such treaties or conventions codify what already exists as CIL. A good example of this is the United Nations Convention on the Law of the Sea (UNCLOS[3]). In UNCLOS, there are several CIL principles such as the prohibition on piracy and description of rights of transit through territorial waters, which were already accepted as CIL before being codified in UNCLOS.

In the context of the Rule of Law, treaty law, like the Geneva Conventions (GCs) and the 1977 Additional Protocols and Hague Rules, is paramount and impacts significantly on military operations. In fact, the legal, operational and humanitarian principles found in these treaties are so fundamental that it is Canadian Forces policy that all its members will apply the spirit and principles of the GCs, Additional Protocols I&II and Hague Rules on international operations, even if Canada is not engaged in an armed conflict.

In addition to the GCs, Additional Protocols I&II and Hague Rules, there has been a proliferation since the end of WWII of other treaties best characterized as "human rights" laws which have also had a significant impact on military operations. These treaties reflect a growing concern for human rights issues which are not necessarily fully addressed in the LOAC.

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[3] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994). The U.S. has signed but not ratified the treaty.

2. International Humanitarian Law

The growing focus on human rights and human rights law since the end of the Cold War has significantly impacted the way the World responds to conflicts and humanitarian disasters. Since the end of the Cold War, the UN as been much more active and effective in responding to conflicts and humanitarian disasters. Though the response may not always have been prompt and efficient, it has occurred. No nation has been immune from the growing focus on human rights. Accordingly, the armed forces of most nations have had to adapt to this growing concern and have had to modify or create their operational doctrine, policy decisions and orders. The Canadian Forces has been no exception to this.

The following are examples of the interoperability legal issues when participating in an alliance.

a. Different Treaty Obligations.

Nations are bound by customary international law but they are not bound by treaty law unless they have signed and ratified a particular treaty. Even in a coalition of the closest allies, there will inevitably be international legal treaties that have a direct impact on the planning of, training for, and conduct of an operation that some coalition partners will be bound by and others will not. For example, not all countries have signed and ratified the Additional Protocols to the Geneva Conventions. Therefore, there are provisions of the Protocols that technically may not apply to all coalition partners. However, the common sense nature of most provisions of the Protocols and a *de facto* commitment by many nations to comply with the spirit and intent of the Protocols, if not the exact wording, can usually overcome any potential problems.

The same interoperability concerns apply equally to the Ottawa Convention on the Use of Anti-personnel Landmines[4] (APM). Canada, for example, is bound by the Convention's prohibition with respect to the stockpiling, transfer and use of anti-personnel mines. Further, Canadian Forces personnel are prohibited from participating in the planning for the use of anti-personnel mines or providing assistance in the use of these mines to a coalition partner who may not be a party to this Convention. The interoperability issues are obvious although participation in a coalition operation with non-APM signatories is not prohibited. It is Canada's clearly stated national view that in the context of operations, exercises or other military activity sanctioned by the UN or otherwise conducted in accordance

[4] The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Mar. 1, 1999, 36 I.L.M. 1507.

with international law that mere participation with nations who engage in the use of APMs would not in itself be considered to be assistance, encouragement or inducement and therefore not a breach of the APM Convention. As a result, it is a challenge that must be managed.

b. Different Rules of Engagement Architecture

It may be that the coalition's ROE architecture is quite different from the respective troop contributing nations' ROE system. Obviously, if national forces apply their own national ROE architecture to the numbered rules that are authorized through the coalition chain of command and different coalition partners are operating under different national architectures (for example some coalition partners' national ROE architecture is permissive and others are operating under a restrictive architecture), there will be a wide divergence in use of force responses by various coalition partners. This example is only valid if assuming that there is no clearly defined and understood coalition ROE architecture.

c. Different Interpretations of International Law

Nations view the interpretation of international law through their own national perspective. This can lead to different positions by coalition partners with respect to many operational legal issues. An obvious and debated example is the varying national views on self-defence and in particular "anticipatory self-defence". There is also the example of the varying national views on the granting of refugee or asylum seeker status based on international obligations under the Refugee Convention[5]. Sorting out all these differences in positions will be very important to coalition commanders as they attempt to use available assets in the most effective manner possible.

3. Domestic Law Influence

Finally, and closely related to this last concept, are domestic law influences (as opposed to domestic interpretation). An example of this type of influence is the general prohibition under Canadian law to use deadly force to protect property. Simply stated, deadly force to defend against the theft of a wristwatch is unacceptable under Canadian law. That does not mean that the use of deadly force will never be authorized. For example, ROE permitting the use of deadly force could be issued for the protection of mission critical equipment or the protection of property the destruction of which could cause serious injury or loss of human life. The defence of property is a particularly

[5] Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

challenging issue in failed states where the food supplies and equipment of coalition forces may appear particularly attractive to a hungry and destitute population. Obviously, a multilateral force commander will need to be aware of national approaches to the defence of property in order to make the most effective use of the assets at the commander's disposal.

V. RECENT CANADIAN FORCES INTERNATIONAL OPERATION: NATO AIR CAMPAIGN IN THE FEDERAL REPUBLIC OF YUGOSLAVIA (OPERATION ALLIED FORCE)

This case study is provided to highlight in more concrete terms the impacts of the legal framework for operations and the challenges facing legal military professionals in an international operation.

A. Canadian Forces Participation

Canada, as a member of NATO, actively participated into the aerial campaign of Operation ALLIED FORCE from 24 March to 10 June 1999. One of the key issue facing NATO and its troop contributing nations was the lack of a definitive United Nations Chapter VII Resolution ("All means necessary by military forces to restore international peace and security . . .") to authorize the armed intervention against Serbian forces and supporting assets. Hence, NATO and many of its member nations referred to the customary international law concept that force could be used to intervene to prevent a humanitarian crisis (i.e. ethnic cleansing of Kosovar Albanians by Serbian authorities).

The legitimacy / legality of the NATO intervention in Federal Republic of Yugoslavia is still the subject of many animated debates amongst lawyers, diplomats, military professionals and academics. It is also the subject of litigation before the International Court of Justice and before Canadian Courts.

Before the beginning of Operation ALLIED FORCE, Canadian Forces fighter aircraft had been present in theatre as part of NATO's stabilization force in the Balkans. One Legal Officer supported Canadian Task Force Aviano.

As the duration and intensity of Operation ALLIED FORCE remained unknown, the number of Legal Officers was raised to two. They served at the tactical level (in Aviano, Italy) as it was determined that the requirement for immediate legal assistance resided at that level. They also advised the operational level (in Vicenza, Italy) through secure communications means and by physically being present with the Commander when the situation dictated.

One of the challenges these two Legal Officers faced was the assistance required on a 7/24 basis (e.g. one Legal Officer was present with the air staff at all times) throughout the 79 days campaign. They achieved this continuous presence by dividing their tours of duty into "watches." They basically resolved the situation by determining that while one of them was working, the

other one had to get some rest. They were actively assisted by two other Legal Officers at the National Defence Headquarters in Canada, also advising at the strategic level.

B. Targets

Targets that were engaged by the Canadian Task Force included:

- Army camps;
- Airfields;
- Radio relays;
- Bridges / tunnels;
- Industry making an effective contribution to Serbia's military action;
- Serbian fielded forces;
- POL sites; and
- Storage depots.

C. Canadian Legal Officers Involvement

One new facet of this campaign for the Canadian Forces was the process by which every target assigned to Canadian pilots was legally reviewed. For every mission flown for which ordnance was expected to be released, a Canadian Forces Legal Officer examined the target to be assigned to Canadian resources by the Combined Air Operations Center (CAOC) with a view towards its legitimacy and relevance as a valid military target under Canadian and international law. A target would not be the object of an attack if a Legal Officer had not reviewed it. It always remained the Commander's prerogative to disregard the legal advice provided, however, the command-operator-legal team worked very closely together and there were no such occurrence.

A challenge faced by the legal officers in theatre was the interpretation of the target imagery and the target information folders. As the campaign progressed, more "dual purposes" (e.g. civilian radio relays also used by Serbian military forces) were designated as potential targets. Canadian Legal Officers in theatre had to work extremely closely with the intelligence community to determine whether a target was a valid military target.

Additionally, the Legal Officers were an integral part of the pre-mission planning process. For every bombing mission, they reviewed with the planning cell the ingressing and egressing plans and the type of weapons in view of minimizing the potential for collateral damage for civilian persons and structures. This presented the Legal Officers with the challenge of becoming conversant with the CF18's weapons systems.

One of the positive consequences of pilots working through missions with legal advice was the fact that, when they flew their mission, any doubts

that they had in respect of the moral or legal justification for their action were removed. Those are their words, not those of the lawyers. They flew with confidence that the target that they were going to attack and that the weapons they were going to use were weapons and a target that were in accordance with the law.Throughout the campaign, the legal-operator team worked extremely well together. Operators fully integrated and considered the various legal aspects of their missions. Legal Officers fully integrated all operational aspects and considerations in their advice.

The Legal Officers in theatre reported that CF18 pilots were extremely disciplined throughout the campaign. In one circumstance, although a target (a bridge in the heart of the Federal Republic of Yugoslavia) was a legitimate military target under the LOAC, the CAOC Commander had issued Special Instructions (SPINS) not to attack bridges if vehicles were positively identified (there had been reports of Serbian forces using civilians in vehicles as human shields on bridges). The CF18 flight-lead and his wingman aborted the mission when they visually located an unidentified object on the bridge that had been designated. This in itself is a significant demonstration of the self-discipline of a professional officer and the respect he has for the rule of law. Remember, there are always pressures in combat situations to release the bombs and engage the opposing forces.

