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MILITARY LAW REVIEW

ARTICLES

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BOOK REVIEWS

Department of Army Pamphlet 27-100-200

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Headquarters, Department of the Army, Washington, D.C.

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MILITARY LAW REVIEW

Volume 200 **Summer 2009**

REDEEMING PEACEKEEPING: USING THE U.N. SECURITY COUNCIL TO INTERNATIONALIZE THE U.S. MILITARY BAN ON PROSTITUTION PATRONAGE

COMMANDER PATRICK JOSEPH GIBBONS*

I. Introduction

At the beginning of 2005, roughly 250,000 American troops were deployed in almost 130 nations worldwide; if servicemembers stationed at permanent overseas garrisons in Germany, Japan, and elsewhere were added, the number of personnel abroad was on the order of 350,000.[1] An important benefit of having those troops forward-deployed is that they create a favorable impression of the United States through their commendable behavior. Activities such as patronage of prostitutes and establishments that facilitate human trafficking are detrimental to that image. While the frequency of military prostitution patronage might be gauged from the number and proximity of brothels in the area of a military base, the Department of Defense (DoD) recently criminalized prostitution patronage as an offense under the Uniform Code of Military Justice (UCMJ). The new policy was a step taken to reduce the demand for victims of human trafficking in accordance with international treaty commitments, and to avoid the embarrassing scandal of U.S. troops

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[1] *See Where Are the Legions, Global Deployments of US Forces*, GlobalSecurity.org, http://www.globalsecurity.org/military/ops/global-deployments.htm (last visited Mar. 10, 2009).

participating in human rights violations in the far corners of the world to which they carry the flag.

The United Nations (U.N.) and North Atlantic Treaty Organization (NATO), facing reports of forced prostitutes exploited by peacekeepers deployed under their banners, have struggled to prevent embarrassing recurrences. Peacekeeper use of prostitutes undermines the peacekeeping mission by flouting the rule of law, repeating the violations of the trafficking victims' human rights, and channeling cash to sources of the instability they are deployed to remedy. But compared to the United States, international organizations are hobbled in their attempts to enforce discipline in that they have no jurisdiction over the troops at their disposal. There were 83,000 uniformed servicemembers from 119 nations deployed supporting seventeen different peacekeeping missions around the world at the end of 2007.[2] Troop-contributing States retain a sovereign right to discipline themselves, leaving international organizations relatively powerless to prevent incidents of military misconduct that tarnish their reputations. That disability could be remedied by appropriate U.N. Security Council action.

Because the authority to set and enforce standards of conduct for troops currently resides with the sending States, the United States should introduce a Security Council resolution under U.N. Charter Chapter VII requiring contributor States to prohibit prostitution patronage by their armed forces. Chapter VII empowers the Security Council to bind Member States to act according to its requirements when it determines that a threat to international peace and security exists. Recent Security Council resolutions on terrorism and the proliferation of weapons of mass destruction have set precedent for the Security Council's power to require legislation by Members to combat general phenomena threatening the peace, rather than specific actors or transgressor States. Human trafficking is sufficiently destabilizing that Chapter VII action to prevent peacekeeper support for it is justified. Furthermore, a Resolution setting standards for peacekeepers would be an important step toward Security Council leadership of peacekeeping missions envisioned by the U.N. Charter but abdicated in practice.

Part II of this article begins with a survey of human trafficking generally before turning to its manifestation as sexual slavery. That will

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[2] *See* Background Note, U.N. Dep't of Public Information, U.N. Peacekeeping Operations, Dec. 31, 2007 (Feb. 2008).

include a discussion of how military patronage of prostitutes creates demand for trafficked women and affects security. The article will then review international law related to trafficking in persons, and U.S. implementation of it in Part III. This section will highlight the current relative powerlessness of international organizations to undertake an enforceable abolitionist policy such as that adopted by the United States. Part IV will then turn to the scope of Security Council authority, both as the U.N. Charter provides for it and as the Council has chosen to exercise it. Finally, it will conclude in Part V by arguing that the United States should introduce a Security Council resolution prohibiting peacekeeper prostitution patronage, drawing on the analysis of recent Security Council resolutions to remedy the institutional disabilities previously discussed. A Chapter VII resolution would require troop-contributing States to enforce prescribed norms of conduct, forcing those States to do what the U.N. itself cannot. This argument will be made, however, recognizing that there are significant political challenges to successful passage of such a resolution.

Before outlining the problem of trafficking in persons, however, some important aspects of this problem should be noted as beyond this study's scope. First, because this article proposes a course of action to give further effect to an existing U.S. policy on trafficking and prostitution, it accepts as a given that prostitution is a social ill. It therefore will not delve into the debate among activists as to whether the interests of prostitutes are better served by legalization or prohibition. Second, because this article deals with penalizing individual misconduct, this article will not discuss procurement-related issues. Although U.S. policy guidance deals extensively with regulating conduct of contractor employees, those provisions do not apply directly to the individual servicemember.

II. Human Trafficking & Military Culpability

Slavery is a practice universally condemned and outlawed as *jus cogens*. Yet it exists today still, in nearly all parts of the world. The traffic in humans for purposes of exploiting coerced, unpaid labor feeds organized crime.[3] With a relatively low cost and high return,[4] it is now

[3] *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 5 (2007) [hereinafter 2007 TIP REPORT].

estimated to be the third most profitable international criminal enterprise, after arms and drugs.[5] Its destruction is a goal the international community often announces, but abolition has proven difficult to achieve.

The common denominator in slavery—what makes a slave a slave—is the use of fraud, force, or other coercion to exploit labor for a profit.[6] The International Labor Organization estimates that there are 12.3 million people enslaved globally.[7] A 2006 U.S.-sponsored research project approximated the number of persons trafficked across borders at 800,000, plus millions more trafficked within transnational borders.[8] Eighty percent of international trafficking victims are female, and fifty percent are underage; the majority of these are trafficked for commercial sexual exploitation.[9] From January 2000 to June 2003, over five thousand women were trafficked into southeast Europe.[10] Although discussions of trafficking of women and children often center on prostitution, these groups also form the majority of victims trafficked for non-sexual labor.[11]

While trafficking is sometimes confused with migration issues,[12] the push/pull factors that drive voluntary migration nevertheless influence the slave trade as well. The "pushes" include poverty, instability, lack of opportunity, the low status of females in some societies, and armed conflict.[13] The "pull" is the demand for cheap labor, whatever the industry: agriculture, textiles and garments, or sexual services.[14] While

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[4] *See* Jennifer L. Enck, Note, *The United Nations Convention Against Transnational Organized Crime: Is It All That It's Cracked Up to Be? Problems Posed by the Russian Mafia in the Trafficking of Humans*, 30 SYRACUSE J. INT'L L. & COM. 369, 374 (2003).
[5] *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 14 (2004).
[6] *See* 2007 TIP REPORT, *supra* note 3, at 8.
[7] *See* Int'l Labor Org., Special Action Program to Combat Forced Labour, http://www.ilo.org/sapfl/lang--en/index.htm (last visited Mar. 10, 2009).
[8] *See* 2007 TIP REPORT, *supra* note 3, at 8.
[9] *See id.*
[10] *See* SARAH E. MENDELSON, BARRACKS & BROTHELS 8 (2005).
[11] *See* Kara Abramson, Note, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT'L L.J. 473, 474 (2003).
[12] *See* 2007 TIP REPORT, *supra* note 3, at 30; *see also* REPORT OF SPECIAL RAPPORTEUR ON SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY, U.N. DOC. E/CN.4/1999/71, ¶ 50 (Jan. 29, 1999) [hereinafter 1999 SALE OF CHILDREN REPORT].
[13] *See* 2007 TIP REPORT, *supra* note 3, at 35.
[14] *See id.*; 1999 SALE OF CHILDREN REPORT, *supra* note 12, at 49; Keith J. Allred, *Human Trafficking: Breaking the Military Link*, CONNECTIONS: THE Q.J., Winter 2005, at 63, 64.

globalization contributes to demand, the U.N. cautions against overlooking the impact of local demand.[15]

Slavery takes many forms. It includes practices such as debt bondage and involuntary servitude, commercial sexual exploitation, and exploitative labor conditions in private homes.[16] Children are pressed into service as child soldiers, as well as into combat support roles as camp cooks, couriers, and porters.[17] Authorities have found men and boys from Burma, Thailand, Ghana, and the Ukraine working as forced labor on the high seas on commercial fishing vessels.[18] Women have been trafficked into Lebanon and the Gulf States to work as domestics and prostitutes;[19] Lebanon has also been the destination for children trafficked to beg on the streets.[20] Depending on the culture and conditions, women are trafficked as forced brides to settle a debt, relieve their families' poverty, or display the groom's wealth.[21] Whatever its manifestation, violence and abuse underpin trafficking.[22]

Victims are brought into the traffickers' web by various means. Some begin as voluntary migrants; a favored tactic of Japanese organized crime, the Yakuza, is to prey on foreign workers who have overstayed or strayed beyond the limits of their work visas.[23] Traffickers are creative and ruthless in developing means to entrap their victims.[24] They often promise employment, education, or even marriage to lure their victims

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[15] *See* REPORT OF SPECIAL RAPPORTEUR ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN & CHILDREN, U.N. DOC. E/CN.4/2006/62, ¶¶ 75, 77 (Feb. 20, 2006) [hereinafter 2006 UN TRAFFICKING REPORT].
[16] *See* 2007 TIP REPORT, *supra* note 3, at 8.
[17] *See id.* at 21.
[18] *See id.* at 9.
[19] *See* REPORT OF SPECIAL RAPPORTEUR ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN & CHILDREN, ADDENDUM: MISSION TO BAHRAIN, OMAN & QATAR, U.N. DOC. A/HRC/4/23/ADD.2, ¶¶ 70–78 (Apr. 25, 2007) [hereinafter GULF STATES REPORT]; REPORT OF SPECIAL RAPPORTEUR ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN & CHILDREN, ADDENDUM: MISSION TO LEBANON, U.N. DOC. E/CN.4/2006/62/ADD.3, ¶ 22 (Feb. 20, 2006) [hereinafter LEBANON REPORT].
[20] *See* LEBANON REPORT, *supra* note 19, ¶¶ 63–64.
[21] *See* REPORT OF THE SPECIAL RAPPORTEUR ON HUMAN RIGHTS ASPECTS OF THE VICTIMS OF TRAFFICKING IN PERSONS, ESPECIALLY WOMEN & CHILDREN, U.N. DOC. A/HRC/4/23, ¶ 28 (Jan. 24, 2007) [hereinafter 2007 U.N. TRAFFICKING REPORT]. Forced marriage is distinguished from arranged marriage by the right to say no, even though the match is made by the family. A forced marriage is against the bride's consent. *Id.* ¶¶ 25–26.
[22] *See* 2007 TIP REPORT, *supra* note 3, at 33.
[23] *See* Yasuzo Kitamura, *Evolution of Antitrafficking in Persons Law & Practice in Japan: A Historical Perspective*, 14 TUL. J. INT'L & COMP. L. 331, 347–48 (2006).
[24] 2007 TIP REPORT, *supra* note 3, at 8.

into their network.[25] Once entrapped, a victim may be sold or transferred several times.[26]

In many countries with large populations of guest workers, trafficked victims initially were taken in with deceptive recruiting promises, only to find out that the worker-sponsorship program placed them in situations of indentured or involuntary servitude.[27] A U.N. study of three Gulf States provides a good example of the sponsorship system. A worker in a poor country, attracted by the prospect of better pay, pays a fee to a recruiting agency in the sending country.[28] An agency in the receiving country pays for a one-way ticket and processes all immigration and labor documents such as visas and work permits at the expense of the prospective employer, who will be the worker's sponsor.[29]

Once the worker arrives in the receiving country, he is presented with an employment contract, often in the language of the receiving country.[30] Regardless of whether he had previously signed a contract in the sending country, or whether the terms match, or even if he can understand the agreement, he is in no position to refuse or to report the abuse: his passport may already have been confiscated, he is indebted for his transportation there, and he relies upon the employer for an exit visa and return ticket.[31] He is entirely dependent upon the sponsoring employer for work and for the continued legality of his presence in the country.[32] With no viable recourse but submission, the guest worker is at the sponsoring employer's mercy. Although the system is regulated, with fines and imprisonment for violations,[33] enforcement is uneven.[34]

Sex trafficking is the largest subcategory of the trade.[35] The movement of young females from East Europe and former Soviet states for forced prostitution is the dominant pattern in southeast Europe.[36] An estimated ninety percent of the foreign prostitutes there were trafficked

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[25] *See id.*; LEBANON REPORT, *supra* note 19, ¶ 55.
[26] *See* MENDELSON, *supra* note 10, at 9.
[27] *See* GULF STATES REPORT, *supra* note 19, ¶ 7.
[28] *See id.* ¶ 54.
[29] *See id.* ¶ 55.
[30] *See id.* ¶ 56.
[31] *See id.* ¶¶ 56–57.
[32] *See id.* ¶ 60.
[33] *See id.* ¶ 53.
[34] *See id.* ¶ 60.
[35] *See* 2007 TIP REPORT, *supra* note 3, at 27.
[36] *See* MENDELSON, *supra* note 10, at 15.

into the region.[37] North Korean refugees in China are abducted and sold into prostitution or concubinage.[38] The demand for prostitutes is overwhelmingly from males,[39] although demand from females is not unheard of.[40] While the prostitution of children is commonly understood and condemned as exploitative,[41] there is no international legal regime to outlaw adult prostitution.[42] Nevertheless, in most situations the practice could properly be called trafficking,[43] and in any event, where prostitution is tolerated there is a measurable increase in trafficking activity.[44]

Thousands of Russian women find themselves trafficked into the Middle East, Asia, North America, and Europe.[45] Russian crime syndicates extend from agents in villages through regional "recruiters" to an extended, international web of traffickers.[46] The recruited women are offered jobs as models, dancers, or waitresses, and false passports are obtained if necessary through corrupt contacts in the Ministry of Foreign Affairs.[47] Only later do the women realize that they have been sold into slavery as prostitutes, and that they are expected to work off the cost of delivering them to their destination country through debt bondage.[48]

A common method of entry for trafficked women destined to be prostitutes is the misuse of artist or performer visas.[49] Once the victim is

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[37] *See id.* at 9.
[38] *See* Donna M. Hughes, *"How Can I be Sold Like This?" The Trafficking of North Korean Women Refugees*, NAT'L REV. ONLINE, July 19, 2005, *available at* http://www.uri.edu/artsci/wms/hughes/trafficking_nk_refugees.pdf.
[39] *See* REPORT OF SPECIAL RAPPORTEUR ON SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY, U.N. DOC. E/CN.4/2006/67, ¶ 38 (Jan. 12, 2006) [hereinafter 2006 SALE OF CHILDREN REPORT].
[40] *See* 1999 SALE OF CHILDREN REPORT, *supra* note 12, ¶ 22 (describing sex tourism by women to Trinidad & Tobago for "beach boys" as young as fourteen).
[41] *See* 2006 SALE OF CHILDREN REPORT, *supra* note 39, ¶ 28.
[42] *See* 2006 UN TRAFFICKING REPORT, *supra* note 15, ¶ 41.
[43] *See id.* ¶ 42.
[44] *See* 2007 TIP REPORT, *supra* note 3, at 27.
[45] *See* Christopher M. Pilkerton, *Traffic Jam: Recommendations for Civil & Criminal Penalties to Curb the Recent Trafficking of Women from Post-Cold War Russia*, 6 MICH. J. GENDER & L. 221, 222 (1999).
[46] *See id.* at 228.
[47] *See id.*
[48] *See id.*; *see also* Donna M. Hughes, *Supplying Women for the Sex Industry: Trafficking from the Russian Federation*, *in* SEXUALITY AND GENDER IN POSTCOMMUNIST EASTERN EUROPE AND RUSSIA 209, 219 (A. Stulhofer et al. eds., 2005).
[49] *See* LEBANON REPORT, *supra* note 19, ¶¶ 53–56; GULF STATES REPORT, *supra* note 19, ¶ 76.

in the destination country, her documents are confiscated, leaving her unable to travel elsewhere or go to the authorities without being detained as an illegal migrant.[50] This coercion is in addition to the constant violence attendant upon them. A 2006 study of prostitutes trafficked into Europe found that ninety-five percent had been violently assaulted.[51] Trafficked women in southeast Europe tell of repeated rape at the hands of their captors, in order to establish dominance over them and break their will.[52] They are frequently moved (or sold) from place to place and country to country.[53]

In addition to violence, trafficked prostitutes suffer severe neglect. Few if any receive medical care.[54] The 2006 European study reported sixty percent of the women interviewed had infections, gastro-intestinal disorders, fatigue, and pain.[55] Mental health issues such as depression, anxiety, post-traumatic stress disorder, and dissociative and personality disorders were rife as well.[56] Although the hope of avoiding HIV infection partly drives the demand for child prostitutes,[57] estimates of HIV/AIDS infection rates among child prostitutes in Southeast Asia range from fifty to ninety percent.[58]

The plight of trafficked prostitutes is a slightly different, and in some ways more disturbing, violation of their human rights than normal labor trafficking. Whereas other slaves are trafficked for their work potential, the women and children forced into sexual slavery are there by virtue of being women and children.[59] A similarly nuanced distinction applies to the demand for prostitutes as well. For example, in the case of prawns harvested with trafficked labor, the market demand is not for the coerced labor but for the prawns. The labor is exploited to meet the demand for prawns.[60] By contrast, in the case of prostitutes, the demand is for the exploited, trafficked victim.[61] The purchaser of prostitution is both a

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[50] *See* GULF STATES REPORT, *supra* note 19, ¶ 78.
[51] *See* 2007 TIP REPORT, *supra* note 3, at 33.
[52] *See* MENDELSON, *supra* note 10, at 9.
[53] *See id.*; LEBANON REPORT, *supra* note 19, ¶ 54; GULF STATES REPORT, *supra* note 19, at 78.
[54] *See* MENDELSON, *supra* note 10, at 9.
[55] *See* 2007 TIP REPORT, *supra* note 3, at 33.
[56] *See id.*
[57] *See* 2006 SALE OF CHILDREN REPORT, *supra* note 39, ¶ 40.
[58] *See* 2007 TIP REPORT, *supra* note 3, at 35.
[59] *See* 2006 UN TRAFFICKING REPORT, *supra* note 15, ¶ 63.
[60] *See id.* ¶¶ 58–59.
[61] *See id.* ¶¶ 60, 63.

demand-contributor and a trafficker, by his receipt of the trafficked victim.[62] Although there are arguably prostitutes who are not trafficked, the purchaser is most likely unable to distinguish them.[63]

This inability to recognize trafficked prostitutes is at the heart of the problem of military prostitution patronage. Servicemembers who purchase sex do so unable to differentiate between the voluntary prostitute and the sex slave.[64] The sex slave's revenue then funds the activities contributing to the instability the servicemember is deployed to remedy.[65] The military prostitution patron has undermined his own mission.