Such awareness can only be achieved through education, training, strict personal discipline as a professional of arms and a comprehensive understanding of the rule of law. Legal professionals play a key role in promoting the supremacy of the rule of law in the conduct of armed forces operations.

VI. THE FUTURE

These comments from the Somalia Commission of Inquiry[6] capture the essence of why the Canadian Forces work very hard to instill with all members at all levels in the chain of command the importance of adhering to the rule of law:

> [T]he involvement of the armed forces in peace operations in support of human rights and law, and in which the maintenance of legitimacy is important, places a premium on the democratic character and commitment of forces, without diminishing the rule of proper military virtues. Soldiers must themselves be conscious of these values, and experience them, if they are to be expected to protect them and foster them abroad . . . .

[6] Report of the Commission of Inquiry into the deployment of the Canadian Forces to Somalia (June 1997).

As was stated by the United States Secretary of State General (Ret'd) Colin Powell in his report to Congress regarding Coalition operations during the Gulf Conflict:

> "Operations were impacted by legal considerations at every level and the Law of Armed Conflict proved invaluable in the decision making process."

This statement has been reinforced by practical experience during the past 9 years.

The law is a force multiplier for commanders. It has to be an integral part of how professional officers both think and act. Now retired General Zinni[7] commented on the importance of the rule of law and the integral role played by legal advisors in contributing to the success of a military operations:

> Operational law is going to become as significant to a Commander as maneuver and fire support and logistics. It will be a principle of battlefield activities. The Senior Staff Judge Advocate may be as close to the Commander as his Operations Officer or his Chief of Staff. SJAs will find themselves more and more part of the operational aspects of the business. They will be the right hand of the Commander and he will come to them for advice.

In conclusion, "*Fiat Justitia*." Let justice be done. The motto of the Canadian Forces Legal Branch. While one might muse about lawyers communicating in a language that is seldom used now on the world scene, the sentiment of our motto truly is the basis for the work we do as professionals tasked with the challenge of bringing law, order, peace and security to the world scene.

[7] Lieutenant-General Anthony Zinni, USMC, Commander Marine Expeditionary Force I, 1995.

THOMAS P. KEENAN MEMORIAL LECTURE[1]

THE DEMISE OF THE NATION-STATE, THE DAWN OF NEW PARADIGM WARFARE, AND A FUTURE FOR THE PROFESSION OF ARMS[2]

LIEUTENANT COLONEL JEFFREY K. WALKER*

Let me begin by expressing my sincerest appreciation to my many distinguished colleagues within the Air Force international and operations law community and to the Commandant and faculty of the Judge Advocate General's School for bestowing this honor upon me. To be given an award bearing the name of a distinguished gentleman, scholar, and jurist like Tom Keenan is truly humbling. He was a man of great humor and enormous intellect—noted equally for his rapier pen and his razor wit. What little contribution I may have made to the discipline is but a drop in the ocean compared to Mr. Keenan's life's work. With his passing just a few years ago, we lost one of the finest members of our profession.

On a grander scale, today we are witnessing the inevitable passing of that "Greatest Generation," the generation that rescued the world from the brink of darkness in the Second World War, then carried the burden of securing democracy around the world for those of us who follow. It is with great sadness that I have buried nearly all my personal heroes from that generation within the last few years: my father, who fought with MacArthur in the retaking of the Philippines; my Uncle Pat, who flew Hellcats from the decks of

* *Lt Col Walker (B.A. Tulane, MS.Sc. Syracuse, J.D. Georgetown, LL.M. Harvard) is chief of operations law at the International and Operations Law Division, Headquarters Air Force. He is a former B-52 navigator and has served as a legal advisor in operations in the Balkans, including DENY FLIGHT and JOINT ENDEAVOR. He is a member of the Illinois State Bar.*

[1] The author presented an abridged version of this paper as the Thomas P. Keenan Memorial Lecture, 8 May 2001, at the Air Force Judge Advocate General School as part of the School's Operational Law Course. The Award recognizes the Air Force judge advocate or civilian attorney who, during the prior year, made the most notable contribution to the development of international law or military operations law.

[2] The last few parts of this paper concerning military ethics in a US-dominated post-Westphalian world are based upon a presentation given by the author at the annual meeting of the American Society of International Law, as part of a panel on humanitarian intervention in the Balkans chaired by Professor Linda Malone, Marshall-Whythe Law School, College of William & Mary.

carriers in Admiral Nimitz's Pacific Fleet—and who was the main reason I became an Air Force aviator; and most recently, my father-in-law, who shipped out in January 1943 as a young Marine F-4U mechanic with Pappy Boyenton's fabled Black Sheep and ended his service three years and several islands—including Guadalcanal—later in China. When I contemplate the enormity of what these many heroes accomplished, I am reminded of something written by a 12th century medieval jurist who, after years of working with the recently rediscovered law texts of Justinian, cried out in equal measures of admiration and despair: "We are but midgets standing on the shoulders of giants!" I can think of no more appropriate professional epitaph for Thomas P. Keenan, one of the true giants of our discipline.

I. INTRODUCTION

Today I would like to discuss some Big Ideas—but Big Ideas that are of enormous practical importance to international lawyers in particular and military judge advocates in general. The two Big Ideas that I would like to examine with you today are—and I will surely not be accused of understatement—the death of the sovereign state and the end of armed conflict as we have known it. After looking at these Big Ideas, I would like to say something about what these mean to us as soldiers, officers, and jurists. With that admittedly ambitious mandate, let me begin with the death of sovereignty.

II. POST-WESTPHALIAN WORLD?

It has become somewhat trendy within international law and political science circles over the last few years to speak of the post-modern or "Post-Westphalian" international order.[3] The argument usually runs something like this. The international system has, since the Peace of Westphalia in 1648, contained only one type of relevant actor—the sovereign state run by a government in exclusive charge of a geographically defined territory and people. This resulted from the horrible depravations wrought by the religion-charged Thirty Years' War—that final and tragic denouement of the Reformation. Although it took thirty bloody years to figure out, the European powers came to the realization that trying to impose one's own ideas of what was spiritually correct—like Lutheranism or Calvinism or Catholicism—on someone else's subjects was a formula for producing unspeakable violence. The theory therefore ran for 350-odd years, based on the original 1555 Peace of Augsburg rule that the religion of the sovereign determined the religion of the state, that within their own borders, sovereigns could do as they pleased.

[3] For some in-depth discussion of this idea of a post-Westphalian world order, see ANDREW LINKLATER, THE TRANSFORMATION OF POLITICAL COMMUNITY : ETHICAL FOUNDATIONS OF THE POST-WESTPHALIAN ERA (1999) and RICHARD FALK, LAW IN AN EMERGING GLOBAL VILLAGE: A POST-WESTPHALIAN PERSPECTIVE (1998).

Admittedly, this rule was as often honored in the breach as in the observance, but that is what we had as a basic international system for the better part of four centuries.

During the Cold War, since the Superpowers could not engage in direct confrontation—the risk of escalation to a nuclear exchange being viewed as too great—they settled instead for a somewhat perverse system of nose-counting. The idea was to see how many supposedly sovereign states you could get into your particular ideological camp—reminiscent of the 18th and 19th century era of colonial expansion when there was great concern among the European colonial powers to "paint the map red," if you were English,[4] or some other appropriately jingoistic color if you were French or German or Dutch (of course, the colonial powers did not generally view the supposedly primitive sovereignty of indigenous peoples as worthy of consideration). It was a similar Cold War race to accumulate client states—rather than outright colonies—that led to the many small but nasty Superpower surrogate conflicts like Korea, Vietnam (twice), Cuba, El Salvador, Nicaragua, Malaysia, Angola, and Afghanistan. From the American perspective, these conflicts were viewed as a righteous crusade to halt the march of Communism—enforcing the containment theory and keeping the democratic dominoes from falling. From the Russian viewpoint, these otherwise peripheral skirmishes were seen as propagating the socialist revolution or keeping solidarity with the international proletariat or manifestations of some Marxist-Leninist dialectic. Of course, the more cynical *real*-politicians or neo-imperialist theoreticians would argue that the Cold War era was just about the aggrandizement of national power or a continuation in a nuclear age of the same Euro-American imperialism that characterized the 19th century.[5]

In contrast, the *post*-Westpahalian idea is that: 1) what a sovereign does to his own people isn't *necessarily* his own business—and other states may rightfully intervene under certain conditions; 2) *non-state entities* such as international organizations, regional alliances, and non-governmental organizations have a place at the international table; and 3) there are some *universally applicable ideas* that no one gets to reject, such as the inherent right of persons to fundamental human rights, the right of peoples to self-determination, and perhaps the right of everyone to democratic governance and environmental protection.

These post-Westphalian ideas are, as one might expect, not without vigorous detractors and dissenters. Smaller and less powerful states fear intervention by stronger states on the pretext of upholding post-Westphalian ideas. Asian and African states often see this as just another manifestation of the hegemony of Western notions of right and wrong—a kind of ideological

[4] For an excellent overview of British imperialism, see BERNARD PORTER, THE LION'S SHARE: A SHORT HISTORY OF BRITISH IMPERIALISM, 1850-1995 (3d ed. 1996).

[5] For an interesting (and African) perspective on post-colonial Western imperialism, see WALTER RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA (rev ed. 1981).

imperialism. Islamic states have for some time disputed the true universality of some so-called fundamental human rights principals.[6]

Regardless of dissent and the ultimate contours of the post-Westphalian system, however, the old and exclusively state-centric system is in its final death throes.