Trafficked persons, particularly forced prostitutes, follow demand, and in post-conflict settings demand is often fueled by the introduction of peacekeeping troops.[66] Soldiers are sometimes directly involved in trafficking; in the Democratic Republic of the Congo and in Sudan, soldiers have been accused of abducting women for sexual slavery, and in Myanmar soldiers traffic Burmese women into forced prostitution in Thailand.[67] But more common is support for trafficking as a prostitution customer.[68]

Military servicemembers' support of local prostitution is well-documented. In 1946, the Allied occupational government in Japan banned licensed prostitution, but tolerated the continued private sex trade in part to ensure its availability to Allied troops.[69] British authorities in Belize designated which brothels their troops were permitted to attend.[70] There, as well as in brothels near American bases in the Philippines, Honduras, and pre-war Hawaii, prostitutes were required to submit to regular medical examinations conducted either by military medical personnel or by local authorities at the instigation of military

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[62] *See id.* ¶ 63.
[63] *See id.*
[64] *See* MENDELSON, *supra* note 10, at 29.
[65] *See id.* at 17.
[66] *See id.* at 1.
[67] *See* Connie de la Vega & Chelsea E. HaleyNelson, *The Role of Women in Peacekeeping & Peacemaking: Devising Solutions to the Demand Side of Trafficking*, 12 WM. & MARY J. WOMEN & L. 437, 448–49 (2006).
[68] *See* MENDELSON, *supra* note 10, at 3.
[69] *See* Kitamura, *supra* note 23, at 341.
[70] *See* Isabelle Talleyrand, Note, *Military Prostitution: How the Authorities Worldwide Aid & Abet International Trafficking in Women*, 27 SYRACUSE J. INT'L L. & COM. 151, 155 (2000).

commanders, in order to protect the troops' health.[71] Media allegations that U.S. servicemembers in South Korea were abetting trafficked forced prostitution prompted congressional hearings and a DoD Inspector General investigation.[72]

As with prostitution generally, military support stimulates demand for more prostitutes. The proximity of brothels to military installations is evidence of the link.[73] The number of trafficked women in West Timor jumped once a transnational administration was established in Timor Leste,[74] as it did in Thailand in the 1960s when Americans went there for "rest and relaxation" breaks from Vietnam.[75] In Bosnia, non-governmental organizations (NGOs) working with trafficking victims in 2003 said as many as forty percent of prostitution patrons were foreign, mostly from the NATO Stabilization Force.[76] Foreign customers were a lucrative revenue source: by one estimate they accounted for seventy percent of revenues because they were charged more than locals.[77] In Kosovo in 2000, a reported eighty percent of prostitution patrons were international.[78] Kosovar brothels tailored their names to the nationality of the local peacekeeping contingent.[79] And when the number of troops dropped, so did the number of women assisted by NGOs.[80]

Toleration of trafficked prostitution stems from different causes. Trafficked women may be mistaken for "regular prostitutes."[81] Some commanders are indifferent, arguing that boys will be boys.[82] In other instances, members of peacekeeping contingents are themselves involved

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[71] *See id.* at 154–56.
[72] *See Implementing the Department of Defense "Zero Tolerance" Policy with Regard to Trafficking Humans: Hearing Before the H. Comm. on Armed Servs. & the Comm'n on Security & Cooperation in Europe*, 108th Cong. (2004) (statement of Dep't of Defense Inspector Gen. Joseph E. Schmitz), *available at* http://www.dodig.osd.mil/Inspections/IPO/combatinghuman.htm [hereinafter Schmitz Statement].
[73] *See* MENDELSON, *supra* note 10, at 10.
[74] *See* de la Vega & HaleyNelson, *supra* note 67, at 453.
[75] *See id.* at 461.
[76] *See* MENDELSON, *supra* note 10, at 10.
[77] *See* REPORT OF SPECIAL RAPPORTEUR ON TRAFFICKING IN PERSONS, ESPECIALLY WOMEN & CHILDREN, ADDENDUM: MISSION TO BOSNIA & HERZEGOVINA, U.N. Doc. E/CN.4/2006/62/ADD.2, ¶ 6 (Nov. 30, 2005) [hereinafter BOSNIA REPORT].
[78] *See* MENDELSON, *supra* note 10, at 10.
[79] *See id.* at 11.
[80] *See id.*
[81] *See id.* at 54.
[82] *See* Sarah E. Mendelson, *U.S.-Russian Military Relations: Between Friend & Foe*, WASH. Q., Winter 2002, at 161, 167; *see also* Schmitz Statement, *supra* note 72, at 5.

in operating forced prostitution enterprises. NATO officers in Kosovo reported that Russian officers were potentially involved in managing brothels near Russian garrisons there.[83] United Nations civilian police believed that someone within the Russian military contingent was betraying their planned raids to the traffickers.[84] Similar allegations have been made against the Russian contingent in Eastern Slovenia.[85] United Nations peacekeepers in Cambodia, West Africa, and the Democratic Republic of the Congo have been accused of sexual exploitation and abuse.[86]

Military support of trafficking through prostitution has significantly unique implications. For one thing, misconduct is generally detrimental to mission accomplishment.[87] In many post-conflict areas, violence against women, such as systematic rape, forced impregnation, and forced prostitution, is used as a method of ethnic and sectarian warfare.[88] In those areas, purchased sex continues a pattern of trafficking and rape, since the women prostituted are not positioned to consent to their sale.[89] Additionally, acquiescence in troops' use of prostitutes sends a message that criminal conduct will be tolerated, undermining the very rule of law climate peacekeeping missions are meant to impose.[90] When peacekeepers are found complicit in sexual exploitation or abuse, the most common response is repatriation of the individual, reinforcing the impression of impunity locally.[91]

But aside from these factors, there is a more direct, operational impact on the mission when peacekeepers support traffickers. Organized crime often functions as a para-government, regulating criminal activity

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[83] *See id.* at 56.
[84] *See* MENDELSON, *supra* note 10, at 59. United Nations police suspected the Russian police contingent as well. *See id.*
[85] *See* Mendelson, *supra* note 82, at 168.
[86] *See* The Secretary-General, *A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations, delivered to the General Assembly*, U.N. Doc. A/59/710, ¶ 3 (Mar. 24, 2005) (prepared by Zeid Ra'ad Zeid Al-Hussein) [hereinafter Zeid Report].
[87] *See* MENDELSON, *supra* note 10, at 14.
[88] *See, e.g.*, Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia & the Failure of Human Rights Law to Comprehend the Injuries*, 46 AM. U. L. REV. 793 (1997).
[89] *See* MENDELSON, *supra* note 10, at 13.
[90] *See id.* at 17–18.
[91] *See id.* at 7.

and corrupting government officials.[92] Gangs trafficking women also traffic guns and drugs.[93] Patronizing prostitutes thus puts cash in the hands of parties with an interest in preventing the creation of strong governmental institutions.[94] These parties work at cross purposes with the peacekeepers themselves by violating the human rights of the trafficking victims and fostering instability.

Policy makers have caught on to the human rights implications and security consequences of tolerating military prostitution patronage. The following section will review efforts by the U.N., NATO, and United States to deprive traffickers of this revenue stream.

III. Existing Legal Responses to Human Trafficking

Over the last century, as concern over human trafficking, particularly of women and children, has waxed and waned, the law has responded, although not necessarily with complete or even measurable success. This section will review the evolution of both international and U.S. domestic law on human trafficking, with a focus on the interaction between military misconduct and trafficked women.

A. International Law: Conventions and Organizations

1. Convention Law

The international response to the trafficking plague has been described as coming in two waves.[95] The first responded to the perceived threat to Western women from the trade in "white slavery," while the second arose with the emerging influence of human rights law, and particularly the women's human rights movement, in the 1970s.[96] But in no agreement does the international community deal directly with military-related trafficking or call for a per se ban on prostitution.

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[92] *See* Pilkerton, *supra* note 45, at 224.
[93] *See* MENDELSON, *supra* note 10, at 14.
[94] *See id.* at 17.
[95] *See* Elizabeth M. Bruch, *Models Wanted: the Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT'L L. 1, 6 (2004).
[96] *See id.*

The 1904 International Agreement for the Suppression of the White Slave Trade (White Slave Agreement)[97] by its title addressed only the plight of white women. Prompted by concerns over the sale of women into prostitution in Europe during difficult economic periods,[98] it referred explicitly to neither trafficking nor prostitution but to "the procuring of women or girls for immoral purposes abroad."[99] The White Slave Agreement was aimed primarily at protecting potential victims, rather than punishing traffickers.[100] It was followed in 1910 by the International Convention for the Suppression of the White Slave Traffic,[101] which did provide for trafficker prosecution and punishment.[102]

When the League of Nations was created at the end of World War I, supervision of agreements regarding trafficking in persons was included in its mandate.[103] In execution of that responsibility, the League oversaw the conclusion of the Convention for the Suppression of Traffic in Women and Children[104] in 1921 and the International Convention for the Suppression of the Traffic in Women of Full Age[105] in 1933. Both treaties were amended by Protocol in 1947.[106]

Following World War II and the creation of the U.N., the General Assembly adopted the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (Trafficking

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[97] International Agreement for the Suppression of the White Slave Trade, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83 [hereinafter White Slave Agreement].
[98] *See* Stephanie Farrior, *The International Law on Trafficking in Women and Children for Prostitution: Making It Live Up to Its Potential*, 10 HARV. HUM. RTS. J. 213, 216 (2004).
[99] White Slave Agreement, *supra* note 97, art. 1; *see also* Bruch, *supra* note 95, at 9.
[100] *See* Farrior, *supra* note 98, at 216.
[101] International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 3 L.N.T.S. 278.
[102] *See id.* arts. 1–3; Farrior, *supra* note 98, at 216.
[103] *See* League of Nations Covenant art. 23, para. (c).
[104] Convention for the Suppression of Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415.
[105] *See* International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431.
[106] Protocol to Amend the Convention for the Suppression of Traffic in Women and Children and the International Convention for the Suppression of the Traffic in Women of Full Age, Nov. 12, 1947, 53 U.N.T.S. 13.

Convention).[107] It addressed prostitution mainly, treating trafficking as an adjunct evil, and served as a conglomeration of the preceding trafficking conventions, as well as a 1937 convention drafted by the League of Nations but never acted upon because of the war.[108] As did all the agreements it incorporated, the Trafficking Convention took a law enforcement approach to the trafficking-prostitution problem, emphasizing criminalization and punishment.[109]

It was in some ways innovative compared to its predecessors. Although weak, it did contain implementation and enforcement mechanisms.[110] Addressed to prostitution, it did not oppose it per se;[111] instead, it abolished brothels,[112] on the theory that they created demand for trafficked women.[113] It implied that trafficking was not limited to women, since it used gender-neutral language in the treaty's body, despite the title.[114] And it provided for "rehabilitation and social adjustment" of victims.[115] It also reiterated measures from previous agreements, such as the obligation to warn potential victims about the dangers of trafficking and assist in their return to their State of origin, and to supervise employment agencies and points of entry and departure.[116]

The Trafficking Convention, the most comprehensive and the last trafficking-specific multilateral treaty until the 1990s,[117] is nevertheless subject to criticism. Implementation and enforcement were limited to the requirement to report implementing legislation to the Secretary-General,

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[107] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271 [hereinafter Trafficking Convention].
[108] *See id.* pmbl.; *see also* Bruch, *supra* note 95, at 8–9; Farrior, *supra* note 98, at 217; Sasha L. Nel, *Victims of Human Trafficking: Are They Adequately Protected in the United States?*, 5 CHI.-KENT J. INT'L & COMP. L. 3, 12 (2005); Shelley Case Inglis, *Expanding International & National Protections Against Trafficking for Forced Labor Using a Human Rights Framework*, 7 BUFF. HUM. RTS. L. REV. 55, 56 (2001).
[109] *See* Bruch, *supra* note 95, at 11.
[110] Trafficking Convention, *supra* note 107, art. 21; *see also* Bruch, *supra* note 95, at 10; Farrior, *supra* note 98, at 217, 220.
[111] *See* Farrior, *supra* note 98, at 218.
[112] Trafficking Convention, *supra* note 107, art. 2.
[113] *See* Farrior, *supra* note 98, at 218.
[114] *See* Inglis, *supra* note 108, at 61.
[115] *See* Trafficking Convention, *supra* note 107, art. 16.
[116] *Id.* arts. 17–20; *see also* Bruch, *supra* note 95, at 9–10.
[117] *See* Bruch, *supra* note 95, at 10.

who published it to the other States Parties.[118] It created no body to supervise or verify implementation, or to suggest measures based on the reports.[119] It did not address human rights in any way,[120] although it did provide that alien victims would have the same national-law rights to be present at the prosecution of a described offense as those afforded citizens.[121]

It also suffered definitional problems by conflating trafficking and prostitution into one issue. Consequently, it had no effect on trafficking for purposes other than sexual exploitation,[122] and confused the issue of what was to be outlawed and punished.[123] Despite the gender-neutral language of the Trafficking Convention, the above agreements all focus solely on trafficking for sex purposes, ignoring other forms.

Finally, the first-generation treaties, culminating in the Trafficking Convention, were very deferential to domestic law.[124] Parties to the Trafficking Convention agree to punish pimps[125] and brothel owners,[126] but with respect to other parties to a prostitution transaction they commit only to punishment "[t]o the extent permitted by domestic law . . . ."[127] The Convention reflects a consensus to root out links in an international enterprise, specifically procurers, but not to require regulation of conduct, prostitution and its patronage, deemed an internal, domestic issue. This may be partly explained by the state of human rights law at the time, which was not yet a major field of international law,[128] but also reflects a lower level of comfort with intruding upon national sovereignty than later developed.

This first period also saw other treaties on slavery and labor practices adopted which, although not aimed at trafficking specifically, are

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[118] *See* Trafficking Convention, *supra* note 107, art. 21.
[119] *See* Farrior, *supra* note 98, at 220.
[120] *See generally* Bruch, *supra* note 95, at 10; Farrior, *supra* note 98, at 219–20; Nel, *supra* note 108, at 12–13.
[121] *See* Trafficking Convention, *supra* note 107, art. 5.
[122] *See* Bruch, *supra* note 95, at 11.
[123] *See* Nel, *supra* note 108, at 12.
[124] *See* Farrior, *supra* note 98, at 219–20.
[125] *See* Trafficking Convention, *supra* note 107, art. 1.
[126] *See id.* art. 2.
[127] *Id.* arts. 3–4.
[128] *See* Farrior, *supra* note 98, at 219–20.

relevant to the issue. The Slavery Convention of 1926[129] defined slavery in terms applicable to sex trafficking[130] and required States to abolish slavery,[131] prevent and suppress the slave trade,[132] and make implementation reports.[133] The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery[134] expanded the 1926 Conventions requirements to practices such as selling women, bride price, exploiting children, debt bondage and serfdom.[135] Additionally, the International Labor Organization (ILO) adopted the Forced Labor Convention[136] in 1930 and the Abolition of Forced Labor Convention in 1957.[137] Both treaties define forced labor as "work or service . . . extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily,"[138] which could be applied to sex trafficking.[139]

There was little progress internationally on updating or improving the conventions related to trafficking for several decades. But in the 1970s, the issue regained prominence as human rights and particularly women's human rights became important topics of international discussion.[140] The first international agreement of this second era was the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), concluded in 1979.[141] It required States Parties to take measures, including legislation, to suppress trafficking in

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[129] Slavery Convention of 1926, Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253.
[130] *See id.* art. 1, § 1.
[131] *See id.* art. 2.
[132] *See id.* arts. 2–4.
[133] *See id.* art. 7; *see also* Farrior, *supra* note 98, at 221.
[134] 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3.
[135] *See* Farrior, *supra* note 98, at 222; Linda Smith & Mohamed Mattar, *Global Challenges: Trafficking in Persons, Humanitarian Intervention, and Energy Policy: Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the U.N., and Global Responses and Challenges*, 28 FLETCHER J. WORLD AFF. 155, 157 (2004).
[136] Forced Labor Convention, June 28, 1930, 39 U.N.T.S. 55.
[137] Abolition of Forced Labor Convention, June 25, 1957, 320 U.N.T.S. 291.
[138] *See* Forced Labor Convention, *supra* note 136, art. 2(1).
[139] *See* Farrior, *supra* note 98, at 223; Bruch, *supra* note 95, at 24.
[140] *See* Bruch, *supra* note 95, at 12.
[141] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

women and the exploitation of prostitution.[142] Despite the prominent role of women's rights advocates in bringing the issue back to the fore, disagreement among these activists on the relationship between trafficking and prostitution delayed conclusion of an agreement.[143] In the end, CEDAW, like many of its predecessors, linked the two issues in a more or less conflating way.[144]

Human trafficking was included on the agendas of the World Conferences on Women in 1975, 1980, 1985, and 1995, and on that of the 1993 World Conference on Human Rights.[145] Despite that activity, the focus in treaty conclusion turned from protecting women to protecting children in the 1980s and 1990s. The Convention on the Rights of the Child[146] was signed in 1989 and required States Parties to prevent the abduction, sale, or trafficking of children for any purpose.[147] An Optional Protocol[148] was adopted by the General Assembly in 2000. While previously the ILO had been circumspect in addressing prostitution in its labor treaties, in 1999 it adopted the Convention to Eliminate the Worst Forms of Child Labor.[149] There, it prohibited all forms of slavery including the sale and trafficking of children, the use, procuring or offering of children for prostitution or production of pornography, the use of children for illicit activities, and work likely by its nature to harm the health, safety, or morals of children.[150] In addition

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[142] *See id.* art. 6; *see also* Bruch, *supra* note 95, at 12; Smith & Mattar, *supra* note 135, at 157.

[143] *See* Bruch, *supra* note 95, at 12. Feminist positions on prostitution are widely divergent. On one end of the spectrum are those who argue for its complete abolition, while others argue for legalization and regulation to protect the rights of prostitutes. Some even contend that prostitution empowers the prostitute by allowing her to take control of the commodification of sex. *See* Bruch, *supra* note 95, at 18–19; *see also* Karen Engle, *Liberal Internationalism, Feminism, and the Suppression of Critique: Contemporary Approaches to Global Order in the United States*, 46 HARV. INT'L L.J. 427, 435 (2005) (comparing the arguments of abolitionist feminists with those who are women should be free to commodify their bodies). This article explores furthering the U.S. abolitionist position, so a thorough comparison of these theories is beyond its scope.

[144] *See* Bruch, *supra* note 95, at 12.

[145] *See id.*

[146] Convention on the Rights of the Child, Nov. 20, 1989, S. TREATY DOC. NO. 103-21, 1577 U.N.T.S. 3.

[147] *See id.* art. 35; *see also* Smith & Mattar, *supra* note 135, at 157.

[148] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, U.N. Doc. A/RES/54/263, T.I.A.S..

[149] Convention to Eliminate the Worst Forms of Child Labor, June 17, 1999, T.I.A.S., 38 I.L.M. 1207.