A. The End of the Nation-State as The Exclusive Actor Within the International System

The old Westphalian days are over, and indeed have been, in practice if not theory, since the end of the Cold War. This brings me to a point that must be made early and often—the end of the credible threat of a nuclear exchange between Superpowers capable of annihilating each other—and probably the entire world in the process—is a watershed moment in modern history. It is often difficult to discern when one's own time is of great historical importance—every generation tends to overestimate their place in history, but when the very survival of the species hung in the balance for the first time in the history of mankind, all else seems pale in comparison. But those bad old days are gone—hopefully forever, and new and sometimes frightening possibilities have emerged. It is those possibilities upon which I would like to focus.

B. Increasing Global Economic Interdependence

It is simply incorrect—and getting less correct every day—to say that sovereign states are the only relevant actors within the international system. Today, there are many forces that pull mightily at the fabric of this time-worn monopoly of individual states. First and foremost among these forces is a rapidly broadening and deepening global economic interdependence. The paradigm example of a surrender of state sovereignty in the economic arena is, of course, the European Union.[7] It's somewhat ironic that the only real contemporary competitor to the economic might of the United States is an institution the US was instrumental in forming. It was as a precondition for the receipt of Marshall Plan aid that France and Germany formed the European Coal and Steel Community, the direct ancestor of the present day European Union. Today, the EU is moving almost inexorably toward deeper social and political union, with only a few self-selected and self-marginalized laggards like the United Kingdom and Denmark resisting. Soon, even one of the most

[6] For an overview of the Arab perspective on international human rights, see KEVIN DWYER, ARAB VOICES: THE HUMAN RIGHTS DEBATE IN THE MIDDLE EAST (1991).

[7] For an excellent overview of the constitutional aspects of European integration by a noted legal scholar, see JOSEPH WEILER, THE CONSTITUTION OF EUROPE: ESSAYS ON THE ENDS AND MEANS OF EUROPEAN INTEGRATION (1999).

emotional and tangible symbols of state sovereignty—national currency and coinage, will either disappear or undergo a radical transformation within the Euro monetary area. Even the brass in your pocket will no longer identify you as a Frenchman or a Spaniard or a German.

It is somewhat astonishing that the hitherto distrusting and often violent states of Europe have come together in such tight economic and political union, such that it is hard to imagine Germany and France resorting to arms over Alsace or the Saarland, as they have periodically ever since Charlemagne's grandsons divided the Frankish empire. Why bother when there is no border, other than an anachronistic and largely nostalgic line on a map, separating them anyway? For those who came of age in a pre-World War world, such an eventuality not only seemed possible, it was downright inevitable.

But we should look beyond the EU. Do not underestimate the enormous influence on US, Canadian, and Mexican politics of the North American Free Trade Area. Although the southern expansion of NAFTA has not been without problems and resistance within the US, there seems little chance of undoing what has been done to date. Anyone familiar with the amazing cross-border activity between south Texas and the *maquilladoras* areas across the border would emphatically agree, I believe. The remarkable, albeit somewhat tentative, consensus reached at the Summit of the Americas just a few months ago in Canada—with only a half-hearted dissent from Venezuela (an OPEC member and major oil exporter), that a Free Trade Area of the Americas was an objective to be sought for the entire Western Hemisphere shows the dynamism of the movement to more open trade relationships closer to home. The last gasp of US opposition to hemispheric free trade—the ill-fated and slightly comedic candidacy of Ross Perot with his apocalyptic warnings of a giant economic sucking sound were the US to allow Mexico into NAFTA—has not found any serious traction in today's political environment.

Economic interdependence runs much deeper, however, than just these formal regional arrangements. Literally scores of international bodies have made significant and at least tacitly consensual inroads on individual state sovereignty: the WTO,[8] where trade disputes are authoritatively adjudicated and effectively enforced; the World Intellectual Property Organization, where international patent and trademark policy is set and enforced; meetings of the world's major central bankers, where interest rate and inflation targets are set; the G-8,[9] where much international economic policy is hammered out; the association of the world's stock markets, where international trading and

[8] World Trade Organization.

[9] A group formed by the major industrial democracies that meets to deal with the major economic and political issues facing their domestic societies and the international community as a whole. The group consists of France, the United States, Britain, Germany, Japan, Italy, Canada, and since 1998, Russia. G-8 Information Centre, University of Toronto at http://www.g7.utoronto.ca/g7/what_is_g7.html.

settlement rules are determined; transnational anti-trust enforcement, that makes it increasingly impossible for state governments to coddle and protect national corporate darlings; the domination of world investment flows by a handful of multinational banking conglomerates, whose allegiance is to shareholders and bottom lines, not sovereigns; or development and marketing of drugs by just a few multinational pharmaceutical companies, with enormous impact on everything from the worldwide price of aspirin to the availability of anti-AIDS drugs in Africa. These are just a few examples of bodies or organizations or informal groupings that wield significant influence over large swaths of the world economy.[10] Each and every one represents a whittling away of traditional notions of state sovereignty. We have reached the antithesis of 18th century mercantilism, when states attempted to tightly control their economies in a conscious attempt to beggar one's neighbor, and have in the last few decades witnessed the apotheosis of international free market capitalism.

But on an even grander scale, economic interdependence has fundamentally changed the way macroeconomics work. It is no longer a truism that when the US sneezes, the rest of the world catches a cold. In fact, it is widespread global economic interdependence that has smoothed out some of the heretofore unavoidable pitfalls of the world economic cycle. For example, the enormous national debt run up during the Reagan and Bush years did not trigger sky-high interest rates domestically because there was a lot of foreign capital floating around at the time—mostly Japanese—willing to buy up piles of US government notes without jacking up the cost. The free-spending US consumer helped stave off a general collapse of the Asian economies in the late '90s after some notable economic disasters in Thailand and Indonesia. A reliable EU economy has helped lessen the impact of the dot-com meltdown in the US over the past year. Even the mighty New York Stock Exchange has shown itself highly sensitive to economic events overseas—in reality having now become a world bourse discounting future risk for a world economy.

C. Free Movement of People, Information and Ideas has Erased Borders and Controls

Related to but separate from economic interdependence, the movement of people and ideas has also accelerated since the end of the Cold War. Borders of every state—with the exception of only the most autarkic countries like North Korea—have become remarkably permeable. Legal immigration is enormous within the US and most other developed countries. As just one example, recent census results revealed that my zip code in northern

[10] For a remarkable work on the issue of sub-state actors, transnational activities, and international relations, see, ROBERT KEOHANE & JOSEPH NYE, POWER AND INTERDEPENDENCE (2000).

Virginia—22032—has seen the influx of nearly 1,000 new legal immigrant residents in just the last ten years. Due largely to immigration, Hispanic Americans are now the single largest minority group in the US, surpassing African Americans for the first time. Although this is not new in the United States, a country built by successive waves of immigration, the ease and rapidity of modern day immigration is remarkable.

Intercontinental travel has become commonplace, with airfares from Washington to Europe now often cheaper than flights to Los Angeles and without much difference in time. The Channel Tunnel has effectively ended the geographic, and the much more daunting psychic barrier of the English Channel between the Great Britain and the Continent. It is now routine practice for Londoners to spend the day shopping or touring in Paris, returning at night to their own beds. The adoption by most EU members of uniform entry requirements has lead to the elimination of border checks between, say, Germany and France or Italy and Austria. Traveling across much of Western Europe is now equivalent to driving from Ohio to Wisconsin. The result of all this is that somewhere around two million people cross an international boundary every day—the US alone hosts over 110 million visitors a year.

This frenetic and almost frictionless movement of people combines with another new development in the international system, the free and rapid movement of ideas and information, with the result that there just are not too many secrets any more. Every corner of the globe is subject to the 24-hour news cycle—today even in the most remote reaches of the world, one can find a hotel with CNN. The internet and the world wide web have, at least as far as information and ideas are concerned, completely eliminated borders as well as distance.

This revolution—and it is undeniably a revolutionary development—in the movement of people, information, and ideas has had, in my opinion, two significant effects. First, state governments, even those controlling the most closed or authoritarian societies, can no longer escape notice. Be it interethnic genocide in Rwanda or Bosnia, deliberate famine in Somalia, the desecration of ancient Buddhist carvings in Afghanistan, or government corruption in the Philippines, it makes it to the television screens and newspapers of a global audience near real-time. Some states have tried to resist—China, for example, persists in attempting to regulate access to the internet, but with remarkably poor results. An instructive example of the futility of fighting the tide of information technology was the Tiannamen Square debacle in 1988. In that long-ago, pre-internet day, dissent groups kept the world apprised of events in Beijing through the use of fax machines. So the first major impact on sovereignty is the plain fact that would-be bad actors can no longer do dirty deeds in the dark.

The second, and I think more important effect of this revolution in the movement of people, information, and ideas is that what we are now beginning to witness is the capability for the formation of *instantaneous transnational*

communities of interest around almost any issue—big or small. It's simply no longer necessary to have a state sponsor for an interested group of people to effect changes within the international community. Anthony Lake, former national security advisor to President Clinton, described this phenomenon as "technology enabling local groups to forge vast alliances across borders, and . . . a whole host of new actors challenging, confronting, and sometimes competing with governments on turf that was once their exclusive domain."[11]

A very good example of this can be seen in the way the Ottawa Convention banning anti-personnel landmines (APLs) came to fruition. In the early 1990's, there were not too many important states much interested in undertaking a ban on APLs. However, in the wake of several civil conflicts that left enormous numbers of APLs scattered willy-nilly over the countryside, and the inevitable number of deaths and maiming injuries to farmers, children, and other innocents, the world NGO[12] community took up the cause. Helped by some influential persons—the Princess of Wales for one, the movement gathered momentum. Through internet activities, transnational cooperation between NGOs, and skillful use of the media, an incredibly effective transnational community of interest sprang up to push for an APL ban. This movement co-opted several national governments through the very attractive political appeal of ending injuries to children and others from APLs. Canada was a prime example of a state government recruited into the effort.

The US government, and particularly the DoD and State Department, were caught somewhat unaware by the remarkable speed with which this effort gained inertia. The result was that the overwhelming majority of state governments, some dragged along quite reluctantly (like the British) by what their political leadership saw as irresistible public opinion, joined the Ottawa Convention. The US ultimately refused to join—thereby costing a significant amount of good will with our usual allies and causing difficulty in coalition operations today. Ironically, an American woman would win the Nobel Prize for her efforts in mobilizing the anti-APL transnational community of interest. Anthony Lake summed up the Ottawa campaign as, "The international campaign on landmines, coordinated through computer links from a house in Vermont, forced an issue on many governments that would have rather avoided it."[13]

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[11] ANTHONY LAKE, SIX NIGHTMARES: REAL THREATS IN A DANGEROUS WORLD AND HOW AMERICA CAN MEET THEM 281-82 (2000).

[12] Non-governmental organizations.

[13] LAKE *supra* note 11. Some do not view Ottawa as a triumph of international civil society and grass roots democratic action, however. For an interesting counter-argument, *see* Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 European J. Int'l L. 91, 120 (2000).

D. Loss of Control Over the Physical State: Things Fall Apart?

So our beleaguered nation-state (as was the trendy term for countries when I studied political science in the late '70s) has essentially lost control over its economy and can no longer effectively control the movement of information and ideas through and within its borders.

Could it get any worse for our nation-state? Well, yes it could.

Quick on the heels of the end of the Cold War, the rapid growth in economic interdependence, and the revolutionary expansion in the movement of information came the resurgence of group identification below the state level. When physical or political or economic survival had been in question, people were more or less willing to sacrifice smaller group impulses for effective membership in a militarily and economically viable nation-state—it was just the price that had to be paid to keep a hostile neighbor or would-be hegemon from dominating significant parts of the world. In short, grudging acquiescence to domination by people *kind of* like us was preferred to subjugation to people very alien to us. This really began in response to Napoleon—Germany is a prime example of 'kind of' similar peoples—and continued more or less unabated until the end of the Cold War.

Once the survival threat of the Cold War was removed, the bottle was uncorked and the genie of national self-determination reappeared bigger and more intractable than ever. The rapid disintegration of the Soviet Union was perhaps the greatest example—although many of the peoples of the Union arguably did not even grudgingly acquiesce to Russian domination. The sad case of Yugoslavia is another example—a federation of peoples that, if history is any guide, would have been at each other's throats but for the fact they were wedged between Russian socialist and Western capitalist hegemonic powers.[14]

Interestingly, economic interdependence has actually hastened the centrifugal forces of self-determining nationalism—and in some very interesting places. Italy, from unification in the 19th century of a country patched together on vaguely linguistic and cultural grounds, has seen the rise of an influential northern separatist party, the *Lega Nord*, that has held the balance in government on one occasion and may well do so again. A powerful and—unlike the Basques in the north—non-violent Catalan separatist movement has sprung up in the area of northeast Spain centered on Barcelona. Most interestingly, the government of Tony Blair in the UK has delivered on an election promise to devolve powers from the center to regional assemblies in Wales, Scotland, and Northern Ireland. The success of these efforts in Scotland is manifested by the fact that the avowedly separatist Scottish National Party is now the official opposition in the Edinburgh Assembly. As a

[14] For a somewhat more hopeful counterpoint to this pessimistic view of the Balkan peoples, see JULIE MERTUS, KOSOVO: HOW MYTHS AND TRUTHS MADE A WAR (1999).

result, it is not an unreasonable possibility that we may see the end of the United Kingdom in our lifetimes.

One characteristic these European nationalist-separatist movements have in common is an appeal that runs something like this. "We're all in the EU now. Tiny Denmark and tinier Luxembourg are in the EU as well. Our would-be independent country has a population and economy equal to or greater than Denmark or Luxembourg, so why can't we go it alone within the EU, too?" Coupled with the fact that more and more of the traditional functions of the central state government are now performed in Brussels—labor and monetary policy, safety and health regulation, environmental and business standards—this idea of finding one's own way within the EU framework is attractive to many.

So the supposed sovereignty of our beleaguered nation-states continues to be undermined by increasing economic interdependence, the instantaneous and unimpedable flow of information and ideas, and the centrifugal forces of separatism. Of course, this is not to gainsay any future role for the state as we know it—just a greatly changed and vastly reduced role.

E. What Will Wars Look Like in a Post-Westphalian World?

So much for the issue of state sovereignty in the post-Westphalian world. What changes are underway concerning the military and the waging of war?

Operation DESERT STORM represented, at the same time, both the last great traditional war and the first future war. Although somewhat oxymoronic, DESERT STORM was both the end and the beginning of warfare as we know it. It was a classic war of the past with its grand climax of massed movements of armor and soldiers over a vast strategic chessboard of desert—and also because of the enormous amount of time, effort, and logistical support required to pull it off. At the same time, just as the American Civil War and the Franco-Prussian War provided chilling previews of the industrial warfare of World War I, DESERT STORM provides a glimpse of what armed conflict will look like for the foreseeable future. It's fairly widely acknowledged that DESERT STORM was all but won by the air campaign, a war waged—at least after the first few nights—with near impunity by coalition air forces.

The 1995 DELIBERATE FORCE (Bosnia) and 1999 ALLIED FORCE (Kosovo) air campaigns in the Balkans were the natural extension of the lesson learned from DESERT STORM that air power could be the dominant maneuver force, and in the case of the Kosovo campaign, the *only* maneuver force. However, this should not give airmen cause for hubris—ALLIED FORCE also demonstrated many weaknesses in air-only warfare. Air forces, for example, cannot occupy land and have great difficulty flushing out land forces determined to hide. So the conflicts of the future, like the smaller peacekeeping missions of the past, will require more tailored military

responses—not the armor-heavy and logistic-intense war we trained for throughout the last 50 years.

Why do I think we won't face big, heavy, traditional military operations in the foreseeable future? Mostly because I subscribe to the idea of the democratic peace—first put forward by Michael Doyle, but refined by other academics. The democratic peace theory holds that historically democracies don't start many wars and—of equal importance—democracies don't often fight each other. Although this theory can be oversold, it holds an essential nugget of truth. So if we are now at that moment, as Francis Fukyama has said, of an end to history[15]—meaning the universal victory and ascendancy of liberal democracy, there isn't much chance for big wars between democracies.

There are still not insignificant risks that this blissful state of affairs may go off the rails. The enormous wild card in the deck is most certainly China. The ultimate victory of democracy in China is, in my opinion, still more likely than not, but it is a shaky proposition. If we can keep anything nasty and violent from happening with China for another half-generation—until all the first-generation Maoists and octogenarian leadership dies off—there may be a good chance for democracy in China. Free market economics has already taken hold to the point that the most reactionary and thuggishly committed communist leader could not turn back the clock now. So let's remain hopeful, but keep our powder dry.

There are other possible stumbling blocks along the way—too many Arab states going over to an intolerant and—I specifically mean this next word, *aberrant* form of Islam, a sudden collapse of markets and hope in Russia, or perhaps anarchy in Indonesia. But barring any enormous upheavals, and it should be the US's business to work very hard to prevent any such upheavals, the conflicts of the near- to mid-term future should be ones with limited objectives, limited stakes, and commensurately limited means.

F. The Luxury of a Conscience

It seems likely that the Western powers, including the US—contrary to the campaign promises of the Bush administration—will continue to get involved in the limited conflicts that do pop up. The end of the Cold War, after all, has now given the West the luxury of a conscience. With the end of a bipolar system of closely aligned client states glued together by the threat of nuclear Armageddon, we now have the leisure to indulge our Enlightenment ideals of protecting universal human rights and securing individual dignity. Michael Ignatieff described the warmest part of the Cold War—the so-called 'détente era' of US-USSR relations—as an era of complicity, wherein "the West agreed

[15] FRANCIS FUKYAMA, THE END OF HISTORY AND THE LAST MAN (1992). This book was a full-length exposition on Fukyama's short and highly controversial 1989 article published in *National Interest*. Fukyama subsequently produced a blueprint for his vision of a 'post-historical' world in TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY (1996).

to keep silent about human rights abuses in return for Soviet cooperation in the maintenance of geopolitical order. In effect, détente traded rights for order."[16] Not so today—there's no need to trade Russia much for order since they aren't much of a threat to anyone but themselves now.

So now we've finally got a chance to do what we first wanted in the idealistic flush of post-war Allied solidarity—stop evil around the world. Although many believe, as the Clinton Administration more or less did, that we should work to hold states together, intervention may be a good idea if "a state's behavior [has] become so repressive that it has lost the right to sovereignty over its component parts . . . ."[17]

The problem with these somewhat ambiguous limited conflicts is that they don't square very well with the post-DESERT STORM military ethos of total victory. Let's not lose sight of the fact that DESERT STORM was not just the opening salvo of the supposed New World Order, it was also the final vindication of the last of our military leadership who were Vietnam veterans—the men who were young lieutenants and captains in Southeast Asia like Colin Powell and Chuck Horner. These men had intoned relentlessly during the Reagan years the mantra that no Commander-in-Chief should send the military anywhere unless he gave them the overwhelming force and *carte blanche* authority to win quick and win big. This was publicly expressed in what became known as the Powell Doctrine.