[150] *See id.* art. 3. "Child" is defined as anyone under age 18. *Id.* art. 2.

to requiring States Parties to take measures to prevent and punish these offenses, the Convention requires the creation of rehabilitation and social services for child victims, as well as free basic and vocational education and outreach to at-risk children.[151] With respect to children, at least, the ILO sidestepped the question of trafficking's interplay with prostitution and called for abolition.[152]

Regional human rights agreements also address trafficking. The European Convention for the Protection of Human Rights and Fundamental Freedoms[153] prohibits slavery and forced labor.[154] The American Convention on Human Rights[155] explicitly prohibits trafficking in women in its prohibition of slavery.[156] Both conventions establish courts to hear complaints regarding failures to comply with their requirements.[157]

Similarly, the drafters of the International Criminal Court's Statute[158] brought human trafficking within the jurisdiction of the new international forum.[159] The list of offenses constituting crimes against humanity and war crimes included enslavement, sexual slavery, and enforced prostitution.[160] "Enslavement" is defined to include trafficking in persons, particularly women and children.[161] These provisions extend the jurisdiction of the ICC to acts beyond the Fourth Geneva Convention's requirement to protect women from attacks on their honor.[162]

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[151] *See id.* arts. 6–7.
[152] *See* Bruch, *supra* note 95, at 25.
[153] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. 005, 213 U.N.T.S. 221 [hereinafter European Convention].
[154] *See id.* art. 4.
[155] American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. 36, 1144 U.N.T.S. 123 [hereinafter Inter-American Convention].
[156] *See id.* art. 6(1).
[157] *See* European Convention, *supra* note 153, arts. 19–51; Inter-American Convention, *supra* note 155, arts. 52–73.
[158] Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9* [hereinafter Rome Statute].
[159] *See generally* Valerie Oosterveld, *Sexual Slavery & the International Criminal Court: Advancing International Law*, 25 MICH. J. INT'L L. 605 (2004).
[160] *See* Rome Statute, *supra* note 158, arts. 7(1), 8(2)(b)(xxiii).
[161] *See id.* art. 7(2)(c).
[162] *See* Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

In 2000, the U.N. General Assembly adopted the Convention Against Transnational Organized Crime[163] and the Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[164] The Trafficking Protocol's three-fold goals are to prevent and combat trafficking, protect and assist the victims, and promote cooperation among States in furtherance of the first two goals.[165] Unlike its predecessors, it defines "trafficking in persons" and "exploitation" explicitly.[166] The purposes of exploitation for which a victim might be trafficked include the exploitation of prostitution as well as forced labor, slavery, servitude, or removal of organs.[167] The consent of the victim is irrelevant under the Trafficking Protocol.[168]

The Trafficking Protocol requires the criminalization under national law of the conduct described in the definitional provisions,[169] as well as more robust victim protection, rehabilitation, and assistance measures than had been called for in previous conventions, including potential rights to remain in the State rather than be repatriated.[170] The States Parties are also required to adopt comprehensive trafficking prevention programs, including legislative or other measures designed to discourage the demand for trafficked persons.[171] This demand-reduction provision possibly reflects the brothel abolition efforts of the 1949 Convention, but is much broader in its requirement and not limited to discouraging prostitution.

As an agreement ancillary to the Transnational Organized Crime convention, the Trafficking Protocol's approach naturally treats trafficking as a facet of organized crime.[172] It is explicitly a law enforcement-centric agreement, and comes down fairly strongly in the abolitionist camp on the question of how trafficking and prostitution are related. Nevertheless, it contains significant human rights considerations

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[163] Convention Against Transnational Organized Crime, Nov. 15, 2000, U.N. DOC. A/RES/55/383, T.I.A.S.
[164] Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, T.I.A.S., U.N. DOC. A/RES/55/25 [hereinafter Trafficking Protocol].
[165] *See id.* art. 2; *see also* Nel, *supra* note 108, at 14.
[166] *See* Trafficking Protocol, *supra* note 164, art. 3(a).
[167] *See id.*
[168] *See id.* art. 3(b).
[169] *See id.* art. 5.
[170] *See id.* arts. 6–8.
[171] *See id.* art. 9.
[172] *See* Bruch, *supra* note 95, at 16.

compared to previous conventions, particularly on the issue of rehabilitation and repatriation.

None of the agreements deal specifically with military-related trafficking. Instead they are nearly all directed at punishing traffickers and discouraging their business, without reference to any specific recipient. Also, no treaty or protocol calls specifically for a ban on prostitution, although the Trafficking Protocol's definition of trafficking fairly encompasses most instances of prostitution.[173] But the Protocol does contain a significant innovation, the requirement to reduce demand, which can reasonably be read to require a prostitution ban and thus indirectly pierces the Parties' sovereignty over the issue.

2. International Organizations

a. U.N. Activities

Although the Trafficking Protocol contains some human rights law elements, the real focus of human rights law activity has been within the U.N. itself rather than in the negotiation of treaties.[174] That work, however, is fragmented and spread across bureaucracies, reducing its effectiveness. The Secretariat and the General Assembly, working through the High Commissioner for Human Rights, have initiated trafficking measures, but coordination has been poor. Further, the Security Council has been conspicuously inactive in addressing allegations of trafficking offenses by U.N. personnel.

There are several trafficking-related bodies under the aegis of the High Commissioner for Human Rights with overlapping mandates. The High Commissioner created the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography in 1990.[175] The Children's Rapporteur's mandate is to investigate the exploitation of children around the world and report to the General Assembly and Commission on Human Rights, recommending means to protect children's rights.[176]

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[173] *See* text accompanying notes 43, 166–168.
[174] *See* Bruch, *supra* note 95, at 31.
[175] *See* Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, http://www2.ohchr.org/english/issues/children/rapporteur/index.htm (last visited Mar. 9, 2009) [hereinafter Children's Rapporteur].
[176] *See id.*

The Special Rapporteur on Trafficking in Persons, Especially Women and Children was created by the High Commissioner in 2004.[177] Her mandate is to focus on the human rights aspects of trafficking and submit reports annually with recommended measures to uphold and protect victims' human rights to the Commission.[178] The Trafficking Rapporteur is charged with cooperating with the other special rapporteurs, particularly the Special Rapporteur on Violence Against Women, as well as other relevant U.N. bodies, regional organizations, and victims and their advocates, and to account for their contributions on the issue.[179] The Special Rapporteur on Violence Against Women, Its Causes and Consequences was created in 1994 with a mandate that included working with the other special rapporteurs to include in their annual reports allegations of human rights violations against women.[180] The Trafficking Rapporteur is also charged with "taking action" on human rights violations against trafficking victims.[181] Taking action, however, seems to be limited to contacting the relevant government to give notice of the allegation and to request information about steps taken to protect the concerned individuals.[182]

Separate from the special rapporteurs, the Committee on the Elimination of Discrimination Against Women is a body of experts created to monitor compliance with the CEDAW[183] by receiving regular reports from States Parties on their efforts to implement the Convention's rights protections.[184] The Working Group on Contemporary Forms of Slavery monitors and reports on slavery throughout the world and compliance with the anti-slavery conventions.[185]

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[177] *See* Special Rapporteur on Trafficking in Persons, Especially Women and Children, http://www2.ohchr.org/english/issues/trafficking/index.htm (last visited Mar. 25, 2009) [hereinafter Trafficking Rapporteur].
[178] *See id.*
[179] *See id.*
[180] *See* Special Rapporteur on Violence Against Women, Its Causes and Consequences, http://www2.ohchr.org/english/issues/women/rapporteur (last visited Mar. 25, 2009).
[181] *See* Trafficking Rapporteur, *supra* note 177.
[182] *See* Special Rapporteur on Trafficking in Persons, Especially Women and Children: Individual Complaints, http://www2.ohchr.org/english/issues/trafficking/complaints.htm (last visited Mar. 25, 2009).
[183] *See supra* notes 141–145 and accompanying text.
[184] *See* Committee on the Elimination of Discrimination Against Women, http://www2.ohchr.org/english/bodies/cedaw/index.htm (last visited Mar. 25, 2009).
[185] *See* Working Group on Contemporary Forms of Slavery, http://www2.ohchr.org /english/issues/slavery/group.htm (last visited Mar. 25, 2009).

Despite the requirement that these bodies work together, actual collaboration seems spotty. For instance, in 2004 the Trafficking Rapporteur, the Slavery Working Group, and two other bodies jointly released a statement announcing the Trafficking Rapporteur's mandate.[186] In 2006, the Trafficking and Children's Rapporteurs collaborated on their annual reports, but the extent of that collaboration is unclear, and they submitted separate reports.[187] But other than those examples, the U.N. human rights bureaucracy seems to approach its work in a way reflecting its fragmentary and topic-specific organization.

The U.N. itself was drawn directly into anti-trafficking issues by the revelation that members of U.N. peacekeeping missions were engaging in human trafficking, directly or by creating demand for prostitutes, in West Africa. The allegations included sexual exploitation by civilian members of the U.N. mission as well as NGO representatives.[188] In response, the Secretary-General promulgated a bulletin detailing standards of conduct for U.N. staff.[189] The Standards of Conduct Bulletin defines sexual abuse as "abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily . . . from the sexual exploitation of another."[190] The bulletin goes on to prohibit, as a form of sexual exploitation, the exchange of money, employment, goods, or services for sex.[191]

The Standards of Conduct Bulletin is problematic in that it arguably applies only to civilian mission members. It refers throughout to the actions of "United Nations staff."[192] It states that U.N. forces operating under U.N. command and control are "prohibited from committing acts of sexual exploitation and sexual abuse."[193] But it then goes on to refer

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[186] *See* Press Release, High Comm'r for Hum. Rts, U.N. Human Rights Institutions Appeal to Countries to Eradicate All Forms of Slavery, http://www2.ohchr.ch/hurricane/hurricane.nsf/view01/AE42DCED6834136DC1256F5D003E782C?opendocument (last visited Mar. 25, 2009).
[187] *See* 2006 UN TRAFFICKING REPORT, *supra* note 15, ¶ 23.
[188] *See* The Secretary-General, *Investigation into Sexual Exploitation of Refugees by Aid Workers in West Africa*, ¶ 20, U.N. Doc. A/57/465 (Oct. 11, 2002).
[189] The Secretary-General, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003) [hereinafter Standards of Conduct Bulletin].
[190] *Id.* § 1.
[191] *See id.* § 3.1.
[192] *E.g., id.* § 3.2(e), (f).
[193] *Id.* § 2.2.

the reader to the Secretary-General's bulletin on observance of international humanitarian law (IHL).[194] The IHL Bulletin does not contain the same preliminary statement that it was prompted by the West Africa controversy, but it was issued the same day as the Standards of Conduct Bulletin.[195] Although it does not specifically mention trafficking or prostitution, it prohibits any form of sexually humiliating or degrading treatment and enslavement.[196] It also requires the special protection of women and children from abuse and enforced prostitution.[197] Unlike the Standards of Conduct Bulletin, it does not contain any description of leadership responsibilities or referral of cases to national authorities.

In 2005, after revelations of extensive sexual abuse and exploitation by U.N. peacekeepers in the Democratic Republic of the Congo (DRC), Jordanian Prince Zeid Ra'ad Zeid Al-Hussein prepared a report on behalf of the Secretary-General detailing and making recommendations to curtail peacekeeper sexual exploitation and abuse.[198] The Zeid Report reviewed incidents of peacekeeper sexual misconduct in Bosnia-Herzegovina, Kosovo, Cambodia, Timor Leste, and West Africa[199] before recounting the Prince's observations when visiting the DRC.[200] There he saw evidence of indigenous women exchanging sex with peacekeepers for money, food or employment, as well as rape "disguised" as prostitution, in which a raped woman would then be given money to cover as payment.[201] The Prince commented that the misconduct was taking place despite the Secretary-General's 2003 Standards of Conduct Bulletin providing detailed policy guidance on unacceptable U.N. mission conduct,[202] highlighting the inadequacies of the U.N.'s measures then in place.[203] The Report describes the negative impact of such misconduct on the reputation and effectiveness of U.N. peacekeeping missions and its corrosive effect on the mission's relationship with the local populace, as well as the potential that it

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[194] *See id.*; *see also* The Secretary-General, *Observance by United Nations Forces of International Humanitarian Law*, U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003) [hereinafter IHL Bulletin].
[195] *See* IHL Bulletin, *supra* note 194.
[196] *See id.* § 7.2.
[197] *See id.* §§ 7.3–7.4.
[198] *See* Zeid Report, *supra* note 86.
[199] *See id.* ¶ 3.
[200] *See id.* ¶ 8.
[201] *See id.*
[202] *See id.* ¶ 4.
[203] *See id.* ¶ 8.

violated international humanitarian law, international human rights law, or both.[204]

The Report noted the difficulties in tackling misconduct by military members of national peacekeeping contingents. Military members are afforded privileges and immunities under the U.N.'s status of forces agreement (SOFA) with the host nation. Under the model SOFA, troop-contributing nations retain criminal and disciplinary jurisdiction over their soldiers, to the exclusion of the host nation.[205] The model SOFA endorsed by the Security Council included a note that any Memorandum of Understanding (MOU) between the troop-contributor and the Secretary-General should include assurances that jurisdiction will be properly exercised. But in practice the assurances are not provided.[206] The Report also pointed out that the Standards of Conduct Bulletin, which by its terms does not apply to national military contingents, was included in mission-specific guidelines provided to each troop contributor, but emphasized that they are guidelines only and not rules.[207] Additionally, the Report argued that the U.N. undermines its own message of zero-tolerance for peacekeeper sexual misconduct by then freely distributing condoms to peacekeepers as part of its HIV/AIDS awareness training.[208]

Prince Zeid made extensive recommendations in his report. For example, he suggested increasing the number of female peacekeepers, both to facilitate contacts with at-risk segments of the host nation's society as well as to change the climate within the peacekeeping forces.[209] He also pressed for better victim assistance, both emergency medical care and improved follow-on care, as well as identification of a source of funds for assistance payments to victims and to mothers of "peacekeeper babies."[210]

The Report detailed measures to increase discipline within the peacekeeping forces. Prince Zeid urged the General Assembly to make the Secretary-General's Bulletin on sexual exploitation and abuse a binding, uniform standard of conduct included in the MOU between the

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[204] *See id.* ¶ 10.
[205] *See id.* ¶ 18.
[206] *See id.* ¶ 78.
[207] *See id.* ¶ 20.
[208] *See id.* ¶ 44.
[209] *See id.* ¶ 43.
[210] *See id.* ¶¶ 52–56.

troop contributor and the U.N., rather than a guideline.[211] He also suggested that the General Assembly require the Secretary-General to obtain the enforcement assurances contemplated in the model MOU.[212] Additionally, he recommended adding a provision requiring that well-founded allegations of peacekeeper sexual misconduct be sent to national military prosecuting authorities for evaluation.[213] The troop-contributing State would then have to report back to the Secretary-General on the progress of the potential case, and if it was not prosecuted, provide a memo detailing the reasons.[214] The Report also urged steps to increase the accountability of unit and force commanders, enforced by the threat of repatriation for failure to cooperate with investigators or to enforce standards.[215] Prince Zeid reasoned that because the ultimate decision to prosecute remained with the participating State, these measures would strengthen the U.N.'s ability to maintain discipline and protect the integrity of its missions while still respecting participating States' sovereignty on issues of criminal enforcement of standards.[216] Finally, whenever possible, he urged that courts-martial be held in the host nation.[217]

The General Assembly quickly welcomed and endorsed the Zeid Report.[218] A draft MOU incorporating the Report's recommendation to make the Standards of Conduct Bulletin was prepared,[219] and the Secretary-General convened a group of legal experts to study how, inter alia, to make the Zeid recommendations binding on military contingents prior to an MOU's conclusion.[220] The Group of Experts Report suggested several potential ways to bind troop-contributing States to the Bulletin. It noted that prior to deployment, the U.N. has extensive contact with the contributing State; there are informal discussions prior

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[211] *See id.* ¶ 25.
[212] *See id.* ¶ 78.
[213] *See id.* ¶ 79.
[214] *See id*.
[215] *See id.* ¶¶ 57, 60–61.
[216] *See id.* ¶ 80.
[217] *See id.* ¶ 35.
[218] *See* G.A. Res. 59/300, ¶¶ 1-2, U.N. Doc. A/RES/59/300 (June 30, 2005).
[219] *See* The Secretary-General, *Revised Draft Model Memorandum of Understanding Between the United Nations and [Participating State] Contributing Resources to [the United Nations Peacekeeping Operation]*, U.N. Doc. A/61/494 (Oct. 3, 2006).
[220] *See* The Secretary-General, *Making Standards Contained in the Secretary-General's Bulletin Binding on Contingent Members and Standardizing the Norms of Conduct so that They are Applicable to All Categories of Peacekeeping Personnel*, U.N. Doc. A/61/645 (Dec. 18, 2006) [hereinafter Group of Experts report].

to a peacekeeping operation's authorization, and an invitation from the U.N. by *note verbale* to participate, followed by pre-deployment inspections.[221] At any time in that process, the U.N. could seek a commitment to the Bulletin, and could bring up the issue of training on the Bulletin during the pre-deployment inspection to emphasize its importance.[222]

The Report also discussed the head of mission's administrative authority over the entire peacekeeping contingent. The Group observed that while the Force commander could issue an order to implement the Bulletin, as had occurred in Liberia for example, he did not have the authority to enforce it directly; contingent commanders retained sole disciplinary power over their troops.[223] But while the troop-contributing State retained exclusive jurisdiction to criminally punish misconduct, the U.N. nevertheless retained responsibility for the operation itself and the good conduct of mission members.[224] To that end, the head of mission possessed the authority to order repatriation of any member, civilian or military, for misconduct or poor performance.[225] Indeed, 144 repatriation orders were issued between 1 January 2004 and 23 August 2006, including seven commanders.[226]

A third option considered that because the General Assembly had endorsed the Zeid Report, contributing States might be under some obligation to implement its recommendations through the issuance of orders from the contingent's chain of command.[227] An added benefit of this avenue was the flexibility to add prohibitions for activity not necessarily criminal, but undesirable in the context of the mission.[228] As in the Zeid Report, the Group of Experts called for reinstating the practice of obtaining assurances that troop-contributing States would exercise their jurisdiction when their troops failed to meet behavioral standards.[229]

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[221] *See id.* ¶¶ 12–13.
[222] *See id.* ¶¶ 13, 17.
[223] *See id.* ¶¶ 26–27.
[224] *See id.* ¶ 10.
[225] *See id.* ¶ 19.
[226] *See id.* ¶ 20.
[227] *See id.* ¶¶ 32, 34.
[228] *See id.* ¶ 35.
[229] *See id.* ¶ 38.