But the clear black-and-white, good-guy/bad-guy motif of DESERT STORM is not what we have faced in the many operations since then—nor what we are likely to face in the near future. Everyone was our enemy in Somalia; Haiti was a political quagmire; all sides in Bosnia were guilty to a greater or lesser extent of atrocities and duplicity; and even the lionized and heroically beleaguered Albanian resistance in Kosovo has now turned into NATO's number one headache in Macedonia. These are not the kinds of conflicts that lend themselves to the massive knockout blow envisioned by General Powell, his contemporaries, and his immediate successors. This may account for much of the frustration expressed by senior military leaders during the peace operations of the 1990s. It is, however, high time to shake off this unrealistic attitude born from the pathology of Vietnam. We better get used to limited, ambiguous, and untidy conflicts—we're stuck with these dirty little wars. We will also need to accept that there are different levels of national interest in these conflicts and that this will lead to varying levels of political and military commitment—it's simply not going to be the all-or-nothing conflict envisioned in the Powell Doctrine.

So that's one aspect of what I see as a fundamental change in the nature of warfare—smaller conflicts, lower stakes, more complicated military solutions.

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[16] HUMAN RIGHTS IN POLITICAL TRANSITION 317 (Carla Hesse and Robert Pose eds., 1999).
[17] Lake, *supra* note 11, at 172.

G. Zero Casualty Warfare

The second tectonic change I see is the American—and to a lesser extent, European—obsession with the notion that wars shouldn't hurt anybody. Although DESERT STORM and the operations that came after have brought it into tight focus, the whole business of "zero-casualty warfare" had been brewing over the preceding 20 years. It was yet another part of the somewhat perverse legacy of Vietnam.

But the question remains, what is the basis of this assumption that the American political leadership—and by extension the American public—will not tolerate friendly casualties or, as has seemingly begun to become the case in the Balkan operations, even enemy casualties? The only attempt I have found to quantify this presumed effect was a study done for RAND in 1996 by Eric Larsen.[18] Oddly, this study, although somewhat flawed in its methodology, suggests that the US *public* reaction to friendly force casualties is, at least in the short term, just the opposite of what many seem to presume—support for a strong military response actually increases. What seems to be happening is a kind of casuistic downward spiral involving our political and military leadership—the political leadership, apparently based on false assumptions about the American and allied public, demands zero-casualty operations, and the military leadership perceives that the political support for military operations—admittedly tenuous in many peace operations—will be undermined unless they avoid casualties at all cost.

And this pervasive casualty aversion has made its way into both friendly and enemy operational doctrine. The presumed casualty aversion of the American political leadership and public is seen by Air Force planners and operators—tacitly or explicitly—as a vulnerable friendly center of gravity, and often our only really vulnerable one, that must be protected at all costs. Conversely, enemies have learned this and seek to exploit it at great cost. Sporadic press reports reveal, for example, that Saddam Hussein has offered large cash rewards to any surface-to-air missile crew that shoots down a US or British aircraft in either no-fly zone over Iraq. The Bosnian Serbs wanted desperately to shoot down and capture any NATO airmen—Scott O'Grady was fortunate—two French aviators were not. Slobodan Milosevic learned these lessons well—the Yugoslav forces during operation ALLIED FORCE understood that it was more important to *have* SA-6s—a potentially lethal surface-to-air missile system—than to *use and lose* them. It was the *possibility* of inflicting NATO casualties that was important and, in fact, contributed greatly to the high minimum altitudes generally flown by NATO aircraft and the concomitant loss of accuracy in bombing.

As a former aviator, I must confess to being somewhat conflicted over this issue. On the one hand, many old and dear friends are still flying—my old

[18] LARSON, ERIC V., CASUALTY AND CONSENSUS: THE HISTORICAL ROLE OF CASUALTIES IN DOMESTIC SUPPORT FOR U.S. MILITARY OPERATIONS (1996).

copilot, for example, now commands the B-2 squadron at Whiteman, so I appreciate the care our commanders take not to squander the lives of our aircrews. So I personally believe that a healthy interest in minimizing friendly casualties is a good thing. On the other hand, our current obsession with zero casualties leads to ludicrous results like a joint force commander stating in the first sentence of his commander's intent, "Force protection is my top priority," or a senior air commander telling the assembled officers of his several multinational flying squadrons, "There's not one thing here worth dying for." I have personally witnessed both. These statements immediately beg the questions in the minds of our very well educated troops, "Why isn't the *mission* our top priority? Why exactly *are* we here?"

So now we have two pieces of what I believe to be a radical change in the way we have done and will probably continue to do military operations: dirty little wars and zero-casualty operations.

H. The Enemy of My Enemy

The third big change I see—and this is certainly a big change from the rather paltry solo military interventions of the Reagan years—is that the US will not, and some cases cannot, go it alone. Coalition warfare is here to stay and we better get used to it and we better get better at it. Thus far, we have been blessed with a group of generally very patient allies who have tolerated a lot of goofiness and recalcitrance from the US. Granted, the US has become, as former Secretary of State Albright has said, "the indispensable ally," but we haven't always been the most agreeable of allies. Because we generally bring the preponderant amount of air and maritime forces to the fight, although not necessarily the largest ground forces, the US has often adopted an 'our way or the highway' approach to coalition warfare.

And do not be mistaken, although the US may be the last remaining superpower, we genuinely *need* coalition partners. When intervening in the kinds of limited and ambiguous missions we have confronted since the Gulf War, it is generally perceived that our political leadership and the American public are much more likely to support US participation if other states are perceived as doing their fair share as well.

To be sure, coalition warfare is not new—there were 10,000 French troops under General Rochambeau at Yorktown when Washington took the British surrender. But what we now see is not a *preference* for coalitions, but, except for the smallest operations, an actual *need* for them.

So now we have three big changes: dirty little wars, zero-casualty warfare, and coalitions.

I. New Technology, Old Methods

I have consciously left until last the great military technological changes underway—the so-called Revolution in Military Affairs—because it is surely the biggest of the Big Ideas in this area. I can only hope to cover a few aspects here.

Certainly the most ballyhooed of the new military-technological frontiers is in the area cyber warfare. This is an interesting but extremely complicated area of military operations, particularly from the legal viewpoint. Many within the military legal community think that computer network operations, international cyber law enforcement, and notions of use of force in cyber space easily fit by analogy into the existing law of war regime. I think otherwise. Just as the instantaneous transmission of ideas has done no small part to radically undermine the traditional internal sovereignty of nation-states, so will it undermine traditional international law notions that have been built up since the time of Grotius on a presumption that the only important actors are sovereign states in control of geographically defined borders. In cyber space, borders simply don't matter.

Let me give an example. Suppose there is a criminal enterprise engaged in fraud, with half the conspirators in Paris and the other half in Marseilles. They promulgate their enterprise via e-mail, with accounts on AOL. The electrons that constitute the stored records of this criminal enterprise just happen to rest in AOL's mainframe computers in Reston, Virginia. Obviously the overwhelming interest in the data represented by those electrons in Reston lies with the French authorities. The US really has no, or at best a marginal, interest in those electrons—which incidentally could be erased, moved, or copied a thousand times in milliseconds. What is wrong, then, with the French authorities, relying on an authorization from a French magistrate, seizing the data encoded in those electrons in Reston? The obvious uneasiness of many with this idea results, I would guess, from two things. First, it involves the French, whose government has been a alleged to be a notorious supporter of industrial espionage for decades. But second, many are undoubtedly aghast at the idea of the French *gendarmerie* electronically crossing our border and seizing 'our' data. I say you are thinking neither broadly nor thoroughly enough—borders just don't matter.

Although this example is drawn from an international criminal hypothetical, the same basic issue lies at the heart of our interpretive angst in the area of international armed conflict in cyberspace. Because the entire law of war regime has been built upon a Westphalian foundation, the transformative properties of cyber warfare are just as breathtaking. We are left pondering some fundamental questions—what constitutes force? What is a hostile act? When is self-defense justified in response to a cyber attack? Is the use of traditional means of force ever justified in response to a cyber attack? These are not easy questions and the international legal regime is lagging far

behind the problems presented by the increasingly sophisticated technological possibilities in this area.

As a theater of warfare, the US may actually be at something of a *disadvantage* in cyberspace. First, our adversaries do not generally rely as heavily on computer networks and systems as we do. As a result, they are generally much less vulnerable to the effects of cyber attack than the more technologically advanced US. Luckily, potential and actual adversaries have not shown a lot of capability in this area, but that will surely change over time.

In the military context, new computer, telecommunications, and space technology has allowed us to strike out boldly in new directions, with air forces at the forefront. Very high fidelity satellites and unmanned aerial vehicles have simply replaced the old air-breathing manned tactical reconnaissance aircraft. The few that are left—none in the Air Force—are not long for this world. Now, with the advent of the GLOBAL HAWK ultra-long range unmanned reconnaissance aircraft system, even strategic reconnaissance is going the same way—one recently landed after a non-stop flight from Edwards to Australia.

Navigators, I say with some personal regret, are dinosaurs awaiting the next Ice Age. They have been all but replaced by global position satellites and inertial navigation systems of incredible accuracy and reliability. Tactical weather forecasting has been revolutionized by space technology as well. Indeed, nearly the entire realm of Information-in-Warfare is now largely remote and stand off.

More momentously, US forces are now actively developing unmanned offensive tactical systems. Recently, as reported in the media and closely followed by our allies and potential foes alike, the US fired an air-to-ground missile from an unmanned PREDATOR aircraft. This, have no doubt, has given the heretofore-unassailable fighter pilot community some pause for thought.

J. The New Mercenaries?

In a more subtle manner, our dependence on highly sophisticated and highly specialized systems, coupled with economic factors and troop recruiting and retention difficulties, has led inexorably to a much heavier dependence on civilian—in particular civilian contractor—support for military forces. This civilianization of the military brings with it some serious and truly fundamental problems I will discuss in a few moments. Suffice it to say that we will almost certainly continue to turn over more and more functions traditionally performed by uniformed military personnel to civilian employees and civilian contractor personnel.

Oddly, it is our very technological sophistication and reliance on state-of-the-art systems—coupled with our presumed casualty aversion, that makes the US and its allies vulnerable to what have been rather unfortunately termed

'asymmetric' means of warfare. Precision, all-weather, day/night bombing capability presumes, for example, that the enemy has definable and discrete targets or target systems that can be attacked from the air and, more importantly, that if attacked will have a significant impact on his ability to carry on with whatever bad acts he may be intent upon doing. This was the problem with bombing the Ho Chi Minh Trail in Vietnam. The Ho Chi Minh Trail existed everywhere and nowhere—it was wherever the light vehicles or bicycles or human porters decided it should be at any given time. Bombing one piece of a primitive dirt road was not much of a hindrance to Viet Cong resupply. Imagine if you will that US and allied forces were given the same tasks in Rwanda as they were given in Serbia and Kosovo. Does anyone really imagine an air-only campaign, no matter how sophisticated, could have seriously stopped the kind of brutal, handmade genocide that was going on there? When this is coupled with an adversary's willingness to engage in surrogate terrorist or suicide attacks against US forces or installations or even the US mainland, that is asymmetric warfare at its worst.

So these are the four major factors that have contributed to fundamentally changing the way warfare will be waged: limited and ambiguous conflicts, zero-casualty warfare, the necessity of coalitions, and the transforming effects of new military technologies. The looming question of all this interesting analysis is, what does it mean for the military in general and international lawyer judge advocates in particular?

K. The Future of International Law and the Profession of Arms

At the same time that we are engaging in limited and ambiguous conflicts, the astounding disparity in technical sophistication, accuracy, and destructive force between US and its allied forces over those of Yugoslavia, or the Bosnian warring factions, or almost all other potential adversaries has meant that we have been able to operate with something approaching complete *impunity*. The only serious constraints we have faced in the Balkans and elsewhere have been self-imposed political ones—like the zero casualty fixation I have already discussed. As a former aviator myself, it would be disingenuous of me to feign resentment of this—the purpose of any well-trained military force is, after all, to out shoot and out fly all comers. But Kosovo brought the *enormity* of this lack of reciprocal risk to our forces into crystalline focus. Why, you may ask, as an officer, aviator, or lawyer, should this disturb me?

Although there was, and certainly is, a strong moral element, the primary motivation for nations to agree to limit the means and methods of warfare, since at least the first St Petersburg conference 130 years ago, has been enlightened self-interest. We agree to treat prisoners well or forego certain horrible types of weapons because we expect our potential enemies across the table will do the same. We both win. Of course, implicit in this

reciprocal self-interest was the fact that the nations around the table could each hold the other's forces at more or less equivalent risk. A poison gas protocol does not do you much good if you are the only one that can deploy gas on the battlefield. With the our new-found ability to attack with impunity, the fundamental basis of reciprocal self-interest that underlies the international humanitarian law regime is essentially eliminated.

This is not to say that US forces acted in Kosovo or will act in the future with callous and deliberate disregard for international humanitarian law. American forces and commanders at least aspire to virtuousness and the high moral ground. I can assure you that every commander with whom I have personally worked wants to do the legal and morally correct thing. One of our most cherished friendly centers of gravity, as already mentioned, has been taking and defending the high moral ground. But the removal of all tangible constraints—and this also includes possible asymmetric means of warfare—is sobering. As Lord Acton famously reminded us, absolute power and the virtuous wielding of that power do not necessarily travel together.

What we are then left with as a mechanism for enforcing the norms of international humanitarian law is simple moral suasion. If all we have are declaratory moral norms, in the heat of a military campaign these might often weigh lightly in the balance against military necessity or even simple military efficiency.

This is exacerbated by the presumed American casualty aversion. Often, increasing accuracy in order to absolutely minimize civilian collateral injury means flying at lower altitudes and marginally increasing risk to aircrews. If however we can deliver weapons from an altitude that is marginally less accurate (and thereby marginally more dangerous to civilians) but reduce to near zero the risk to friendly aircrews, the temptation is often irresistible. Again, as a former flyer, I get a certain comfort from this—while at the same time being somewhat discomfited as a lawyer.

The second additional factor that may erode compliance with the law of war is that with little or no opposing armed threat, there is no marginal cost to our military forces or civilian population for noncompliance. Again, the only real check on our freedom of action is the moral weight of basic humanity. This is a thin reed, made even thinner when dealing with force delivered from a distance because, quoting Schwarzenberger, "The increasingly impersonal character of mechanized warfare tends to reduce to the vanishing point inhibitions of combatants against the use of weapons . . . ."[19] Killing a bright spot on a radar scope is much different than shooting a visible human being with an M-16, for example.

Michael Walzer in his book *Just and Unjust Wars* foresaw this problem several years before Kosovo—in the aftermath of the Gulf War. Walzer points out, "When the world divides radically into those who bomb and those who are

[19] GEORG SCHARZENBERGER, INTERNATIONAL LAW 135 (1968).

bombed, it becomes morally problematic, even if the bombing in this or that instance is justifiable."[20] In the context of the Kosovo air campaign, many have asked—and justifiably so—why NATO viewed the thought of losing a single pilot as so repugnant, but did not seem as troubled over unintentionally killing Serbian civilians. Just as the Balkans were not worth the bones of a single Pomeranian grenadier to Bismarck, are they not worth the life of a single NATO pilot?

So part of my concern with our seemingly enviable ability to act with near-perfect impunity in Bosnia and Kosovo rests on what I perceive to be a dilution of the already tenuous—in the best of times—force of the law of war when faced with the military exigencies of real-world operations. May we not find ourselves attacking targets of diminished military importance, and concomitantly increased civilian importance, merely because we easily can? Certainly many have suggested this may have been the case with some targets, particularly economic targets, in Serbia proper. One must pause to consider whether, given a significant threat to our aircraft, NATO would have chosen to strike Yugoslavia's cigarette production capacity or so-called 'crony targets'? Might impunity not breed an attitude, even if only subconsciously, that we can attack a target that has *any* military value, rather than a military value that clearly *outweighs* potential civilian collateral damage? The hopelessly subjective weighing of proportionality[21] required of commanders by the law of war only makes it that much easier to settle on these types of targets.

Something else may be sparked by this environment of impunity. Not only did NATO enjoy near complete impunity in the range of its targeting choices, but its forces—particularly US forces—also enjoyed near complete freedom in choosing what types of weapons to deliver against targets. As many commentators have pointed out, a humanitarian intervention probably carries with it a requirement to tighten our concern with collateral injury to civilians. Although NATO forces used many precision-guided munitions (PGMs) in Bosnia and Kosovo—more as a percentage of total weapons dropped in Kosovo than in any previous air campaign—its forces also dropped some non-precision weapons. NATO is, after all, quickly dividing into a military community of 'have-PGMs' and 'have-not PGMs.' Some of these non-precision weapons, in particular cluster munitions, have garnered much attention from the NGO community since the end of the Bosnian and Kosovo air campaigns. Although cluster munitions undeniably are an effective and

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[20] MICHAEL WALTZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS xxi (2d ed., 1992).

[21] For a somewhat authoritative and well-written discussion of the problem of subjectivity in making a proportionality determination, see Office of the Prosecutor of International Criminal Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, paragraphs 48-52 (2000).

appropriate weapon of choice in specific circumstances—against isolated airfields for example—the avowed humanitarian nature of these interventions and the near complete impunity enjoined by NATO forces contributed to a sense that the use of these comparatively sloppy munitions was unjustified. Subsequent injuries to civilians, particularly children, from unexploded submunitions has encouraged calls from NGOs to significantly restrict or ban this class of aerial munitions. Much the same reaction resulted from the use by US forces of depleted uranium munitions against Serbian armored vehicles, with the UN Environmental Programme now engaged in studying the long-term health effects of residue left by this class of munitions.

If NATO and US impunity has diminished the authority of international humanitarian law, what other than moral suasion, is left to ensure compliance? First, like less benevolent persons and entities around the world, NATO too will be subject to the microscopic scrutiny of 24/7 international media coverage. Instantaneous global communications—the web in particular—have proven to be the key enabler for the nearly instantaneous formation of transnational communities of interest, both within governments and without. As discussed above, the successful NGO-led transnational community of interest that grew rapidly around the Ottawa treaty banning anti-personnel landmines is a paradigmatic example of what powerful democracies will routinely face in the future as a check on their freedom of action in particular policy areas—undoubtedly including the use of force. International tribunals may play an important role in ensuring scrupulousness by forces enjoying impunity for their actions. Although the US has shown little present interest in joining the International Criminal Court (ICC), there is already an international tribunal with jurisdiction over Kosovo, Serbia, and Rwanda. Indeed, the ICTY[22] has investigated allegations regarding NATO's targeting methods and philosophy and specific targeting information on some selected targets from the Kosovo air campaign. NATO was deservedly exonerated of all allegations by the ICTY Prosecutor—the intense scrutiny given every target for compliance with the law of war during Kosovo was without precedent in my experience. Indeed, arguments questioning specific targeting decisions focus entirely on two irreconcilable matters: human or mechanical errors—which will always happen in the fog of war, and subjective determinations of proportionality. A court is not a good place to adjudicate either of these issues *post facto*.