Finally, the Group discussed the possibility of Security Council action to implement the Standards of Conduct Bulletin. It noted that the Security Council had made reference to the Bulletin in recent resolutions renewing peacekeeping mandates, and had urged the Secretary-General and contributing States to take measures to prevent and if necessary punish military sexual misconduct.[230] But this language was merely hortatory, and only a decision under Chapter VII would bind members.[231] The Group doubted without elaboration the issue was sufficiently necessary to trigger the Council's authority to restore and maintain international peace and security.[232]

Finding a way to require that troops are held accountable was not the only difficulty in the U.N.'s program, however. Both the Secretary-General's Bulletin and the Zeid Report treated prostitution patronage by peacekeepers as a form of sexual exploitation. The Zeid Report pointed out that some troop-contributing nations do not prohibit prostitution, which creates one tension in enforcing a patronage prohibition. Another tension is reflected in the manner in which the U.N. counts incidents: the lack of consensus on the relationship between prostitution and trafficking. The 2004, 2005, and 2006 Secretary-General's Reports on special measures for protection from sexual exploitation and sexual abuse included data on the number of complaints lodged each year against peacekeeping missions.[233] Those tallies were broken down by peacekeeping segment (e.g., U.N. staff, civilian police, military) and type of offense. Within offenses, "exploitative sexual relationships," "sex with minors," and "sex with prostitutes" were separate categories.[234] Furthermore, the explanatory footnote for "exploitative sexual relationships" defined the offense as "exchanges of sexual favors for money, food, employment or other goods or services, excluding prostitution."[235] This suggests that prostitution patronage, while some

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[230] *See id.* ¶ 23; *see, e.g.*, S.C. Res. 1784, ¶ 15, U.N. Doc. S/RES/1784 (Oct. 31, 2007) (requesting "the Secretary-General to . . . take the necessary measures to ensure full compliance . . . with the [U.N.] zero-tolerance policy on sexual exploitation and abuse and . . . [urging] troop-contributing countries to take appropriate preventive action").
[231] *See* Group of Experts report, *supra* note 220, ¶ 24.
[232] *See id.*
[233] *See* Secretary-General, *Report of the Secretary-General on Special Measures for Protection from Sexual Exploitation and Sexual Abuse, delivered to the General Assembly*, U.N. Doc. A/59/782 (Apr. 15, 2005) [hereinafter 2004 Report]; U.N. Doc. A60/861 (May 24, 2006) [hereinafter 2005 Report]; U.N. Doc. A/61/957 (June 15, 2007) [hereinafter 2006 Report].
[234] *See, e.g.*, 2006 Report, *supra* note 233, at 17.
[235] *Id.*

form of sexual misconduct, is somehow not the same as the conduct described in the Standards of Conduct Bulletin, such as sex exchanged for money or property.[236]

Despite the General Assembly's endorsement, the Zeid Report is mired in U.N. bureaucracy. The U.N. is discussing ways to incorporate the Standards of Conduct Bulletin into existing MOUs, while a revised model MOU is debated by a General Assembly Special Committee.[237] It faces serious institutional challenges as it tries to deal effectively with human trafficking. As an organization promoting anti-trafficking on its agenda, its own bureaucracy is hampering its efforts. Anti-trafficking policymaking is fragmented and lacks coordination. As the U.N. itself struggles to avoid being tarred by the stigma of creating demand for human trafficking, it is frustrated by its inability to fully control the most visible element of its peacekeeping mission—the military contingent. As of this writing, the U.N.'s performance can best be described as only minimally effective.

b. NATO Activities

No NATO official or staff member has been accused of sexual misconduct.[238] Nevertheless, peacekeeping forces in the former Yugoslavia created a demand for prostitutes that was met by brothels which sprang up almost immediately outside the peacekeepers' bases, and which closed when the bases were abandoned.[239] Many of the women working in those establishments were trafficked into Yugoslavia specifically to satisfy peacekeeper demand.[240]

Consequently, in October 2003, Norway and the United States pushed for adoption of a NATO policy on trafficking, particularly of

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[236] *See* Standards of Conduct Bulletin, *supra* note 189, § 3.2(c).
[237] *See* 2007 TIP Report, *supra* note 3, at 232; *see also* The Secretary-General, *Report of the Secretary-General, Implementation of the Recommendations of the Special Committee on Peacekeeping Operations*, ¶ 23, U.N. Doc. A/62/67/Add.1 (Dec. 28, 2007) (placing the Group of Experts Report on the 2008 agenda for further discussion); Nancie Carraway, *Human Rights and Existing Contradictions in Asia-Pacific Human Trafficking Politics and Discourse*, 14 TUL. J. INT'L & COMP. L. 295, 316 (2006) (criticizing the U.N. for lacking the political will to meaningfully address human trafficking).
[238] *See* 2007 TIP Report, *supra* note 3, at 233.
[239] *See* Keith J. Allred, *Combating Human Trafficking*, NATO REV., ¶ 6 (2006), http://www.nato.int/docu/review/2006/issue2/english/analysis.html.
[240] *See id.*

women and children.[241] In furtherance of that effort the two nations jointly hosted a conference of the NATO allies to discuss trafficking.[242] Their efforts resulted in the NATO Policy on Combating Trafficking in Human Beings (Policy),[243] adopted at the June 2004 Istanbul summit.[244] It established a zero-tolerance policy on trafficking by NATO personnel and staff.[245] Aimed at establishing standards of individual behavior, the policy required Members, among other things, to review national legislation and efforts to meet their obligations under the Trafficking Protocol, to ensure that all personnel receive trafficking awareness training, and to support host nation authorities in combating trafficking.[246] Its definitions of trafficking and exploitation mirrored those of the U.N. Secretary-General.[247] The Policy was recognition that trafficking, including patronage of prostitutes by NATO troops, undermines NATO's security and stability efforts by financing organized crime and other elements that flourish in the absence of security.[248]

As a result of the Policy, the NATO School developed three training programs targeted at different audiences among its students.[249] Anti-trafficking considerations are included in all operational plans.[250] Officials have been appointed within the NATO bureaucracy with oversight responsibility for implementing the Policy.[251] However, although it was expressly meant to change the behavior of individual NATO soldiers, the Policy did not establish or require the adoption of any punitive measures. Each Member remains responsible for disciplining its own troops,[252] but only Norway and the United States have affirmatively criminalized prostitution patronage.[253]

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[241] *See* R. Nicholas Burns & Kai Eide, *Mission for NATO: An Alliance Against the Traffic in Humans*, INT'L HERALD TRIB., Mar. 3, 2004, *available at* http://www.iht.com/articles/2004/03/04/edburns_ed3_.php?page=1.
[242] *See id.*
[243] NATO, *Policy on Combating Trafficking in Human Beings*, NATO POLICY DOC. B-1110 (June 29, 2004) [hereinafter NATO Policy].
[244] *See* NATO, *Istanbul Summit Communique*, ¶ 30, June 28, 2004, *available at* http://www.nato.int/docu/pr/2004/p04-096e.htm.
[245] *See* NATO Policy, *supra* note 243, ¶ 1.
[246] *See id.* ¶ 5.
[247] *See id.* ¶ 3.
[248] *See* Allred, *supra* note 239, ¶ 18.
[249] *See id.* ¶ 17.
[250] *See* 2007 TIP REPORT, *supra* note 3, at 233.
[251] *See id.*
[252] *See id.*
[253] *See* Allred, *supra* note 239, ¶ 18.

Thus, like the U.N., NATO has set in place a program to address the challenge of military demand for trafficking that is little more than "moralization" on the issue.[254] Faced with the same challenge of balancing enforcement of troop discipline with the sovereignty of its Members, NATO is similarly hindered by its reliance on Members' enforcement of its Policy.

B. U.S. Law

Long before the United States and Norway called on NATO to take action on trafficking, the United States was considering the security implications of transnational organized crime, including human trafficking. When President Clinton's National Security Council (NSC) produced the International Crime Control Strategy (ICCS)[255] in 1998, trafficking in women and children was among the international criminal activities described as threats to global security and stability. But as a plan of action for tackling the spread of international organized crime, the ICCS instead focused mainly on financial crimes, drug-related crimes, and corruption.

Pursuant to the ICCS, an interagency working group produced the International Crime Threat Assessment[256] two years later. The NSC Threat Assessment was more explicit in describing the connection between international crimes, such as human trafficking, and security threats. It noted that transnational criminals would spare no expense to corrupt government and law enforcement officials in their areas of operation or transshipment.[257] It pointed out the frequency with which such criminals partnered with extremist groups such as the PKK in the Middle East and the FARC in Columbia.[258] Such terrorist groups without State sponsors looked to criminal groups for financial support as well as to secure supplies of weapons and other materials.[259] Thus, the

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[254] *See* NATO Parliamentary Assembly, Sub-Comm. on Democratic Governance, *The Fight Against Children Trafficking in Europe*, ¶ 38, 157 CCDG 04 E (Nov. 2004).
[255] U.S. Nat'l Sec. Council, Int'l Crime Control Strategy (1998), *available at* http://clinton4.nara.gov/WH/EOP/NSC/html/documents/iccs-frm.html [hereinafter ICCS].
[256] Nat'l Sec. Council, Int'l Crime Threat Assessment (Dec. 15, 2000), *available at* http://clinton4.nara.gov/WH/EOP/NSC/html/documents/pub45270/pub45260into.html [hereinafter NSC Threat Assessment].
[257] *See id.* at 9.
[258] *See id.* at 10.
[259] *See id.* at 17.

Threat Assessment labeled trafficking in women and children along with terrorism and drug- and weapons of mass destruction-smuggling as threats to U.S. and global security and stability.[260] The United States signed the Trafficking Protocol[261] in 2000[262] and passed the Trafficking Victims Protection Act.[263]

President Bush raised the policy priority of human trafficking. He created the Interagency Task Force to Monitor and Combat Trafficking in Persons[264] and published National Security Presidential Directive Twenty-Two (NSPD-22).[265] This directive declared human trafficking a "transnational threat"[266] and announced a policy based on an "abolitionist approach" to human trafficking.[267] An important facet of that approach was opposition to prostitution and any related activity, such as pandering and brothel operation, as inherently harmful and dehumanizing.[268] The Interagency Task Force would oversee the planning and implementation of programs supporting NSPD-22's policy. The Task Force's charter included developing a strategy for "active diplomatic engagement" and for increasing international cooperation.[269]

As part of its plan of action, NSPD-22 adopted a zero-tolerance policy for government employees who engage in human trafficking, and required all departments to develop policies to educate and, when necessary, punish employees.[270] In addition, the State Department was ordered to work in conjunction with other Executive agencies to develop priorities and objectives for working through international organizations, including the U.N., to combat trafficking.[271] Departmental implementation

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[260] *See id.* at 14.
[261] *See supra* notes 164–72 and accompanying text.
[262] *See* The Secretary-General, *The Status of Multilateral Treaties Deposited with the Secretary-General*, U.N. Doc. ST/LEG/SER/E/, *available at* http://treaties.un.org/Pages/DB.aspx?path=DB/MTDSGStatus/pageIntro_en.xml (last visited Mar. 30, 2009).
[263] 22 U.S.C. §§ 7101–7112 (2006).
[264] Exec. Order No. 13,257, 67 Fed. Reg. 7,259 (Feb. 19, 2002).
[265] Memorandum from The White House on the National Security Presidential Directive Regarding Trafficking in Persons (Dec. 16, 2002) [hereinafter NSPD-22].
[266] *Id.* at 1.
[267] *See id.* at 2.
[268] *See id.*
[269] *Id.* at 3.
[270] *See id.* at 4.
[271] *See id.* at 6.

was coordinated by the Task Force, which reported to the President through the Secretary of State.[272]

1. Department of Defense Implementation: Awareness Training & Orders

The Department of Defense's implementation of the President's policy was slow to start. Although NSPD-22 ordered expedited implementation of its policy, it was not until January 2004 that a DoD policy memo was promulgated. It provided that "trafficking in persons will not be facilitated in any way by the activities of our Servicemembers . . . . DoD opposes prostitution and any related activities that may contribute to the phenomenon of trafficking in persons as inherently harmful and dehumanizing."[273] The memo reminded commanders of their responsibility under the U.S. Code to inspect vigilantly their personnel in order to guard against "all dissolute and immoral practices, and to correct . . . all persons who are guilty of them."[274] It set out as implementation objectives the education of all servicemembers on trafficking and personal responsibilities, as well as increased command and military police vigilance to place off-limits those off-base establishments connected with trafficking.[275]

The policy memo was followed several months later by a memo from the Secretary of Defense. In it, the Secretary expressed his desire that commanders at all levels train their troops to understand and recognize trafficking, calling it a "serious crime."[276] He ordered commanders to place off-limits any establishment found to be involved in trafficking for sexual exploitation, and to make full use of all tools available, insisting, "No leader in this department should turn a blind eye to this issue."[277] A short time later, the DoD's trafficking-in-persons awareness training program was announced, with instructions to

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[272] *See* Exec. Order No. 13,257, 67 Fed. Reg. 7,259, § 3(f) (Feb. 19, 2002).
[273] Memorandum from the Deputy Sec'y of Def. Regarding Trafficking in Persons in the Department of Defense (Jan. 30, 2004).
[274] *Id.*
[275] *See id.*
[276] Memorandum from the Sec'y of Def. Regarding Trafficking in Persons (Sept. 16, 2004).
[277] *See id.*

supplement it appropriately for the cultural and legal environments in individual areas of operations.[278]

The DoD's implementation measures, while welcomed as a start, were subject to expert criticism. Dr. Sarah Mendelson, director of the Center for Strategic and International Studies' Human Rights and Security Initiative, testified before Congress about the shortcomings of DoD's approach.[279] After an extensive discussion of the deleterious effect of human trafficking on security operations, she criticized the DoD program as inadequate to raise awareness and correct misperceptions about the links among trafficking, prostitution and peacekeeping operations.[280] She described the indifference she found among U.S. and NATO officers in Bosnia and Kosovo, arguing that DoD must establish new cultural norms to succeed in combating trafficking.[281] Among the measures she promoted to that end was prosecution of troops who supported trafficking, although she did not call for the creation of any new offenses.[282]

The adequacy of the training program was also criticized within legal circles.[283] The training presentation was a PowerPoint slide show accessed through the Internet. A trainee would click through slides and print out a certificate to document the training's completion.[284] The program was thought unreliable; there was no way to guarantee that the trainee actually read or understood the slides.[285] It also failed to inform the trainee about potential legal liability associated with trafficking in its various forms, and particularly prostitution.[286]

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[278] Memorandum from the Under Sec'y of Def. Regarding Awareness Training for Combating Trafficking in Persons (Nov. 17, 2004).
[279] *Statement Before the H. Comm. on the Armed Servs., Implementation of DoD Policy with Regard to Trafficking in Humans*, 108th Cong. (2004) (statement of Sarah E. Mendelson), *available at* http://www.csis.org/media/csis/congress/ts040921mendelson .pdf [hereinafter Mendelson Statement].
[280] *See id.* at 6–7.
[281] *See id.* at 2–4.
[282] *See id.* at 7.
[283] *See* Jorene Soto, *"We're Here to Protect Democracy. We're Not Here to Practice It": the U.S. Military's Involvement in Trafficking in Persons and Suggestions for the Future*, 13 CARDOZO J. L. & GENDER 561 (2007).
[284] *See id.* at 572.
[285] *See id.* at 575.
[286] *See id.* at 574.

But commands around the world did not limit their anti-trafficking measures to the online training program.[287] United States Forces Korea supplemented it with awareness training focused on core values and "The Noncommissioned Officer's Creed."[288] It also provided each reporting servicemember with copies of NSPD-22, the Trafficking Victim's Protection Act, and a "Human Trafficking Indicators" guidebook that included a list of off-limits establishments.[289] In Europe, U.S. European Command's General Order One was amended to prohibit support of trafficking and indentured servitude through patronage of prostitution and establishments suspected of trafficking, and regular inspections for signs of pandering at rest and relaxation locations were instituted.[290] In the Middle East, the commander of Multi-National Force Iraq published an order on trafficking.[291]

A key, common element of these field programs is the issuance of an order prohibiting conduct. Such measures are enforced by punishing violations through UCMJ Article 92, Failure to Obey Order or Regulation.[292] Conviction under Article 92 carries a maximum penalty of two years' confinement, forfeiture of all pay and allowances, and dishonorable discharge.[293] But in order to set a uniform, worldwide standard and make a strong public policy statement, the Department of Defense responded to NSPD-22 and congressional and media interest by defining a new offense under the UCMJ for prostitution patronage.

2. Department of Defense Implementation: Amendment of the UCMJ

Historically, it had been left up to commanders to determine whether prostitution patronage needed to be regulated: some commanders prohibited prostitution as well as various subterfuges like hiring "maids," while others ignored the issue, if it was considered an issue at all.[294] But

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[287] *See Trafficking in Persons*, 109th Cong. (2006) (statement of Thomas F. Gimble), *available at* http://www.dodig.osd.mil/Inspections/IPO/combatinghuman.htm (last visited Apr. 12, 2008) [hereinafter Gimble Statement].
[288] *See id.* at 3.
[289] *See id.* at 4.
[290] *See id.* at 4–5.
[291] *See id.* at 8.
[292] 10 U.S.C. § 892 (2006); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, IV-23 to IV-25 (2008) [hereinafter MCM] (providing annotations).
[293] *See* MCM, *supra* note 292, at IV-23.
[294] *See* Soto, *supra* note 283, at 566.

that tradition of local control ran up against Congress and the President's anti-trafficking agenda.[295] By 2004, the DoD Inspector General gave his opinion that one of the root causes of human trafficking was the failure of leaders "to promulgate and enforce principle-based standards for subordinates who create the demand for prostitution generally, and for sex slavery specifically."[296] The issuance of prostitution prohibitions locally or for whole areas of responsibility, while enforceable, continued the piecemeal approach. Amending the UCMJ set a global policy standard for all commanders and at the same time supplied a ready enforcement mechanism.

Congress created the UCMJ as a separate body of criminal law to govern military personnel in light of a number of considerations. First, civilian criminal codes do not address offenses that are uniquely military, such as mutiny, disrespect, disobedience, and desertion.[297] Second, Congress recognized the need for a criminal justice system with a worldwide jurisdiction, in contrast to the limited geographic jurisdiction of the U.S. district courts.[298] Third, the UCMJ makes possible a system with the flexibility to investigate and try criminal offenses rapidly across the spectrum of conditions in which the military operates without compromising the mission or the rights of the accused.[299] The UCMJ is implemented through the Manual for Courts-Martial, which includes not only the substantive offenses themselves with commentary and sample charges, but also the procedural Rules for Courts-Martial and the Military Rules of Evidence.[300]

Part of the UCMJ's flexibility is the creation of the General Article, Article 134.[301] It permits the punishment of "all disorders and neglects to the prejudice of good order and discipline . . . [and] all conduct of a nature to bring discredit upon the armed forces . . . ."[302] Thus, acts that are not otherwise listed in the UCMJ are within a court-martial's jurisdiction if they directly prejudice good order and discipline (referred to as "clause one" offenses), or if they somehow bring the armed forces

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[295] *See id.* at 567.
[296] Schmitz Statement, *supra* note 72, at 4–5.
[297] *See* William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed?*, 48 A.F. L. REV. 185, 190 (2000).
[298] *See id.*
[299] *See id.* at 191.
[300] *See id.* at 192; MCM, *supra* note 292, at i–xliv.
[301] 10 U.S.C. § 934 (2006).
[302] MCM, *supra* note 292, at IV-111.

into disrepute or lower the public's esteem of the armed forces (referred to as "clause two" offenses).[303] The two clauses are not mutually exclusive; a violation could both detract from good order and discipline and from the public's esteem of the armed forces.[304]

In 2004 the Department of Defense proposed amending the UCMJ to include an offense under Article 134 for patronizing a prostitute.[305] Although one of many proposed amendments in the required Federal Register notice, the majority of the comments received in response to the notice were related to the proposed prostitution offense.[306] Those commentators opposed questioned the need for such an offense and its impact on morale; others supported it as appropriate and long overdue.[307] The final amendment was promulgated in 2005.[308]

The new offense was an addition to the existing Article 134 prohibition of prostitution and pandering.[309] The elements of prostitution patronage are: that the accused had sexual intercourse with a person not the accused's spouse; that the act was in exchange for money or other compensation; that it was wrongful; and that it was prejudicial to good order and discipline *or* service-discrediting under the circumstances.[310] Prostitution patronage can thus be charged under either or both clauses Article 134.[311] The maximum authorized punishment is one year's confinement, forfeiture of all pay and allowances, and a dishonorable discharge.[312]

The amendment has been criticized as not going far enough to criminalize indirect support of human trafficking. First, the offense