Beyond these, albeit significant concerns about the effect of impunity on the efficacy of international humanitarian law, I am deeply troubled by its slow corrosive effect on military ethics. This requires some explanation. As the great British military historian John Keegan has argued[23], ever since the advent of means and methods of warfare that allow the application of force at a

[22] International Criminal Tribunal for the Former Yugoslavia.
[23] See the introduction to John Keegan, *The Face of Battle* (reprint ed., 1995).

distance beyond arms length—basically gunpowder—the mark of a great and valorous military officer has ceased being the ability to inflict injury on the enemy with a strong right arm. Rather, with distant means of killing, the mark of the courageous officer has been an indifference to personal safety, a scorn for injury or death. This reached its most ludicrous extreme in the First World War, when the young lieutenants fresh from Oxford or Cambridge went over the top with nothing but an umbrella or riding crop or soccer ball. However, this is a manifestation of the single most fundamental characteristic of the profession of arms—the willingness to engage in self-sacrifice up to and including death. We in the military often say, "It's not about the money." Certainly, military pilots—and military lawyers, could often do much better financially with much less effort and risk in civilian employment. But the military profession has traditionally, and still does fancy itself to be a unique calling.

Back now to my uneasiness with impunity. If we continually engage in conflict marked by our vast technological superiority and our leadership's almost fanatical aversion to friendly casualties, what will it mean for the culture of self-sacrifice, for the ultimate defining characteristic of the profession of arms? Michael Ignatieff, in a *New Yorker* article soon after the end of the Kosovo air campaign in 1999, asserted, "It was a virtual war, fought in video teleconference rooms, using target folders flashed on screens . . . [it] never reached deep into the psyche of a people . . . [did] not demand blood and sacrifice." Just as Kosovo may produce great change in international governance and international humanitarian law, so it may prove a watershed in our understanding of military ethics.

But why should we care? Because some day—inevitably—you'll need us. What happens when all the risk is gone? Two things, in my opinion. First, we will eventually turn our military forces into a corps of technicians, not soldiers. This has actually been occurring at an alarming rate since the end of the Cold War. In our rush to claim a peace dividend by a cost conscious Congress, many of the direct supporting tasks for military operations traditionally performed by uniformed military personnel have been contracted out to civilian companies. Some of these contracted out tasks come perilously close to the actual use of military force—loading sophisticated munitions or maintaining stealthy combat aircraft for example. What do we do when this new and benign kind of mercenary decides the risk of staying near the battle is no longer worth the money—perhaps when threatened by biological or chemical attack?

The second, and potentially much greater threat from zero-risk warfare is that our political leadership will get used to using military force and will begin to see the resort to violence as a *first*, rather than a last, resort.

EXPEDITIONARY LAW: REMARKS ON HOW TO SUCCEED IN THE DEPLOYED ENVIRONMENT

MAJOR GENERAL (S) JACK L. RIVES*

General Rives delivered the closing address at the 2001 annual Operations Law/JAG Flag Course. This course is designed to give Air Force judge advocates and paralegals who are likely to deploy an understanding of complex legal issues which could confront them in a forward operating location during times of conflict, increased international tensions, or humanitarian need. The theme of the 2001 course was, "The Role of the JAG-paralegal team as part of an Air Expeditionary Force." Following is a non-verbatim version of General Rives' remarks to the course graduates.

Good morning. I'll begin with a confession: When I addressed last year's JAG Flag class, I made a mistake. I knew that I was speaking to experienced judge advocates and paralegals, many of whom had already deployed to various locations worldwide. Seeking to reinforce the message that everyone in the room had the background and training necessary for success, at the outset of my comments I asked the audience to raise their hands if they were ready—right then—to deploy. Not a single hand went up. They must have thought it was a trick question, and I realized I had not provided the right context for my audience.

I won't make that mistake today. I will explain why I'm convinced each of you is ready to succeed in a deployed environment, but this year I won't ask "The Question" until I've better described my perspective.

I believe there are two keys for a successful deployment: a positive attitude and adherence to our core values. First, you need to have a positive attitude. Be excited about the opportunities every day will present; your upbeat approach will be a real force multiplier. Have a "can do" attitude and pursue your duties as a *problem solver*. And then, you need to live our Air Force Core Values every day. Integrity First. Service Before Self. Excellence in All We Do. These two things—attitude and core values—are the foundation for personal and professional success during your deployments.

I'd like to spend a few moments putting our current deployment responsibilities into historical context for you. Consider the military career of our current Secretary of State, retired General Colin Powell. After he graduated from the City College of New York and its Army ROTC program in 1958, then-Lieutenant Powell went through basic infantry officer and Ranger training. Then he was assigned to his first duty station, as a platoon leader near the Fulda Gap in West Germany. The Cold War policy of containment was

* Brig Gen Rives (B.A., University of Georgia; J.D., University of Georgia) is the staff judge advocate of Air Combat Command, Langley Air Force Base, Virginia.

already well established and widely understood. Lieutenant Powell and his soldiers knew their mission, which was to stop the Russian army and its Warsaw Pact allies from invading free Europe.

In 1986, then-Lieutenant General Powell assumed command of the Army's V Corps, the most powerful army in the world. General Powell made a point to visit his old bunker near the Fulda Gap. There he found a young lieutenant platoon leader tasked with the mission of containment, the same basic duties that Colin Powell had performed 28 years before.

In 1991, when General Powell was Chairman of the Joint Chiefs of Staff, he again visited Germany. By then, the Soviet Union had dissolved. The Cold War was over. The United States no longer faced a rival military superpower. Germany was no longer divided into "East" and "West." The Fulda Gap had become merely a geographical mark and the old bunker was abandoned.

The Cold War was certainly a difficult period that presented massive challenges to our defense establishment. However, through that almost half-century of time, we had broad bipartisan support for the national security strategy of containment. Today, we continue to face a dangerous world, but the threats are dramatically different than those of the Cold War era. How do we respond to today's national security challenges?

For the Air Force, the answer lies in a return to our roots as an expeditionary force. Back in the days of the Army Air Corps, we were defined by our expeditionary nature. The pilots and aircrews of World War I and II flew missions from forward-deployed locations, often under austere conditions. The image many of us have of young airmen sleeping under their aircrafts' wings, preparing for their next mission, was often reality. Over the years, the United States Air Force grew into its role as a separate branch of the United States military. We adapted to Cold War requirements by building an enormous infrastructure of permanent forward operating bases.

Judge advocates and paralegals had broad and important duties through the Cold War years. But we tended to exemplify that era's garrison force, doing our job at home station or from a temporary duty location. We participated in mobility lines, but we rarely deployed. We helped with base exercises, but we seldom left the confines of our home bases to do so.

Today, our national security strategy has evolved from containment to engagement. The Air Force has reduced our overseas permanent operating bases by nearly seventy percent since the end of the Cold War. The overall number of airmen has decreased by forty percent, while our deployment taskings have increased by some four hundred percent. Clearly, we are again an expeditionary force.

It's important for all of you to understand some terms of this new era. "EAF" stands for Expeditionary Aerospace Force—it's *what* we are. We are able to deploy rapidly anywhere in the world to perform a variety of missions, from conventional warfighting to peacekeeping to humanitarian endeavors.

"AEF"—Aerospace Expeditionary Force packages—is *how* we do it. We provide the theater combatant commanders with the right AEF package to accomplish the mission.

Every JAG and paralegal who has a certain level of training, experience, work ethic and capabilities is ready to deploy. The JAG/paralegal duties in the deployed environment call for substantially the same skill set as that required for daily duties at home station. More sophisticated "operational law" duties, on the other hand, require specialized training and more substantial experience.

A somewhat limited number of judge advocates and paralegals are suited for duties in an Aerospace Operations Center or an operational headquarters. But deployment law simply involves Air Force "JA" duties performed in a deployed setting. The vast majority of judge advocates and paralegals are capable of excelling on a deployment.

This background information sets the stage for my discussion of the JAG/paralegal role in deployments. While people often speak of a deployment as the 90 or so days during which an airman will be assigned to a unit physically distant from home station, the deployment process involves much more. Your duties as a deployed JAG or paralegal do not begin when you arrive at your deployed location. In fact, if you wait until then to focus on your deployment objectives, you will be far behind and unlikely to excel.

Deployments can be broken down into three distinct phases. Pre-deployment comes first. While you continue to work on home station duties, you must also plan for what you'll be doing at your deployed location. Doing your "normal" duties effectively is an essential part of preparing for a successful deployment. But procrastination over your deployment responsibilities can be a recipe for disaster.

I'll emphasize the three keys in the pre-deployment phase: Preparation! Preparation! Preparation! The JAG team must be able to provide the full range of legal services from the moment they arrive in the Area of Responsibility (AOR). Don't expect your time in the AOR to be a time to learn the job. While I'm confident it'll prove to be a great experience and that you'll learn a lot, you have to show up ready to serve, beginning with your first day in theater.

Besides comprehensive job knowledge and a broad base of experience, the pre-deploying JAG and paralegal should take the opportunity to learn from other JAGs and paralegals who have deployed. Gather "lessons learned" from them. Attend courses, like this one, which prepare you for the challenges of deployed operations. Judge advocates should learn as much as possible about fiscal law. Paralegals must be proficient with both military justice and claims, and have a good understanding of AMJAMS and AFCIMS. Familiarize yourself with technology that you will use while deployed. Become proficient with SIPRNET use. Know what's in the "JAG in the box" (AKA the "Blue Cube") and how it works. If you don't know how to use a fax machine and

other equipment, learn now. Above all, take an expansive view of the role of a deployed JAG team member. Realize, for example, that deployed locations are often not as well manned with administrative or communications specialists, and learn some basic computer troubleshooting.

Be physically fit. The demands of deployed operations will be much easier to handle if you arrive in good physical shape. Also, maintain a good fitness regimen while deployed. Just as a hectic work schedule at your home station can cause you to skip workouts, so can the often jam-packed days at your deployed location tempt you to reduce or skip exercise opportunities. By arriving and staying in shape, your effectiveness at your deployed location will be markedly improved (and more enjoyable).

Learn your new mission. Before you deploy, orient yourself to the AOR. Become familiar with the operations at your deployed location. Learn about the weapons and weapons systems the Air Force and our sister services are using there.

Military justice questions may become complicated in the deployed environment. Sometimes, there are differences in approaches between the "home" and deployed units. Other services can also become involved in disciplinary issues. Be prepared to handle them.

Understand the joint or combined nature of operations at your deployed site. Today, almost all deployed operations are conducted jointly, and many are done in cooperation with other nations. "Joint operations" are military endeavors taken in conjunction with sister services; "combined" operations are undertaken with the militaries of other nations. Combined operations can be part of a coalition or an alliance. In simple terms, coalition partners share *interests*, while alliance partners share *values*.

Some commands, such as 9th Air Force/CENTAF, offer en route "spin up" training. CENTAF is responsible for operations in Southwest Asia, and judge advocates and paralegals deploying to that AOR spend a day at Shaw AFB getting oriented to their new duties. Tailored briefings and updates are provided.

Proper preparation will help you avoid or at least minimize problems. Once deployed, you will face many challenges, some of them unpredictable. Let's move now to some thoughts on how to thrive during the deployment phase.

Recognize from the moment you arrive in theater that you have a new chain of command. Your normal home unit of assignment can remain a point of contact for social calls, e-mails and letters. But address every mission-related issue with your new deployed chain of command. If you deploy to Prince Sultan Air Base, Saudi Arabia, for example, you'll be part of 363 AEW, regardless your permanent home station. While deployed to 363 AEW/JA, you'll work with CENTAF/JA, ACC/JA and also with the Joint Task Force-Southwest Asia staff judge advocate (JTF-SWA/JA).

It's especially important in the deployed environment for judge advocates to balance their "can do" approach to mission accomplishment with the need to say "no" when "no" is the right answer. Deployed commanders often have a heightened sense of mission and of the need to accomplish important matters "sooner than later." But sometimes, the law will not permit commanders to do what they want to do, when they want to do it. This can be especially true with fiscal issues. Your commander may have the very best of motives in wanting a certain outcome, but when Congress has not appropriated funds necessary for that purpose, the commander must be told that resources cannot be expended. This may not be a "gray" area and there may not be another path to reach the commander's goal. The JAG must effectively explain the rules, provide the right advice always, and preclude problems by telling commanders what they need to know—even when it's difficult.

I have mentioned that you should take an expansive view of your duties. Judge advocates and paralegals, by virtue of their skills and training, are often tasked for "additional duties" in such areas as executive officer, public affairs, protocol, and host nation liaison. By treating these new challenges as opportunities to excel, you will enhance mission accomplishment while gaining credibility for yourself and for the JAG Department.

An expansive view of your job also means active participation in a variety of base functions. Go to mission briefings, learn what other units and staff agencies are doing, and help them do it when you can. Take part in recreational and athletic activities. Your deployments will be much better personally and professionally if you integrate well into your new team.

Take care of the core JA responsibilities that can help with quality of life at your deployed site. Claims and legal assistance work by the JAG team can mean the difference between having motivated and productive personnel and having frustrated, demoralized personnel. You're performing an important service for a deployed individual who files a claim because of lost luggage or another problem. Similarly, legal assistance takes on real significance at a deployed location. Take your responsibilities seriously and respond professionally and promptly.

Military justice is a critical responsibility at deployed locations. Learn to do Article 15 actions and courts-martial the right way at your home station. Remember to keep your deployed JA chain informed of issues and rely on them for advice and assistance. Depending on the AOR, disciplinary infractions can have broad impacts. For instance, in Southwest Asia, our bases are located in predominantly Muslim countries, which forbid alcohol possession and consumption. To respect local standards, we have made alcoholic beverages contraband at the SWA bases. What could be a mundane underage drinking violation at a home station can be a source of potential international friction when it occurs at a deployed site.

I urge you to work for improvements to benefit your successors. Consider the ancient Greeks and their olive trees. Those who planted seeds

and toiled over young olive trees knew they were unlikely to directly benefit from their efforts. But they did the work so that later generations could reap the benefits. Similarly, on a relatively short deployment you will have many opportunities to "plant seeds" for the benefit of your successors. There will be innumerable things you can do to make your deployed location better for those who follow you. Set up (or update) continuity books and other files so that your successors will not have to re-solve problems you already worked; order furniture and equipment; maybe even design a new facility.

Remember that a successful deployed JAG or paralegal is one with a "can do" attitude who views the deployment as a great opportunity to excel.

The final phase of the deployment process is post-deployment. You'll need to take some time to re-charge your batteries and get re-acquainted with family and friends upon your return. Take pride in your hard work and many accomplishments while deployed. But don't let your deployment become a distant memory too soon; make the time to do things that will help others have a better deployment.

Pass on lessons learned from your deployment. You can do this informally by discussing your experiences. Many commands require formal end-of-tour reports. Treat this requirement seriously and write yours while the memories are fresh. Take advantage of opportunities to speak about your deployment to a variety of audiences. Write articles for your base paper, the *Reporter*, the *Air Force Law Review*, and perhaps your state bar journal.

Also, recall how you treasured every "care package" or piece of mail you received while away. Take it upon yourself to return the favor by way of writing or sending packages to currently deployed Air Force members. Energize your office to do the same. By improving life for those who deploy after you, you will contribute to their mission accomplishment.

Now, I want to come back to my opening comments. Please raise your hand if you believe you are ready, right now, for the challenges and opportunities of a deployment. (*All hands are raised*). Great! I, too, believe that you are all prepared to do the right things on a deployment.

How many of you saw the 1970 movie *Patton*, in which George C. Scott won an Academy Award for his portrayal of General George S. Patton, Jr.? (*Fewer than half the audience raised their hands*). Hmmm, I suppose it has been more than 30 years since the movie was released. In a famous scene at the beginning of the movie, the general addressed his troops in front of a huge American flag. At one point, he paused in his exhortations to reflect that perhaps 30 years from now, the soldiers would be sitting around firesides with their grandchildren, who would ask them what they had done in the Great War. General Patton advised the troops that they were about to do bold and important things; they would not have to pause and respond, "Well, I shoveled [manure] in Louisiana" while their countrymen were expending heroic efforts.

So it is with deployments. Consider the day, 30 or so years from now, when you'll be sitting around with your grandchildren and they ask you what

did during the early days of our Great Expeditionary Aerospace Force. For those who deploy, you'll have fantastic stories to tell—and you won't have to say, "Well, I worked on powers of attorney in Louisiana."

Everyone in the Air Force contributes to our nation's freedom, but it's in the deployed environment that you'll be at the "tip of the spear." As you look back over your Air Force career, I have no doubt that you will remember your deployed days among your fondest memories.

Last year, just before talking to students in this course, I visited the SWA AOR. One of the more memorable places I saw was the MIA Museum in Kuwait City. The Kuwaitis have over 600 men, women and children who are unaccounted for from the Iraqi occupation of 1990-91. I met the museum curator, who had attended college in the United States and had returned to Kuwait just before the Iraqi invasion. The curator explained the hardships of the occupation and the continuing anguish caused by the still-missing countrymen.

But then he looked me in the eyes and he thanked me. He told me that the American military presence in his country means that he and others can go to work and resume normal lives, secure in the knowledge that our forces are there to provide security and comfort to the Kuwaitis. He said that if we were not there, he would constantly worry about his family and the threat of invasion and oppression.

That's what our deployments are really all about. We can provide peace of mind to good people who simply want to lead peaceful lives. If you ever wonder whether you make a difference as you serve in the Air Force, think of that man.

As you prepare to deploy, I remind you that you never know when or where huge challenges and opportunities may lurk. At our recent TJAG Awards Banquet, this year's Kuhfeld Award winner as the Outstanding Young Judge Advocate of 2000 was recognized in part for his actions while deployed. The C-130 transport plane that was bringing Major Eric Dillow and others to Al Jaber Air Base, Kuwait, crashed, resulting in death and severe injuries to several on board. Major Dillow was himself wounded, but he deferred medical attention to assist with care of a severely injured airman. Because of the trauma he had endured, Major Dillow was offered an opportunity to cancel his deployment and return home. But Major Dillow elected to complete his entire deployment as scheduled, and he served with real distinction.

Major Dillow says that he merely did what anyone else would have done in similar circumstances. In part, I recognize his humility and the fact that he was downplaying his own heroism. But I also believe that he hit on an important point.

I hope that many of you have taken advantage of opportunities to meet with veterans who have served our Nation, especially those who served in the Second World War, Korea, Vietnam, or Desert Storm. I hope that you thanked them for their sacrifices. If you spoke to someone who did especially heroic

things, the response you received was more than likely along the lines of, "I'm just an ordinary person who was in an extraordinary situation. Anyone would've done what I did."

Outside the Secretary of Defense's office in the Pentagon is a very large painting of a family in prayer. The man is in uniform and his wife and child are beside him. Beneath the painting is quotation from the Book of Isaiah, Chapter 6, Verse 8: "I heard the voice of the Lord, saying, 'Whom shall I send, and who will go for us?' Then said I, 'Here am I; send me.'" As I look around this room, I am absolutely confident that if the call comes for you to do your duties, no matter how difficult or dangerous, you will all respond, "Here am I; send me."

Our JAGs and paralegals consistently demonstrate, at home and while deployed, that they do perform heroically in service to our Nation. I know that you will carry on that tradition.

I congratulate you on your completion of this course. I anticipate that as you are called upon to serve our country at deployed locations around the globe, the lessons you have learned here will help you build on the achievements of those who have gone before you. I look forward to hearing reports from your deployments. You have my very best wishes!