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[303] *See id.* at IV-112.
[304] *See id.*; *see also, e.g.*, United States v. Holt, 23 C.M.R. 81, 86 (C.M.A. 1957) ("We find in this case that the accused's behavior was not only prejudicial to good order and discipline, but it further reflected discredit upon the armed forces.").
[305] *See* Manual for Courts-Martial: Proposed Amendments, 69 Fed. Reg. 55,600, 55,603 (proposed Sept. 15, 2004) (to be codified in the Manual for Courts-Martial).
[306] *See* Manual for Courts-Martial: Proposed Amendments, 70 Fed. Reg. 1,877 (Jan. 11, 2005).
[307] *See id.*
[308] *See* Exec. Order No. 13,387, 70 Fed. Reg. 60,697 (Oct. 18, 2005).
[309] *See* Lieutenant Colonel Mark L. Johnson, *Forks in the Road: Recent Developments in Substantive Criminal Law*, ARMY LAW., June 2006, at 23, 25.
[310] *See* MCM, *supra* note 292, at IV-134.
[311] *See supra* text accompanying notes 303–304.
[312] *See* MCM, *supra* note 292, at IV-135; *see also* Johnson, *supra* note 309, at 25 (explaining the change).

criminalized prostitution patronage, not human trafficking, without making any connection or reference to trafficking.[313] The issue, according to this argument, is trafficking, specifically sexual slavery, not prostitution.[314] Second, it was argued the amendment should criminalize the trafficking aspects of prostitution in addition to patronage.[315] Patronage of a prostitute who was a trafficking victim could be conceived as a strict liability offense, with an increase in the authorized punishment.[316] Third, the amendment was criticized for being too lenient in its penalty.[317] It was argued that UCMJ punishments for trafficking-related prostitution should be in line with the Trafficking Victims Protection Act, which imposes, for example, a confinement sentence of twenty years to life for sex-trafficking of children.[318]

Although some comments pointed out that the original public notice offered no rationale for the amendment,[319] the Department of Defense touted it as a measure to combat human trafficking pursuant to its NSPD-22 responsibilities.[320] While it could be argued that a local order or service regulation prohibiting prostitution patronage would have been more effective, since a violation of UCMJ Article 92 carries a longer maximum confinement sentence,[321] the amendment nevertheless sent a strong signal of DoD's commitment to its anti-trafficking policy. In choosing to criminalize all prostitution, DoD was in accord with NSPD-

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[313] *See* Soto, *supra* note 283, at 575.
[314] *See id*.
[315] *See id.* at 576.
[316] *See id*.
[317] *See id*.
[318] *See id*; 18 U.S.C. § 1591 (2006).
[319] *See* Manual for Courts-Martial: Proposed Amendments, 70 Fed. Reg. 1,877 (Jan. 1, 2007).
[320] *See* U.S. DEP'T OF DEF., INSPECTOR GEN. REP. NO. IE-2007-002, EVALUATION OF DOD EFFORTS TO COMBAT TRAFFICKING IN PERSONS 79 (Nov. 21, 2006).
[321] It is probably possible for a commander to issue a punitive order not to patronize a prostitute and then charge violations under Article 92 rather than Article 134. Case law suggests that where an unlawful act violates a lawful order as well as a defined Article 134 offense, the Government may choose between the two in charging, although alleging both is multiplicious. *See* United States v. Curry, 35 M.J. 359, 360 (C.M.A. 1992). But a commander could issue an order placing known prostitution establishments off-limits; an accused who goes there and patronizes a prostitute could then be charged with violating Article 92 by violating the off-limits order as well as Article 134 for prostitution patronage. The command in that case would avoid multiplicity issues because proof of one charge does not necessarily require proof of the other. *See* United States v. Gibson, 11 M.J. 435, 437 (C.M.A. 1981).

22's condemnation of prostitution and all related practices.[322] Among NATO allies at least, only one other nation has taken such a step.[323]

Therein lie the challenges to the U.S. policy if it means to live up fully to NSPD-22's pronouncements. The United States rarely puts troops on the ground in a foreign country alone; whether introduced as part of a U.N. mission or with a less formal coalition, U.S. servicemembers serve alongside foreign troops in most overseas locations. But those foreigners are under their own chains of command and national laws. Any gains from the U.S. and Norwegian prohibitions on prostitution would be greatly watered down in the mix of forces from countries without such a hard line. The U.N. and NATO must rely entirely on the participating countries to implement and enforce their anti-trafficking policies. Moreover, responsibility to implement and monitor the U.N.'s policies is fragmented within the U.N. bureaucracy. For the United States to capitalize on its initiative, it must find a way to give these international organizations a means to bind multilateral participants to the anti-trafficking policies. Recalling the words of the DoD IG, leadership is required to combat trafficking effectively.[324] Particularly in the U.N., the United States can use its privileged position on the Security Council to force institutional change. The next section will explore a possible avenue for U.S. efforts.

IV. The Security Council

While the United States has instituted a firm, military-wide policy intended to reduce demand for victims of sex trafficking, other nations have not taken as aggressive a stance. The extent to which the United States may influence other nations' policies is limited. While there may be levers available in the form of security assistance programs,[325] those means would be ineffective in the case of nations that do not receive military aid.

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[322] *Compare* MCM, *supra* note 292, at IV-134, *with* NSPD-22, *supra* note 265, at 2.
[323] *See supra* text accompanying note 253. As of this writing, convictions for violating the new offense had not made their way through the military justice system such that a reasonable account of how often it had been successfully prosecuted could be made. If such a count were possible, however, it would fail to capture acquittals as well as offenses handled by lesser administrative measures or through non-judicial punishment under UCMJ Article 15. *See* MCM, *supra* note 292, R.C.M. 306(c).
[324] *See* Schmitz Statement, *supra* note 72.
[325] *See* NSPD-22, *supra* note 265, ¶ 5.

Faced with few unilateral choices, the United States nevertheless has the option of working through the U.N. Security Council to influence military policies of other nations. This section will examine the scope of authority the Security Council may exert over domestic military policies of Member States, the sources of that authority, and its limits.

A. The Security Council's Authority Under the U.N. Charter

Article 2 of the Charter of the United Nations (U.N. Charter) preserves the sovereignty of Member States over their purely domestic matters.[326] That protection has been interpreted to mean that intervention in a State's affairs is prohibited if the State has a sovereign right to proceed freely on a matter.[327] It not only prevents the interference of one Member in the domestic affairs of another, but also protects Members from interference by the U.N.[328] Article 2 thus seems to shape the U.N.'s response to threats to the peace by requiring a respect for Members' domestic jurisdiction.[329]

But that respect is subject to the authority given the Security Council to counter threats to international peace and security.[330] The Security Council's powers and its position within the U.N. and in relation to the Members are found in Article 24, which gives the Security Council primary responsibility for the maintenance of international peace and security.[331] It expresses the drafters' intent that the Council have the power to act promptly and effectively to maintain international peace and security.[332] It has been noted that "primary" implies that the Council shares responsibility for maintaining peace with some other body; indeed, taking the U.N. Charter as a whole, both the Council and the

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[326] *See* U.N. Charter art. 2, para. 7.
[327] *See* Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT'L L. 519, 529 (1994).
[328] *See* Richard D. Glick, *Lip Service to the Law of War: Humanitarian Law and United Nations Armed Forces*, 17 MICH. J. INT'L L. 53, 64 (1995) (arguing that although the U.N. has a vertical relationship with States to regulate matters of international peace and security, it is bound by the same horizontal rules binding other members of the international community).
[329] *See* Gordon, *supra* note 327, at 576; *see also* KENNETH MANUSAMA, THE UNITED NATIONS SECURITY COUNCIL IN THE POST-COLD WAR ERA 117 (2006).
[330] *See* U.N. Charter art. 2, para.7.
[331] *See id.* art. 24; *see also* 1 RUDOLPH BERNHARDT ET AL., THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 445 (Bruno Simma ed., 2d ed. 2002).
[332] *See* BERNHARDT ET AL., *supra* note 331, at 445.

General Assembly share some jurisdiction over this task.[333] Nevertheless, the power to take binding action is exclusive to the Council, making it superior to the other organs of the U.N. in matters related to keeping the peace; there are no checks and balances in the U.N. Charter when the Council acts under Chapter VII.[334] Thus the Council is properly viewed as the principal organ for the international community to act in the face of a threat to the peace.[335]

Chapter VII has internal limits that protect States' domestic sovereignty as well. Article 39 empowers the Council to determine when the peace is threatened, and to act in order to preserve or restore international peace and security.[336] By providing an exclusive list of three triggers to Chapter VII authority,[337] and limiting the Council to acting to preserve international peace, Article 39 confines the Council's authority.[338] Article 39 also prevents the Council from intruding into competencies assigned by the U.N. Charter's assignment to the other U.N. organs.[339] The U.N. Charter therefore strikes a balance between State sovereignty and the Security Council's authority. While Article 2's sovereignty protections and a State's domestic jurisdiction are qualified by Chapter VII, Article 39 in turn limits the Security Council to acting in the interests of international peace as opposed to domestic peace, and only when it determines the existence of a triggering condition.

Sovereignty considerations, however, seem the only internal check on the Council's Chapter VII powers. Article 39 leaves the determination of a threat to the peace, breach of the peace, or act of aggression entirely to the Council's discretion, limited only minimally by the necessity of overcoming the veto of one of the five permanent members.[340] This accords with the intent that the Council remain free to

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[333] *Compare* U.N. Charter arts. 11, 14 (granting the General Assembly authorities with respect to the maintenance of international peace and security), *with* U.N. Charter art. 24 (conferring primary responsibility for international peace and security on the Security Council).
[334] *See* BERNHARDT ET AL., *supra* note 331, at 446–48, 707.
[335] *See* Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99, 106 (2002).
[336] *See* U.N. Charter art. 39.
[337] "The Security Council shall determine the existence of a threat to the peace, breach of the peace, or an act of aggression . . . ." *Id.*
[338] *See* ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 136–37 (2004).
[339] *See id.* at 137.
[340] *See id.* at 136.

act rapidly and effectively when a situation emerges.[341] Additionally, some International Court of Justice judges have from time to time endorsed the prerogative of the U.N.'s principal organs to interpret the U.N. Charter's powers expansively.[342]

Of the triggers, "threat to the peace" is the broadest and most potentially wide-ranging.[343] "Peace" in this context can be defined negatively as the absence of war, or positively, going beyond mere absence of war to improved economic, social, political, and environmental conditions and friendlier State-to-State relations.[344] Severe breaches of human rights are thought to be potential threats to the peace if their effects are felt internationally.[345] Indeed, it has been argued that the drafters meant the Council to play a significant human rights-protective role in situations involving threats to the peace.[346] Nevertheless, the stronger argument holds that the Security Council is intended only to enforce the peace and not the values of the international community.[347] Thus, for example, human rights violations short of genocide or ethnic cleansing are unlikely to justify Security Council intervention.[348] Because its task is to enforce the peace, it may not direct its actions against States that have yet to violate international law or that have only threatened a violation.[349]

The U.N. Charter's textual mechanism for enforcing the peace through military intervention has never been used.[350] The Members agree in Article 43 to make forces available to the Council for use in enforcing the peace.[351] Their availability, number, location, readiness, and employment are to be governed by agreements between the Council

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[341] *See* BERNHARDT ET AL., *supra* note 331, at 705.
[342] *See* John Quigley, *The "Privatization" of Security Council Enforcement Action: A Threat to Multilateralism*, 17 MICH. J. INT'L L. 249, 260 (1996); *see also* Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 168 (July 20) [hereinafter *Certain Expenses* case] ("As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction.").
[343] *See* BERNHARDT ET AL., *supra* note 331, at 722; DE WET, *supra* note 338, at 138.
[344] *See* DE WET, *supra* note 338, at 138–39.
[345] *See* BERNHARDT ET AL., *supra* note 331, at 724.
[346] *See* Bertrand G. Ramcharan, *The Security Council and the Protection of Human Rights*, *in* RACISM AND HUMAN RIGHTS 16 (Raphael Walden ed., 2004).
[347] *See* BERNHARDT ET AL., *supra* note 331, at 725.
[348] *See* Evans & Sahnoun, *supra* note 335, at 104.
[349] *See* BERNHARDT ET AL., *supra* note 331, at 705.
[350] *See id.* at 763.
[351] *See* U.N. Charter art. 43, para. 1; *id.* art. 45.

and the contributing State.[352] Under these agreements, troop-contributing States should be responsible to the Council for the conduct of their troops.[353] By this arrangement, the U.N. may meet its responsibility for the conduct of its forces.[354] In practice, however, the Council has consistently exercised its Chapter VII powers by authorizing States to act instead of directing action by forces at its disposal.[355] Although unused, a mechanism nevertheless exists for the Council to exert control over the conduct of U.N.-participating military forces.

Structurally, then, the U.N. Charter provides the Security Council the authority to require Member States to take action or refrain from conduct as it decides when it determines that the requirement is necessary to preserve and maintain international peace and security. The Council itself is empowered to command forces in at least some form, although that U.N. Charter authority has never been exercised. The question remains whether the Security Council could use this power to require military forces operating under U.N. authority to ban prostitution patronage. The thesis of this article is that it can. To understand the reasoning, it is appropriate to turn in the next section to how the Council has exercised its authority.

B. The Security Council's Authority as Exercised

For the U.N.'s first forty years, Cold War rivalry and the veto powers of the opposing blocs precluded consensus on the implementation of Article 43.[356] In light of the East-West deadlock in the Security Council, the General Assembly stepped into the gap and passed the "Uniting for Peace" resolution,[357] asserting the authority to recommend peacekeeping missions to the Security Council when it was unable to act.[358] When the General Assembly then included the costs of peacekeeping operations in its assessments of members' dues, some members challenged the General Assembly's actions in the International Court of Justice (ICJ). Finding for the General Assembly in its *Certain Expenses* advisory opinion, the ICJ rejected the contention that the maintenance of peace and security

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[352] *See id.* art. 43, paras. 2–3.
[353] *See* Glick, *supra* note 328, at 99.
[354] *See id.* at 55.
[355] *See* MANUSAMA, *supra* note 329, at 202.
[356] *See id.*
[357] G.A. Res. 377 (V), U.N. DOC. A/RES/377(V) (Nov. 3, 1950).
[358] *See* JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 126 (2005).

was entrusted solely to the Security Council.[359] It differentiated between coercive peace enforcement, which it said was solely within the purview of the Security Council, and peacekeeping.[360] Since peacekeeping missions are usually conducted with the consent of the country to which the peacekeepers are sent, such operations fall within the General Assembly's Article 11 powers.[361] Thus, as a result of Cold War politics, a practice was established whereby peacekeeping became entrusted to the General Assembly with some degree of Security Council oversight.

The Security Council's use of its Chapter VII powers has bloomed since the end of the Cold War, albeit with varying effectiveness.[362] Since the 11 September 2001 terrorist attacks, the Council has added breadth to its use of Chapter VII authority by requiring Members to enact domestic legislation at its direction. It has done this by first declaring forms of transnational criminal conduct—specifically, international terrorism and the smuggling of weapons of mass destruction—threats to international peace and security, but without targeting a specific country or crisis. In order to explore this approach, this section will compare representative pre-September 11th Resolutions with corresponding post-September 11th Resolutions. It will then look at how the Council has in practice used its authority over peacekeeping operations, using the example of HIV/AIDS awareness training for peacekeepers.

1. International Terrorism

Prior to the September 11th attacks, combating terrorism was primarily a General Assembly concern.[363] When the Council did take up international terrorism, it did so in response to specific incidents, and not necessarily using its coercive powers.[364] For example, responding to terrorist attacks on Pan American Flight 103 and Union de Transports Aériens Flight 772, the Council noted terrorism's "deleterious effect" on international relations and affirmed States' rights to protect their nationals from "acts of international terrorism that constitute threats to

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[359] *See Certain Expenses* case, *supra* note 342, at 165.
[360] *See id.* at 163–64.
[361] *See id.*
[362] *See* Quigley, *supra* note 342, at 249. *See generally* MANUSAMA, *supra* note 329, at 1–3 (commenting on the Security Council's increased use of its Chapter VII authority).
[363] *See* Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333, 333 (2003).
[364] *See* MANUSAMA, *supra* note 329, at 109–13.

international peace and security."[365] But although the Council condemned the attacks, it merely deplored the Libyan government's refusal to respond to requests for cooperation in assigning responsibility for the attacks.[366] It further requested that the Secretary-General seek Libya's cooperation and urged States to encourage Libya to respond to requests for information, but took no coercive action.[367] In Resolution 731, then, the Council acknowledged that terrorism could threaten international peace and security but stopped short of labeling an international terrorist attack as a threat.[368]

Three months later, however, the Council determined that Libya's recalcitrance was a threat to international peace and security and acted under Chapter VII.[369] Resolution 748 required Libya to comply with paragraph 3 of Resolution 731 by responding to requests for information from France, the United Kingdom, and the United States, and further required Libya to renounce terrorism promptly.[370] It then imposed a sanctions regime on Libya, and called upon non-member States to act in accordance with them.[371] But it is important that in this instance the Council's coercive action was directed at Libya's refusal to cooperate in tracking down the perpetrators, not the underlying attack itself.

The possibility that terrorism generally might be a threat to international peace and security was discussed in 1999. Several nations allowed that terrorism might threaten international peace and security if its effects were felt internationally.[372] Only Canada went so far as to state that it included terrorism in its definition of a threat to the peace.[373] But generally, Council Members took the position that the General Assembly was addressing international terrorism and thought the Council should encourage States to join anti-terrorism conventions.[374] In the end, the Council unanimously passed Resolution 1269, calling on States to

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[365] S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992).
[366] *See id.* ¶¶ 1–2.
[367] *See id.* ¶¶ 3, 5.
[368] *See* MANUSAMA, *supra* note 329, at 110.
[369] *See* S.C. Res. 748, U.N. DOC. S/RES/748 (Mar. 31, 1992).
[370] *See id.* ¶¶ 1–2.
[371] *See id.* ¶¶ 3–7.
[372] *See, e.g.*, U.N. SCOR, 54th Sess., 4053d mtg. at 3 (Argentina), 5 (Slovenia), 6 (Canada), U.N. DOC. S/PV.4053 (Oct. 19, 1999); *see also* MANUSAMA, *supra* note 329, at 111.
[373] *See* UNSCOR, *supra* note 372, at 6.
[374] *See, e.g.*, *id.* at 2 (Brazil), 6 (Netherlands), 8 (France).

join anti-terrorism conventions,[375] and expressing its readiness to act to counter terrorist threats to international peace and security.[376] However, it stopped short of actually deciding that international terrorism was a threat to the peace.

The tone of Security Council action changed dramatically after the September 11th attacks. The day after the attack, Resolution 1368 passed, declaring that the Council regarded the attacks "*like any act of international terrorism*, as a threat to international peace and security."[377] The Council broke with past practice by speaking in broad terms against international terrorism while addressing a specific instance of it. Two weeks later it followed up by passing Resolution 1373.[378] Resolution 1373 was a dramatic break from the Council's past treatment of terrorism.[379] Whereas pre-September 11th, the Council treated the phenomenon of terrorism as a General Assembly issue,[380] in 1373 the Council referred back to and reiterated 1368's declaration of a threat to the peace, and imposed on Member States a comprehensive scheme to combat it. Resolution 1373 requires States to pass legislation criminalizing terrorist fundraising, to take a variety of steps to obstruct terrorist financing, to cooperate and exchange information, and to report their progress to a specially-created committee.[381] It particularly noted the connection between international terrorism and transnational organized crime in describing the scope of international cooperation it expected.[382] Further, it expressed its determination to ensure that its dictates were obeyed.[383]

Resolution 1373 works within a negative definition of peace, so its novelty is not so much related to the connection between a threat to the peace and the potential for international armed conflict to occur.[384] Rather, its innovation lies in going beyond calls for adherence to conventions and protocols, which would only bind their members, and instead creating a standard set of binding obligations on all U.N.

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[375] *See* S.C. Res. 1269, ¶¶ 2, 4, U.N. Doc. S/RES/1269 (Oct. 19, 1999).
[376] *See id.* ¶ 5.
[377] S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (emphasis added).
[378] *See* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).
[379] *See* MANUSAMA, *supra* note 329, at 185.
[380] *See* Rosand, *supra* note 363, at 333.
[381] *See* S.C. Res. 1373, *supra* note 378, ¶¶ 1–2, 6; *see also* MANUSAMA, *supra* note 329, at 185; Rosand, *supra* note 363, at 334.
[382] *See* S.C. Res. 1373, *supra* note 378, ¶ 4.
[383] *See id.* ¶ 8.
[384] *See* DE WET, *supra* note 338, at 172.

members.[385] Resolution 1373 arguably "amounted to international legislation."[386] It has been criticized as *ultra vires* because the U.N. Charter does not provide the Council authority to intrude on Members' legislative initiatives.[387] At the same time, it did not go beyond measures already required or recommended by various conventions and General Assembly resolutions, possibly mitigating any over-reach.[388] In any event, no State has objected to 1373, setting the stage for a broader interpretation of the Council's Chapter VII powers.[389] In the meantime, the finding that terrorism threatens international peace and security has been reiterated in Resolutions 1438,[390] 1440,[391] 1450,[392] 1530,[393] and 1611;[394] Resolution 1456[395] condemned terrorism in all its forms.[396] Resolution 1373 therefore stands as an example of the Security Council's authority to order States to adopt domestic measures to counter a generalized threat to international peace and security.

2. Countering Weapons of Mass Destruction Proliferation

As with international terrorism, the Security Council's approach to containing the proliferation of weapons of mass destruction (WMD) can be distinguished between pre- and post-September 11th. It is useful to compare the Council's stances on North Korea's threatened withdrawal from the nuclear non-proliferation regimes in 1993 and the nuclear weapons tests of India and Pakistan in May 1998, with its stance on the potential spread of WMD to terrorists and non-State actors in the early twenty-first century.

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[385] *See* Rosand, *supra* note 363, at 334.
[386] MANUSAMA, *supra* note 329, at 186.
[387] *See* BERNHARDT ET AL., *supra* note 331, at 709.
[388] *See* MANUSAMA, *supra* note 329, at 186.
[389] *See* BERNHARDT ET AL., *supra* note 331, at 709.
[390] S.C. Res. 1438, U.N. Doc. S/RES/1438 (Oct. 14, 2002) (regarding bomb attacks in Bali, Indonesia).
[391] S.C. Res. 1440, U.N. Doc. S/RES/1440 (Oct. 24, 2002) (regarding hostage-taking in Moscow).
[392] S.C. Res. 1450, U.N. Doc. S/RES/1450 (Dec. 13, 2002) (regarding bomb and missile attacks targeting Israelis in Kenya).
[393] S.C. Res. 1530, U.N. Doc. S/RES.1530 (Mar. 11, 2004) (regarding bomb attacks in Madrid, Spain).
[394] S.C. Res. 1611, U.N. Doc. S/RES/1611 (July 7, 2005) (regarding bomb attacks in London, United Kingdom).
[395] S.C. Res. 1456, U.N. Doc. S/RES/1456 (Jan. 20, 2003) (adopting a declaration on terrorism).
[396] *See generally* MANUSAMA, *supra* note 329, at 112.

North Korea joined the Treaty on the Nonproliferation of Nuclear Weapons[397] (NPT) as a non-nuclear weapons State in December 1985,[398] but delayed entering the required International Atomic Energy Agency (IAEA) safeguards agreement[399] until 30 January 1992.[400] North Korea sent the IAEA its initial nuclear activities disclosure report in May 1992.[401] The IAEA quickly found discrepancies indicating that more plutonium had been processed than North Korea admitted.[402] On 12 March 1993, North Korea announced its intent to withdraw from both the NPT and the Safeguards Agreement that had entered into force less than a year earlier.[403]

The Security Council responded to North Korea's threatened abrogation with Resolution 825.[404] The Resolution did not determine the existence of a threat to the peace, or even mention the Council's responsibility to safeguard the peace. Rather, it called upon North Korea to reconsider its withdrawal decision and honor its NPT obligations, and urged Members to encourage compliance.[405]

Neither India nor Pakistan is a party to the NPT.[406] India tested a nuclear device in 1974, but had refrained from further testing for over two decades. On 11 May 1998, it unexpectedly conducted underground

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[397] Treaty on the Nonproliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

[398] *See* U.N. Office for Disarmament Affairs (UNODA), Weapons of Mass Destruction Branch, Status of Treaties, *available at* http://disarmament.un.org/TreatyStatus.nsf [hereinafter UNODA] (follow "Status of Treaties" hyperlink; then follow "View by country and treaty" hyperlink; then follow "next" hyperlink to Democratic People's Republic of Korea; then follow "NPT" hyperlink).

[399] *See* NPT, *supra* note 397, art. III; *see also* Eric Yong-Joong Lee, *The Six-Party Talks and the North Korean Nuclear Dispute Resolution Under the IAEA Safeguards Regime*, 5 ASIAN-PAC. L. & POL'Y J. 101, 104 (2004).

[400] *See* Int'l Atomic Energy Agency (IAEA), Agreement of 30 Jan 1992 Between the Gov't of the Democratic People's Republic of Korea and the IAEA for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, IAEA Doc. INFCIRC/403 (May 1992) [hereinafter Safeguards Agreement]; *see also* David E. Sanger, *North Korea Assembly Backs Atom Pact*, N.Y. TIMES, Apr. 10, 1992, at A3.

[401] *See* Lee, *supra* note 399, at 104.

[402] *See id.*

[403] *See* Douglas Jehl, *North Korea Says It Won't Pull Out of Arms Pact Now*, N.Y. TIMES, June 12, 1993, at 1; *see also* Lee, *supra* note 399, at 104.

[404] S.C. Res. 825, U.N. Doc. S/RES/825 (May 11, 1993).

[405] *See id.* ¶¶ 1–2, 4.

[406] *See* UNODA, *supra* note 398.

tests on three nuclear devices.[407] Threatened by the resurgent nuclear ambitions of its neighbor and long-time enemy, Pakistan ignored international pressure and conducted its own nuclear tests on 28 May 1998.[408] Within a week of the second test, the Security Council took up the matter and passed Resolution 1172.[409]

The Resolution declared the Council's awareness that it was primarily responsible for the maintenance of international peace and security, but stopped short of finding that a threat existed.[410] It demanded that the two nations refrain from further tests, and urged them to act with restraint, resume a dialogue to settle their issues, and join the non-proliferation regime.[411] But it did express the Council's readiness to consider how to ensure implementation of its measures;[412] read together with the preamble recitation regarding the Council's responsibility to maintain the peace, this was essentially a threat to escalate to Chapter VII measures if India and Pakistan proved recalcitrant, just as with Libya in the terrorism context.[413]

Six years later, the post-September 11th Security Council, faced with the scale and ambition of repeated acts of international terrorism, set out to shore up the non-proliferation regime to keep WMD from terrorists and other non-State actors with a resolution almost as strong as 1373. Resolution 1540[414] was also legislative in nature, but less intrusive than 1373.[415] It required States to adopt and enforce laws to prevent the transfer of WMD and associated delivery systems to non-State actors.[416] While Resolution 1540 did not refer to Resolution 1373, it nevertheless adopted a similar approach to preventing a general international phenomenon by binding Members to enact domestic legislation in order to prevent a threat to international peace and security.

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[407] *See* Jonathan Karp et al., *Chain Reaction: India's Nuclear Tests Trigger Global Fears for Trade & Safety*, WALL ST. J., May 12, 1998, at A1.
[408] *See* Jonathan Karp et al., *Pakistan Economy Faces Fallout of Bomb Test*, WALL ST. J., May 29, 1998, at A11.
[409] S.C. Res. 1172, U.N. Doc. S/RES/1172 (June 6, 1998).
[410] *See id.*
[411] *See id.* ¶¶ 3–5, 13–14.
[412] *See id.* ¶ 16.
[413] *See supra* text accompanying notes 365–371.
[414] S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).
[415] *See* MANUSAMA, *supra* note 329, at 187.
[416] *See* S.C. Res. 1540, *supra* note 414, ¶¶ 1–5; *see also* MANUSAMA, *supra* note 329, at 187–88.

3. HIV/AIDS & Peacekeeping Operations

With respect to its responsibility to oversee peacekeeping operations, the Security Council has been less ambitious. Although it has direct responsibilities over the conduct of peacekeepers under Article 43,[417] it instead has left this to the Secretary-General. The issue of the HIV/AIDS risk to peacekeepers is a useful example of both how the Security Council has backed away from a broader, positive definition of peace in its approach to maintaining international peace and security, and how it has left peacekeeping oversight to other bodies.

When the United States held the Security Council Presidency in 2000, then-Vice President Gore chaired a Council session at which the United States proposed "a new security agenda" which would include environmental issues, governmental corruption, and pandemics as international peace and security matters.[418] While the notion received some support from Members,[419] others expressed doubt and noted that the Security Council's responsibility was to maintain international peace and security.[420] It was argued that the Security Council could contribute to combating AIDS by working to reduce particularly at-risk populations such as refugees and child soldiers.[421]

In the end, the Council was far less ambitious than Vice President Gore had urged, and adopted a Resolution expressing concern over the potential damage of HIV/AIDS to the health of international peacekeepers and requesting the Secretary-General to take steps to insure that deployed peacekeepers are trained in HIV/AIDS prevention.[422] During the discussion preceding the Resolution's passage, several Members and invited attendees commented that HIV/AIDS was an issue best left to other U.N. organs such as the General Assembly and the Economic and Social Council despite its potential impact on peace and security.[423] This debate was followed up by Resolution 1318,[424] which

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[417] *See supra* text accompanying notes 350–53.
[418] *See* U.N. SCOR, 55th Sess., 4087th mtg. at 3, U.N. DOC. S/PV.4087 (Jan. 10, 2000); *see also* DE WET, *supra* note 338, at 173.
[419] *See, e.g.*, U.N. SCOR, *supra* note 418, at 17 (Sri Lanka).
[420] *See id.* at 13 (Namibia).
[421] *See id.*
[422] *See* S.C. Res. 1308, ¶¶ 1, 3, U.N. Doc. S/RES/1308 (July 17, 2000); *see also* DE WET, *supra* note 338, at 173.
[423] *See* U.N. SCOR, 55th Sess., 4172d mtg. at 10 (United Kingdom), 14 (Ukraine), 16 (Netherlands), 17 (Jamaica), 25 (Uganda), U.N. DOC. S/PV/4172 (July 17, 2000).
[424] S.C. Res. 1318, U.N. Doc. S/RES/1318 (Sept. 7, 2000).

adopted a declaration "on ensuring an effective role for the Security Council in the maintenance of international peace and security, particularly in Africa."[425] Resolution 1327[426] was passed later in 2000, adopting the recommendations of the Panel on United Nations Peacekeeping Operations report,[427] which dealt primarily with issues such as the need to develop peacekeeping doctrine, provide a more reliable pool of forces, and define missions clearly.[428] The Council thus declined to define "peace" expansively in a positive sense, leaving intact its historic tying of peace to the absence of armed conflict.[429] But at the same time, it left itself open to accusations that it is not meeting its Chapter VII responsibilities with respect to supervising peacekeeping forces, calling for operations without any assurance that Members will actually participate,[430] and without directly controlling the conduct of operations or the peacekeepers.[431]

The Security Council, then, has well-established authority to direct Member States to take actions it deems necessary in order to maintain international peace and security. Chapter VII of the U.N. Charter places almost no restrictions on what the Council may order once it has determined that a threat to the peace exists, provided none of the Permanent Members vetoes it. In practice, the Council has already exercised that power to direct States' efforts to combat generalized international phenomena that it has declared threatening, such as international terrorism and WMD proliferation. Additionally, the Council has the power to regulate directly the conduct of U.N. peacekeepers carrying out its mandate. Although it has yet to do so, preferring to leave that responsibility to the General Assembly and Secretary-General, it nevertheless can and should take up a role it was intended to fulfill.

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[425] *Id.*
[426] S.C. Res. 1327, at ¶ 1, U.N. Doc. S/RES/1327 (Nov. 13, 2000).
[427] The Secretary-General, *Report of the Panel on United Nations Peace Operations, delivered to the Security Council and General Assembly*, U.N. Doc. S/2000/809, A/55/305 (Aug. 21, 2000) [hereinafter *Peace Operations Panel Report*].
[428] *See id.* at 54–55.
[429] *See* DE WET, *supra* note 338, at 173–74.
[430] *See* Quigley, *supra* note 342, at 263.
[431] *See id.* at 264–65; Glick, *supra* note 328, at 54–55.

V. Conclusion

Since the September 11th attacks, the Security Council has established for itself the power to compel Members to legislate against declared threats to international peace and security. Resolution 1373 required domestic measures in financial regulation and law enforcement,[432] while the Council mandated adoption of export controls and greater information sharing among Members with Resolution 1540.[433] By moving against international phenomena it decided were threats to international peace and security, the Council expanded its reach beyond matters related to recalcitrant States and flashpoint confrontations.

Human trafficking is a similarly nebulous transnational enterprise. Its incarnation as sexual slavery through forced prostitution is particularly repellant as a human rights violation and insidious because it is so easily overlooked as a victimless crime or voluntary activity. Nevertheless, it is a source of revenue for transnational criminal groups who thrive on instability and who are often tied to transnational terrorist groups such as the FARC.[434] Indeed, the Security Council noted in Resolution 1373 the close connection between terrorism and organized crime.[435] As a serious human rights violation and a resource for forces of instability, trafficking can and should be declared by the Council a threat to international peace and security, and countries contributing peacekeeping troops should be compelled to issue and enforce orders banning peacekeepers' patronage of prostitution.

Such a Resolution would only minimally expand the Council's Chapter VII powers. As noted, the Council has already recognized a connection between organized crime and terrorism in a Chapter VII Resolution, as the United States did under both the Clinton and Bush Administrations. Furthermore, a growing body of research demonstrates the adverse impact of forced prostitution in post-conflict settings. Unlike the case of HIV/AIDS infection among peacekeepers, which is but one aspect of a larger public health problem, patronage of forced prostitution works directly against accomplishing the peacekeeping mission by undermining the rule of law, funding the elements hostile to restoring

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[432] *See supra* text accompanying note 381.
[433] *See supra* text accompanying note 416.
[434] *See supra* text accompanying notes 258–259.
[435] *See* S.C. Res. 1373, *supra* note 378, ¶ 4.

order, and contributing to corruption and instability. Additionally, by limiting the Resolution's reach to peacekeepers, the Council would respect Member sovereignty over the conduct of its troops in garrison, apart from U.N. activities. Thus it would not transgress existing treaty law's tacit demarcation of prostitution generally as a matter of domestic State policy. As a matter of Council practice, the authority to issue a Resolution requiring action against such an enterprise has already been established.

Furthermore, peacekeeper involvement in sexual exploitation and abuse undermines the U.N.'s legitimacy as the guardian of international peace and security and a global advocate for human rights. Sexual misconduct by those serving under the U.N.'s colors is a scandal that requires direct redress by the Security Council as the only body that can act expeditiously, above the normal grind of U.N. bureaucratic study and consultation. Since the end of the Cold War, the Council has shown a renewed willingness to exercise its coercive powers. Passing a Resolution directly regulating peacekeeper conduct would be a step toward realization of its intended leadership role in using military force to guarantee the peace.

Prospects for actually passing the Resolution described are not good. First, the U.N. is struggling to obtain and keep the number of peacekeepers required for its existing missions.[436] Faced with a struggle to meet manpower requirements, an institutional reluctance to place greater demands on troop-contributors is understandable and predictable. In addition, resurgent political gamesmanship among the Permanent Security Council Members would probably play a role. The complicity of Russian military officers in forced prostitution[437] is symptomatic of larger problems of corruption. Many local police allegedly have ties to trafficking rings[438] and senior politicians are reportedly tied to organized crime.[439] At the same time, China has made accommodation of human rights abusers in pursuit of its strategic goals a notable aspect of its foreign policy.[440] Neither country can be expected to support a U.S.-led effort to combat sexual slavery.

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[436] *See Peace Operations Panel Report*, *supra* note 427, ¶¶ 102–18.
[437] *See supra* text accompanying notes 83–84.
[438] *See* Int'l Org. for Migration (IOM), *Trafficking for Sexual Exploitation: the Case of the Russian Federation* 37 (June 2002) (prepared by Donna M. Hughes).
[439] *See id.* at 57.
[440] *See A Ravenous Dragon: Special Report on China's Quest for Resources*, ECONOMIST, Mar. 15, 2008, at 14.

Nonetheless, the United States should pursue Council action. The UCMJ amendment has already made a strong statement of policy, and the United States has led the formation of human trafficking policy within NATO.[441] From its position as a Permanent Member of the Council and as the world's leading military power, the United States has a responsibility to set an example internationally. Introducing a Security Council Resolution to require Members to ban peacekeeper prostitution patronage is a logical next step to build upon the addition of a patronage offense under the UCMJ and to implement NSPD-22 fully.

[441] *See supra* text accompanying notes 241–244.

ADDRESSING STATE (IR-)RESPONSIBILITY: THE USE OF MILITARY FORCE AS SELF-DEFENSE IN INTERNATIONAL COUNTER-TERRORISM OPERATIONS

MAJOR MICHAEL D. BANKS[1]

I. Introduction

A. Hypothetical

You are the Chief Executive of a State. During a cabinet meeting, you receive a briefing concerning an imminent terrorist attack against your State. The terrorist organization concerned is presently based inside a State with whom you enjoy normal diplomatic relations. You discuss with your advisors the possibility of asking that State to deal with the problem for you. Based on the political climate in that State and the location of the terrorist organization, however, such a solution would be ineffective at best; at worst, the terrorists could learn of your intelligence and change their plans and location. Your military leadership strongly recommends an immediate military strike in the area, in order to capture or kill as many of the terrorists as possible. They recommend that the attack take place without any warning to the host State, to lessen the chances that the terrorist organization will learn of the plan and flee. Any delay in ordering the attack increases the likelihood the terrorists will either successfully attack your State, or learn of your intelligence and change their plans or location. What do you do?

Readers might assume that this scenario describes a potential terrorist attack by al Qaeda against the United States. It could equally well describe the situation faced by the fledgling Afghan government in its struggle against Taliban forces operating out of the Federally

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Administered Tribal Areas (FATA) in Pakistan;[2] the situation faced by Turkey, confronted with attacks by the Kongra-Gel (also known as the Kurdistan Workers' Party, or PKK) based in northern Iraq;[3] or any of a number of other States faced with terrorist threats.

B. The Issue

Despite global cooperation in the War on Terror,[4] many States still face the threat of attack, and any could find themselves in the opening scenario. The scenario raises difficult issues under international law, including questions concerning the use of military force against non-State actors, issues of anticipatory self-defense, the responsibility of States for non-State actors operating within their borders, and how much warning to the host State is required, particularly if such warning is reasonably likely to be ineffective or even counter-productive. Each of these issues ultimately hinges on one primary question: whether an injured State may use military force against a non-State terrorist organization if the host State within which the organization is located or operating is unwilling or unable to stop that organization from committing terrorist attacks against the injured State.[5]

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[2] U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2006, ch. 2, Country Reports: South and Central Asia Overview (2007), *available at* http://www.state.gov/s/ct/rls/crt/2006/82734.htm [hereinafter 2006 COUNTRY REPORTS—SOUTH AND CENTRAL ASIA]; FRONTLINE: Return of the Taliban: Interviews: Amrullah Saleh, PBS, Oct. 3, 2006, http://www.pbs/org/wgbh/pages/frontline /taliban/interviews/saleh.html [hereinafter *Saleh Interview*]; *see also* Ahmed Rashid, *Accept Defeat by Taliban, Pakistan Tells NATO*, TELEGRAPH, Nov. 29, 2006, *available at* http://www.telegraph.co.uk/news/worldnews/1535524/Accept-defeat-by-Taliban-Pakistan-tells-Nato.html (detailing likely locations of Taliban forces and leadership in Pakistan).

[3] U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2006, ch. 6, Foreign Terrorist Organizations (2007), *available at* http://www.state.gov/s/ct/rls/crt/2006/82738.htm [hereinafter 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS]; Pam O'Toole, *Profile: The PKK*, BBC, Oct. 15, 2007, http://news.bbc.co.uk/2/hi/europe/7044760.stm.

[4] The War on Terror has been described as "a battle of arms and a battle of ideas." NAT'L STRATEGY FOR COMBATING TERRORISM 1 (2006). Note that the Obama Administration has phased out the term "War on Terror." *See, e.g.*, Jay Solomon, *U.S. Drops "War on Terror" Phrase, Clinton Says*, WALL ST. J., Mar. 31, 2009, at A16.

[5] A brief note on anticipatory self-defense: The application of the analysis to an imminent terrorist attack is identical to the analysis following an actual terrorist attack. However, as few States officially acknowledge the idea of anticipatory self-defense, it is cleaner to assume, for purposes of this article, that a terrorist attack has actually taken place, and that a further attack is imminent, thereby maintaining the threat. Therefore,

Since the attacks of 11 September 2001, international legal scholars have struggled with this question. Some scholars attempt to rely on the traditional models of attribution and state responsibility, seeking to attribute the actions of the international terrorist organization to the State within which they are located or operating.[6] These models of direct responsibility, endorsement, and vicarious responsibility all require some level of knowledge and action (or lack thereof) on the part of the host State, and often argue that the injured State cannot use force against or inside the host State absent such attribution.[7] Relying on these models to justify the use of military force in self-defense leaves dangerous gaps that terrorist organizations may exploit. Weak or ineffective States, failing or failed States, or States faced with significant cultural, religious, or political schisms may be unwilling or unable to prevent terrorist organizations from operating within their borders. Those very challenges may also prevent the host State from requesting, welcoming, or even accepting external assistance from an injured State. Furthermore, it is not necessary to link the use of force against the terrorist organization to attribution of the terrorist attacks to the host State.

Other scholars argue that terrorist acts are simply criminal acts most properly dealt with through law enforcement means, rendering the use of military force in counter-terrorism operations a potential violation of international law.[8] This argument is both illogical and untrue.[9] Counter-

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this article addresses the situation of an injured State, instead of a threatened State, but with the understanding that the injured State faces a continuing threat. The phrase "injured State" will denote this, rather than "threatened or injured State."

[6] *See generally* Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1 (Spring 2003) (discussing the various models of State responsibility); Vincent-Joel Proulx, *Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY J. INT'L L. 615 (2005) (setting forth a strict liability model for State responsibility). Attribution of the terrorist attacks to the host State is discussed in detail in Part VI.A of this article, *infra*.

[7] *See generally* Brown, *supra* note 6 (discussing the various models of State responsibility).

[8] *See* Avril McDonald, *Terrorism, Counter-Terrorism and the Jus in Bello*, *in* TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES 57, 60 (Michael N. Schmitt ed., 2002) (detailing Professor McDonald's analysis of terrorism as international criminal activity). The question of terrorism as a crime is discussed in detail in Part V.A. of this article. *See infra* Part V.A.

[9] Interview with John Norton Moore, Walter L. Brown Professor of Law, Dir., Ctr. for Nat'l Sec. Law, Univ. of Va. Law Sch., in Charlottesville, Va. (Jan. 16, 2008) [hereinafter Professor Moore Interview]; Telephone Interview with Dr. Walter Gary Sharp Sr., Senior Assoc. Deputy Counsel for Intelligence, Office of Gen. Counsel, Dep't of Def., in Charlottesville, Va. (Feb. 27, 2008) [hereinafter Dr. Sharp Interview]. The

terrorism law enforcement methodologies have their place, but they are not a panacea. States faced with a use of force that amounts to an armed attack under international law may use military force in self-defense under Article 51 of the Charter of the United Nations (U.N. Charter).[10]

Various scholars also argue for preventative, rather than curative, measures.[11] While the answer ultimately requires both, curative measures cannot take a back seat to preventative measures. Installing sprinklers in a business is a wonderful idea before a fire breaks out, but if your store is already on fire, your first priority needs to be extinguishing the fire, not preventing the next one.

The difficulty lies with the complexity of the analysis, not the legal framework. In fact, the legal framework currently in place allows States sufficient flexibility to respond to international terrorism in a fashion appropriate to the circumstances, including diplomacy, law enforcement, and the use of military force. The bottom line is simple: States have a legal responsibility to prevent the commission of terrorist acts from within their borders.[12] If a terrorist organization operates within a host State, and that host State cannot or will not act to prevent the terrorist organization from attacking another State, the injured State may act in self-defense against the terrorist organization, with or without the consent of the host State. [13]

II. Factual Predicates

In order to avoid, at least somewhat, allegations of American bias and provincialism, this article does not focus on the U.S. fight with al

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views expressed by Dr. Sharp represent his personal views, and not the official position of the Department of Defense Office of General Counsel.

[10] U.N. Charter art. 51. Article 51 of the U.N. Charter states, in part, that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." *Id.* The application of Article 51 to the use of military force in counter-terrorism operations is discussed in more detail in Part VII.A of this article, *infra*.

[11] *See, e.g.*, Proulx, *supra* note 6 (setting forth a strict liability model for State responsibility).

[12] G.A. Res. 2625 (XXV), at 122–123, U.N. Doc. A/8028 (Oct. 24, 1970); G.A. Res. 49/60, at 5, U.N. Doc. A/RES/49/60 (Feb. 17, 1995); S.C. Res. 1373, ¶ 2(b), U.N. Doc. S/RES/1373 (Sept. 28, 2001); S.C. Res. 1566, ¶ 3, U.N. Doc. S/RES/1566 (Oct. 8, 2004).

[13] Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9.

Qaeda. Granted, a discussion of current counter-terrorism operations must account for the attacks of 11 September 2001 and their aftermath. This is not solely a U.S. problem, however; it is an international problem. India, Indonesia, and Pakistan are just a few examples of other States facing significant terrorist threats.[14] Terrorism and counter-terrorism operations must be addressed and analyzed in a fashion that applies to the global community, not just one country or region. For this reason, this article focuses on the threats faced by two States outside the Western hemisphere: Afghanistan and Turkey.

A. Afghanistan, Pakistan, and the Taliban

Afghanistan continues to face a threat from Taliban forces, arguably supported by al Qaeda fighters.[15] Following the U.S.-led invasion, many al Qaeda and Taliban fighters fled into the FATA in northwestern Pakistan in an effort to escape coalition and Afghan troops.[16] The FATA, a rugged, mountainous stretch of some 450 kilometers along the

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[14] *See* U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2006, ch. 2, Country Reports: East Asia and Pacific Overview (2007), *available at* http://www.state.gov/s/ct/rls/crt/2006/82731.htm (discussing the terrorist threats currently facing Indonesia); 2006 COUNTRY REPORTS—SOUTH AND CENTRAL ASIA, *supra* note 2 (discussing the terrorist threats currently facing India and Pakistan); *Death Toll from Mumbai Train Blasts Hits 200*, MSNBC, July 12, 2006, http://www.msnbc.msn.com/id/10958641/ (reporting on an 11 July 2006 attack in which "[e]ight bombs ripped through packed trains at rush hour . . . kill[ing] at least 200 people and wound[ing] more than 700"); Maria Ressa et al., *At Least 183 Dead in Bali Bombings*, CNN, Oct. 13, 2002, http://archives.cnn.com/2002/WORLD/asiapcf/southeast/10/13/bali.blast/index.html (detailing how an al Qaeda-linked terrorist group detonated bombs in two Bali nightclubs on 12 October 2002, killing at least 183 people); Syed Mohsin Naqvi, *Death Toll Rises in Bhutto Attack*, CNN, Oct. 19, 2007, http://www.cnn.com/2007/WORLD/asiapcf/10/18/pakistan.explosions/index.html?iref=newssearch (detailing a suicide bombing that took place near Benazir Bhutto's motorcade on 18 Oct. 2007, killing at least 136 people and wounding more than 387); Mohsin Naqvi, *Benazir Bhutto Assassinated*, CNN, Dec. 28, 2007, http://www.cnn.com/2007/WORLD/asiapct/12/27/pakistan.bhutto/index.html?iref=newssearch (reporting on the 27 December 2007 assassination of Benazir Bhutto).

[15] *Saleh Interview*, *supra* note 2; *see* Rashid, *supra* note 2.

[16] 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3; *see* FRONTLINE: Return of the Taliban: Introduction, PBS, Oct. 3, 2006, http://www.pbs.org/wgbh/pages/frontline/taliban/etc/synopsis.html (discussing the movement of Taliban forces after the U.S.-led invasion of Afghanistan, and the current resurgence); Rashid, *supra* note 2 (detailing likely locations of Taliban forces and leadership).

Pakistan-Afghanistan border, is largely autonomous.[17] The central government in Pakistan plays little role in governing the tribes in the area, ensuring that "[i]nterference in local matters is kept to a minimum."[18] The Pakistani government allows the tribes to "regulate their own affairs in accordance with customary rules and unwritten codes, characterised by collective responsibility for the area under their control."[19] The politics of this area make it very difficult for the central government of Pakistan to take direct action.[20] Democracy and the rule of law have little place in the FATA, which follows the same basic tribal-rule model it has used for centuries.[21] From the FATA, al Qaeda members may have moved elsewhere in Pakistan or even traveled to other States, such as Yemen or Saudi Arabia.[22] Amrullah Saleh, the head of Afghanistan's National Security Directorate, believes that the Taliban threat remains firmly based in the FATA.[23]

B. Turkey, Iraq, and the Kongra-Gel

Turkey has been engaged in a running battle with the Kongra-Gel stretching back more than twenty years.[24] The Kongra-Gel, also known as the Kurdistan Workers' Party or PKK, is a Marxist-Leninist separatist organization based primarily out of Turkey and Iraq.[25] Its goals are not completely clear. The Kongra-Gel originally sought to "establish an independent Kurdish state in southeast Turkey, northern Iraq, and parts

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[17] GOV'T OF PAKISTAN, PLANNING AND DEVELOPMENT DEP'T, FATA SUSTAINABLE DEVELOPMENT PLAN 2006–2015, at 3 (2006) [hereinafter FATA DEVELOPMENT PLAN].
[18] *Id*. at 5.
[19] *Id*.
[20] *Id*.
[21] *Id*. at 4–6 (discussing the internal tribal regulation according to customary rules and unwritten codes, as well as the role of political officers given judicial powers to decide both criminal and civil cases, through a *jirga* (council of elders) process).
[22] 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3; *see* FRONTLINE: In Search of Al Qaeda: Introduction, PBS, Nov. 21, 2002, http://www.pbs.org/wgbh/pages/frontline/shows/search/ etc/synopsis.html (discussing the movement of al Qaeda forces after the U.S.-led invasion of Afghanistan).
[23] *Saleh Interview*, *supra* note 2; Rashid, *supra* note 2.
[24] 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3; O'Toole, *supra* note 3.
[25] 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3; O'Toole, *supra* note 3.

of Iran and Syria."[26] More recently, though, the Kongra-Gel has shifted its focus to cultural or linguistic freedom instead.[27] Its primary targets remain "Turkish Government security forces, local Turkish officials, and villagers who oppose the organization in Turkey."[28] As Dr. Sadi Cayci[29] points out, "[t]he PKK's terrorist campaign has claimed approximately 40,000 lives since 1986."[30] Turkey believes that "the U.S.-led invasion of Iraq and the country's subsequent instability . . . has enabled the PKK to regroup."[31] As of 2002, there were "an estimated 4,000–5,000 armed militants stationed in Northern Iraq."[32] While some of those may operate in southern Turkey instead, current estimates still place more than 3000 Kongra-Gel fighters in northern Iraq.[33]

III. Defining Terrorism

At this point, some readers may question whether the Kongra-Gel or the Taliban represent international terrorist organizations. To address this question, it is first necessary to define terrorism. The definition used affects the discussion of whether terrorist acts are criminal acts or armed attacks, as well as the discussion of preventative or curative measures used in response.

The phrase "[o]ne man's terrorist is another man's freedom fighter" has become cliché, and tends to blur discussions on terrorism.[34] One

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[26] U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2005, ch. 8, Foreign Terrorist Organizations 206 (2006) [hereinafter 2005 COUNTRY REPORTS].

[27] 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3. The 2006 Country Reports indicate a somewhat narrower current goal, though, moving away from an independent State, and more towards "cultural or linguistic rights." *Id.*

[28] *Id*.

[29] Dr. (Colonel) Sadi Cayci served as a Military Judge and Legal Advisor for the Turkish General Staff. He currently works as an Associate Professor with the Avrasya Stratejik Araştirmalar Merkezi (ASAM, also known as the Eurasia Strategic Research Center), in Ankara, Turkey. Sadi Cayci, *Countering Terrorism and International Law: The Turkish Experience*, *in* TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES 137, 137 (Michael N. Schmitt ed., 2002).

[30] *Id.* at 138; *see also* O'Toole, *supra* note 3.

[31] Simon Hooper, *PKK's Decades of Violent Struggle*, CNN, Oct. 11, 2007, http://www.cnn.com/2007/ WORLD/europe/10/10/pkk.profile/index.html.

[32] Cayci, *supra* note 29, at 139.

[33] 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3.

[34] *See* DR. BOAZ GANOR, DEFINING TERRORISM: IS ONE MAN'S TERRORIST ANOTHER MAN'S FREEDOM FIGHTER? 1 (1998), *available at* http://www.ict.org.il (search for

expert in international terrorism, Dr. Boaz Ganor, expresses a great deal of frustration with this cliché, taking the position that it actually hinders the fight against terrorism worldwide.[35] While truth is necessarily perspective-based, widely divergent positions make it difficult for the international community to reach a consensus on a definition of terrorism.[36] Dr. Ganor defines terrorism as "the intentional use of, or threat to use violence against civilians or against civilian targets, in order to attain political aims."[37] The U.S. State Department similarly defines terrorism as the "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."[38] Another author has defined terrorism as "[t]he serious harming or killing of non-combatant civilians and the damaging of property . . . done for the purpose of intimidating a group of people or a population or to coerce a government or international organization . . . ."[39] The U.N. Security Council has also struggled to define terrorism in various resolutions. In one of the more recent attempts, U.N. Security Council Resolution (UNSCR) 1566, the Security Council defines terrorism as:

> [C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act . . . .[40]

"Ganor"; then follow "Defining Terrorism" hyperlink under "Search>>Search Results"; then follow the "Free Download" hyperlink).

[35] *Id.*

[36] *Id*. at 3; *see* Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. INT'L & COMP. L. REV. 23, 26–27 (Winter 2006).

[37] GANOR, *supra* note 34, at 6.

[38] 22 U.S.C. § 2656f(d)(2) (2006). The State Department's definition is statutory, rather than purely regulatory. The State Department is required to produce annual reports for Congress providing detailed assessments of countries involved in terrorism, including countries "whose territory is being used as a sanctuary for terrorists or terrorist organizations." *Id.* § 2656f(a)(1)(B).

[39] Young, *supra* note 36, at 64.

[40] S.C. Res. 1566, *supra* note 12, ¶ 3. Unfortunately, the definition in UNSCR 1566 also helps blur the line between terrorism as a criminal act and terrorism as a use of force, by sending mixed messages. In the body of UNSCR 1566, the Security Council identifies terrorism as a threat to international peace and security under Chapter VII, but goes on to describe it as a criminal act. In the *chapeau*, however, the Security Council reaffirms the

The various definitions share one element: the effort to effect some sort of political change. This political goal is also recognized by the Security Council, which noted that terrorist acts "are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature . . . ."[41]

The methods of terrorism, however, may cause greater concern than the goals of the terrorist organization.[42] Political self-determination is a laudable goal for any population.[43] Similarly, the use of violence to achieve these goals is not necessarily unreasonable, provided the violence is directed against lawful targets.[44] When violence is directed against innocent civilians, however, it is hard to argue that "the end justifies the means."[45] Most definitions of terrorism highlight this,

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need to "combat terrorism in all its forms and manifestations by all means, in accordance with the Charter of the United Nations and international law." *Id.* The issue of terrorism as criminality vice terrorism as an armed attack is developed further in Part V of this article. *See infra* Part V.

[41] S.C. Res. 1566, *supra* note 12, ¶ 3.

[42] *See* Cayci, *supra* note 29, at 139 (indicating that he has greater concerns over the means and methods used by the Kongra-Gel than he does their political aims). Dr. Cayci's view makes sense, because if the terrorist organization had the requisite popular support, and believed they could achieve a legitimate victory within the existing political structure, they would likely do so without resorting to terror attacks. *See Hamas Sweeps to Election Victory*, BBC, Jan. 26, 2006, http://news.bbc.co.uk/1/hi/world/middle_east/4650788.stm; *Who are Hamas?*, BBC, Jan. 25, 2007, http://news.bbc.co.uk/2/hi/middle_east/1654510.stm. "In January 2006, Hamas translated its widespread popularity among Palestinians into a dramatic win in the Parliamentary elections." *Id.* Although Hamas has been labeled a terrorist organization by a number of States, including the United States and the European Union, they nonetheless built significant popular support, entered the political arena, and took a majority of parliamentary seats in the election. *Id.*

[43] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); Universal Declaration of Human Rights, G.A. Res. 217A, art. 21, at 75, U.N. Doc A/810 (Dec. 12, 1948) ("Everyone has the right to take part in the government of his country, directly or through freely chosen representatives."); G.A. Res. 1514 (XV) at 67, U.N. Doc. A/4684 (Dec. 14, 1960) ("All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

[44] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[W]henever any Form of Government becomes destructive of those ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . . .").

[45] GANOR, *supra* note 34, at 11; *see* Hugh Muir & Rosie Cowan, *Four Bombs in 50 Minutes—Britain Suffers Its Worst-ever Terror Attack*, GUARDIAN, July 8, 2005, http://www.guardian.co.uk/uk/2005/jul/08/terrorism.july74 (discussing the coordinated bombings that took place in London on 7 July 2005); Al Goodman & Christiane Amanpour, *Police Search for Madrid Bombers*, CNN, May 5, 2004, http://www.cnn.com/2004/ WORLD/europe/03/11/spain.blasts/index.html (reporting on

identifying that the primary targets of terrorist attacks tend to be civilians.[46]

The Kongra-Gel and the Taliban also highlight the distinction between domestic and international terrorism. Purely domestic terrorism is arguably a domestic problem, rather than an international problem.[47] International terrorism involving non-State actors engaged in transnational operations from within a host State is an international problem, and one not amenable to purely domestic solutions.[48] This article focuses on international terrorism, and for purposes of clarity, relies upon Dr. Ganor's definition. Using this definition, coupled with the distinction of political goals and military-like methodology, we return briefly to the Kongra-Gel and the Taliban to address whether they constitute terrorist organizations.

As previously discussed, the Kongra-Gel seeks to establish an independent, democratic Kurdish State, or at least achieve some sort of independent political recognition for a united Kurdish people.[49] The problem with this is two-fold. First, the State envisioned encompasses territory and peoples currently within the sovereignty of four different

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the bombing of the trains in Madrid); *Death Toll from Mumbai Train Blasts Hits 200*, MSNBC, July 12, 2006, http://www.msnbc.msn.com/id/10958641/ (detailing the 11 July 2006 bombing of rush hour trains in Mumbai); Ressa et al., *supra* note 14 (reporting on the bombing of two Bali nightclubs); Naqvi, *Death Toll Rises in Bhutto Attack*, *supra* note 14.

[46] Rein Müllerson, *Jus ad Bellum and International Terrorism*, *in* 79 INT'L L. STUD. 107–17 (Fred L. Borch & Paul S. Wilson eds., 2003) (discussing how terrorists often treat attacks against civilians as part of their normal operations); *see* GANOR, *supra* note 34; *see also* 22 U.S.C. § 2656f(d)(2) (2006) (defining terrorism in terms of "politically motivated violence perpetrated against noncombatant targets.").

[47] This idea is simply the logical extension of the idea of territorial and political independence. G.A. Res. 2625 (XXV), *supra* note 12, at 124. There can certainly be situations, such as the on-going situation in Somalia, where domestic threats create sufficient instability within the State to effectively represent a threat to international peace and security. *See* United Nations, United Nations Operation in Somalia I (UNOSOM I)—Background, http://www.un.org/Depts/dpko/dpko/co_mission/unosom1backgr2.html (last visited June 12, 2009) (discussing the first U.N. mission in Somalia); United Nations, United Nations Operation in Somalia II (UNOSOM II)—Background, http://www.un.org/Depts/dpko/dpko/co_mission/unosom2backgr2.html (last visited June 12, 2009) (detailing the follow-on U.N. mission in Somalia).

[48] Müllerson, *supra* note 46, at 116–17; *see* NAT'L STRATEGY FOR COMBATING TERRORISM, *supra* note 4, at 13. One key to combating terrorism is effective international partnerships. NAT'L STRATEGY FOR COMBATING TERRORISM, *supra* note 4, at 19.

[49] 2005 COUNTRY REPORTS, *supra* note 26, at 206; 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3.

States, none of which would be willing (understandably) to give up their territory for the creation of such an independent Kurdish State.[50] Second, and perhaps more importantly, the methodology of the Kongra-Gel includes attacking civilians, such as "local Turkish officials and villagers who oppose the organization in Turkey."[51] More recently, the Kongra-Gel has struck "over the border from bases within Iraq . . . engag[ing] in terrorist attacks in eastern and western Turkey."[52] These attacks have included attacks on "resort areas on the western coast where foreign tourists, among others, have been killed."[53] Despite several attempts throughout their history to shift to peaceful political activities, the Kongra-Gel continues to fall back on violence to achieve its ends.[54]

The Taliban, on the other hand, had de facto control of Afghanistan from 1996 until the U.S.-led invasion in 2001.[55] In December 2001, after al Qaeda and the Taliban fled Afghanistan, a new government was formed under the Bonn Agreement,[56] which paved the way for Hamid

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[50] 2005 COUNTRY REPORTS, *supra* note 26, at 206 (indicating that that the Kongra-Gel's "goal has been to establish an independent Kurdish state in southeast Turkey, northern Iraq, and parts of Iran and Syria"); *see also* 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3 (indicating a somewhat narrower current goal, moving away from an independent State toward "cultural or linguistic rights").

[51] 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3; *see* Cayci, *supra* note 29, at 143 (listing some of the Kongra-Gel's criminal acts).

[52] 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3. Turkish attacks into Iraq have continued, including some quite recently. *See* Ivan Watson, *Turkey Bombs Suspected Kurdish Rebel Targets in Iraq*, CNN, Mar. 13, 2009, http://www.cnn.com/2009/WORLD/meast/03/13/turkey.iraq.kurds/index.html?iref=newssearch (reporting on a 12 March 2009 Turkish attack against Kurdish targets in northern Iraq).

[53] 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3.

[54] *Id.*; *see also* Cayci, *supra* note 29, at 139 (claiming that the name change from PKK to KADEK in 2002 was "an effort to camouflage its terrorist past"); 2005 COUNTRY REPORTS, *supra* note 26 (indicating that a similar logic appears to have been behind the name change to Kongra-Gel in 2003).

[55] *See Panel I Discussion—Jus ad Bellum*, *in* 79 INT'L L. STUD. 143 (Fred L. Borch & Paul S. Wilson, eds. 2003) [hereinafter *Panel I Discussion*] (reporting Christopher Greenwood's comments during the Panel I discussion); John Ford Shroder, *Taliban*, MSN ENCARTA ONLINE ENCYCLOPEDIA 2007, http://encarta.msn.com/encyclopedia_761588418/Taliban.html (last visited June 12, 2009); *Background on Afghanistan: History of the War*, HUMAN RIGHTS WATCH, Oct. 2001, http://www.hrw.org/backgrounder/asia/afghan-bck1023.htm#Other%20sources.

[56] Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (Bonn Agreement), Dec. 5, 2001, *available at* http://www.mfa.gov.af/Documents/ ImportantDoc/The%20Bonn%20Agreement.pdf.

Karzai's election in 2002.[57] Since that time, the Taliban has engaged in attacks against both military and civilian targets, although over the last few years the Taliban has focused on "targeting . . . civilians in order to weaken the will of the Afghan people."[58] The Taliban, wanting to regain control of Afghanistan, attempted to control population areas, but ultimately fell back on terrorist attacks in an effort to achieve its goals.[59]

Both the Kongra-Gel and the Taliban clearly have a political goal in mind. The Taliban's past history indicates that a religious goal is part of their planning.[60] Both of these groups operate outside of the State they seek to change or control and both are engaged in attacking civilians in addition to legitimate military targets.[61] The Kongra-Gel and the Taliban are representative of international terrorist organizations seeking to impose political change through terrorist attacks against the civilian population. Therefore, these groups serve as appropriate test subjects for the recommended analysis governing the legality of the use of military force in counter-terrorism operations.

IV. The Analysis: An Overview

The analysis of the legality of the use of military force in counter-terrorism operations involves several distinct steps. A brief overview follows, although each of these steps will be broken down in detail in this section.

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[57] *See* LIBRARY OF CONGRESS, FEDERAL RESEARCH DIVISION, COUNTRY PROFILE: AFGHANISTAN 3–4 (May 2006), *available at* http://lcweb2.loc.gov/frd/cs/profiles/Afghanistan.pdf.

[58] *Saleh Interview*, *supra* note 2; *see also* Farhad Piekar, *Afghan Blast Death Toll Reaches 75*, CNN, Nov. 9, 2007, http://www.cnn.com/2007/WORLD/asiapcf/11/09/afghanistan.blast/index.html?iref=newssearch.

[59] Barbara Starr, *Military Chief: Attacks Up in Afghanistan*, CNN, Dec. 11, 2007, http://www.cnn.com/2007/ US/12/11/us.afghanistan/index.html?iref=newssearch.

[60] Declan Walsh, *Taliban Reaches Beyond Swat Valley in Pakistan*, GUARDIAN, Apr. 25, 2009, *available at* http://www.guardian.co.uk/world/2009/apr/25/taliban-mingora-pakistan-swat-islamists (detailing the Taliban's goal to create a religious Islamic caliphate covering the entire Muslim world).

[61] These groups operate both within and outside of the States in question—the key here is that both groups operate in a transnational fashion, taking their actions outside of the model of a purely domestic insurgency. *See Saleh Interview*, *supra* note 2; Piekar, *supra* note 58; 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3.

The first step requires determining whether the terrorist attack rises to the level of an armed attack triggering the self-defense provisions of Article 51.[62] Terrorist attacks that do not rise to the level of an armed attack may still be dealt with through law enforcement, but the use of military force would be impermissible under international law.[63]

Second, the injured State must identify the host State within which the terrorist organization operates. This is not to say that the actions of the terrorist organizations must be attributable to the host State; some sort of geographic nexus is sufficient.[64] This geographic nexus is necessary to establish which State bears the responsibility to prevent the commission of terrorist attacks originating from within its territory.[65]

Third, the injured State must provide the host State with some warning, and either request that the host State handle the problem itself, or seek the host State's permission to handle the problem.[66] If the host State effectively addresses the problem or consents to the presence of military or law enforcement personnel from the injured State, the analysis ends.[67] On a more practical note, this is also the stage where the injured State should determine whether to address the problem through law enforcement, military force, or both.

Fourth, if the host State cannot or will not address the problem, then the injured State may act in place of the host State.[68] In this case, the injured State will almost certainly utilize military force, either in lieu of or in addition to law enforcement. The third and fourth steps are

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[62] U.N. Charter art. 51; *see* Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L.J. 41, 47–48 (Winter 2002); *see infra* Part V.

[63] Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14, 101 (June 27); Dr. Sharp Interview, *supra* note 9; MICHAEL N. SCHMITT, COUNTER-TERRORISM AND THE USE OF FORCE IN INTERNATIONAL LAW 17–19 (2002).

[64] Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; *see infra* Part VII.

[65] G.A. Res. 2625 (XXV), *supra* note 12, at 122–23; G.A. Res. 49/60 *supra* note 12, at 5; S.C. Res. 1373, *supra* note 12, ¶ 2(b); S.C. Res. 1566, *supra* note 12, ¶ 3; *see infra* Part VI.

[66] Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; *see infra* Part VII.

[67] Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; G.A. Res. 56/83, Annex, art. 20, U.N. Doc. A/RES/56/83 (Jan. 28, 2002); SCHMITT, *supra* note 63, at 66; *see infra* Part VIII.

[68] Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; SCHMITT, *supra* note 63, at 66.

necessary to overcome the prohibition against the use of force contained in Article 2(4) of the U.N. Charter.[69] Assuming the injured State uses military force without the consent of the host State, the injured State must comply with Daniel Webster's proportionality, necessity, and immediacy requirements from the *Caroline* case.[70]

V. Step One: Terrorism as an Armed Attack

Let us assume that the terrorist attack discussed in the hypothetical actually occurred, and a second attack is imminent. As the Chief Executive, it falls upon your shoulders to determine whether or not the terrorist attack is tantamount to an armed attack, allowing the use of force in self-defense under Article 51.[71]

Unfortunately, this is the first area that tends to trigger significant debate, as some scholars believe that terrorism is nothing more than criminal activity, to be dealt with as such, rendering the use of military force in counter-terrorism operations illegal under international law.[72] The language used in UNSCR 1373 and UNSCR 1566 tends to blur this discussion as well, by sending mixed messages concerning whether terrorism is a crime or an armed attack permitting States to respond in self-defense.[73]

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[69] U.N. Charter art. 2, para. 4.

[70] TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, VOLUME 4, DOCUMENTS 80–121: 1836–1846, at 449 (Hunter Miller ed., 1934) (detailing the 1842 letter from Daniel Webster to Lord Ashburton regarding the *Caroline* incident); *see infra* Part VIII.B.

[71] *See* U.N. Charter art. 51.

[72] *See, e.g.*, McDonald, *supra* note 8, at 62.

[73] S.C. Res. 1373, *supra* note 12, ¶ 1, 2; S.C. Res. 1566, *supra* note 12, ¶ 3. Security Council Resolution 1373 followed in the footsteps of Security Council Resolution 1368, and was published as part of the further response by the U.N. Security Council to the attacks of 11 September 2001. S.C. Res. 1373, *supra* note 12. Security Council Resolution 1566 was drafted as a result of a series of attacks in September and October 2004. U.N. SCOR, 59th Sess., 5053d mtg. at 2-4, 6-7, U.N. Doc. S/PV.5053 (Oct. 8, 2004). The mixed messages have been present in other Security Council resolutions on terrorism as well. *See, e.g.*, S.C. Res. 1456, U.N. Doc. S/RES/1456 annex, ¶ 3 (Jan. 20, 2003) (referring to acts of terrorism as "criminal and unjustifiable" and discussing the need to bring terrorists "to justice").

A. Terrorism as Criminality

The view that terrorist attacks are merely criminal acts was dominant prior to the attacks of September 11th; it took an attack by a non-State actor of a scale comparable to an armed attack by a State to alter that view.[74] It is also true that small-scale terrorism essentially mirrors normal criminal activity, just with a different goal. A criminal who kills or kidnaps someone, for example, represents normal criminal activity, sufficiently addressed within domestic criminal codes.[75] The essential elements of these crimes do not change if they are instead committed by members of an international terrorist organization for political purposes, although the terrorist acts would likely be charged somewhat differently in a terrorism case.[76] There are also a number of international conventions addressing terrorism which address the criminalization of terrorist acts under domestic law.[77]

Professor Avril McDonald believes that law enforcement is the solution, stating:

> It seems clear that it is ridiculous to characterize what is obviously international criminality, committed for the most part in peacetime, as armed attacks or armed conflict. Al Qaeda and other terrorist organizations must

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[74] John Murphy, *International Law and the War on Terrorism: The Road Ahead*, *in* 79 INT'L L. STUD. 395 (Fred L. Borch & Paul S. Wilson eds., 2003); Murphy, *supra* note 62, at 45–50; SCHMITT, *supra* note 63, at 1; *see* U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 2001, at v (2002) [hereinafter 2001 TERRORISM REPORTS].

[75] *See* 18 U.S.C. § 1111 (2006) (Murder); *id.* § 1201 (Kidnapping).

[76] *See id.* § 2332 (Criminal Penalties); *id.* § 2332b (Acts of Terrorism Transcending National Boundaries). Chapter 113b of Title 18 of the U.S. Code codifies the various criminal aspects of terrorism. It primarily addresses terrorist acts committed outside the United States and transnational terrorist acts. As an interesting counterpoint, the acts leading to the 1993 bombing of the World Trade Center primarily took place inside the United States, and were not charged under Chapter 113b of Title 18. THE 9/11 COMMISSION REPORT 71–73 (n.d.) [hereinafter 9/11 COMMISSION REPORT]. Since 9/11, Chapter 113b has been amended to include sections addressing the harboring of terrorists and providing material support and financing to terrorism or terrorist organizations. *See* 18 U.S.C. § 2339–2339D.

[77] *See* U.S. DEP'T OF STATE, TREATIES IN FORCE, A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2007, SECTION 2: MULTILATERAL AGREEMENTS 24, at 179–80 (2007). The Convention on Offences and Certain Other Acts Committed on Board Aircraft, the International Convention Against the Taking of Hostages, and the International Convention for the Suppression of the Financing of Terrorism are three examples of treaties or conventions to which the United States is a party addressing the criminalization of terrorist acts. *Id.*

> be defeated for the most part by detection (good intelligence) and by prosecution, among other techniques. This can be (and is being) achieved successfully for the most part under domestic criminal legislation.[78]

Dr. Gary Sharp provides a facially similar viewpoint, stating that "[e]ven horrific acts of international terrorism committed by non-state actors remain a law enforcement issue."[79] He further notes that "[f]rom a legal perspective, *all* acts of international terrorism are either non-state sponsored and thus a crime addressed by national and peacetime treaty law, or are state sponsored terrorism and thus a use of force governed by the law of conflict management."[80] Dr. Sharp's view includes a caveat, as he argues that the failure of the host State to cooperate with law enforcement requests by the injured State could potentially be viewed as State sponsorship, a topic that will be addressed shortly.[81]

The concern with the application of law enforcement methodologies to counter-terrorism operations relates to their efficacy under the circumstances. Professor McDonald appears to place significant credence in the value of law enforcement, although even her opinion leaves room for doubt.[82] Dr. Sharp, on the other hand, directly addresses his concerns about the effectiveness of law enforcement, pointing out that "when the location of a terrorist or a terrorist base camp is known and the territorial state refuses to cooperate with American law enforcement, the law enforcement response is completely ineffective in defending Americans and American interests abroad."[83] Any State could

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[78] McDonald, *supra* note 8, at 62. Dr. Avril McDonald is an Associate Researcher in International Humanitarian Law and International Criminal Law at the T.M.C. Asser Institute for International Law, the Hague. Dr. Avril McDonald, http://www.wihl.nl/ (follow "Our researchers" hyperlink; then follow "Dr. Avril McDonald" hyperlink) (last visited June 12, 2009).

[79] Walter Gary Sharp, *American Hegemony and International Law: The Use of Armed Force Against Terrorism: American Hegemony or Impotence?*, 1 CHI. J. INT'L L. 37, 46 (Spring 2000). Dr. Walter Gary Sharp currently serves as a Senior Associate Deputy General Counsel for Intelligence at the Department of Defense, and as an Adjunct Professor of Law at Georgetown University Law Center. Dr. Sharp has a significant background in International Law and National Security Law. Walter Gary Sharp, http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=Faculty&ID=192 (last visited Mar. 30, 2009).

[80] Sharp, *supra* note 79, at 47.

[81] *Id*. at 44.

[82] McDonald, *supra* note 8, at 62.

[83] Sharp, *supra* note 79, at 38.

experience this same difficulty in utilizing the law enforcement approach to counter-terrorism.

As Dr. Sharp points out, law enforcement approaches arguably function well in States that follow the rule of law, but are unlikely to work in States where the injured State's law enforcement agencies cannot function or where the host State's law enforcement agencies cannot or will not act.[84] Furthermore, the purpose or intent of the terrorist organizations themselves may hinder counter-terrorism law enforcement efforts. As then–Lieutenant Colonel William K. Lietzau notes:

> In contrast to most criminals who are driven by private gain, terrorists generally are motivated by political ideology or religious extremism. This distinction renders it difficult for law enforcement agents to exploit a suspect's selfish motives as an inducement to turn on fellow conspirators, leaving terrorists less susceptible to law enforcement techniques that have proven successful in combating organized crime and other traditional criminal activity.[85]

Professor John Norton Moore expresses a similar concern, stating:

> It is debatable . . . whether the provisions and processes of criminal law regarding the prohibition of terrorist acts and the apprehension, prosecution, and punishment of those who commit them can be an effective deterrent to terrorism. The terrorist, by definition, is an ideologically motivated offender who rejects the legal characterization of his acts as criminal

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[84] *Id*. at 38.

[85] Lieutenant Colonel William K. Lietzau, *Combating Terrorism: Law Enforcement or War?*, *in* TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES 75, 78 (Michael N. Schmitt ed., 2002). Colonel Lietzau currently serves as the Commander, Headquarters Battalion, Marine Corps National Capital Region, and has previously served as the Staff Judge Advocate for the U.S. European Command, a research fellow at the National War College, and a Special Advisor to the General Counsel of the Department of Defense for International Law matters associated with the Global War on Terrorism. Colonel William K. Lietzau, http://hqinet001.hqmc.usmc.mil/hh/bnco.htm. (last visited June 12, 2009).

> and who may regard the prospect of a prison term as a small price to pay for furthering his cause.[86]

In situations where counter-terrorism law enforcement is ineffective, a different solution must be adopted in order to protect those at risk. More importantly, terrorist acts need not, and should not, be viewed solely as criminal acts to be dealt with only through law enforcement methodologies. Some may argue that a soldier arguing for the application of military force is an example of the old adage: "If the only tool you have is a hammer, [you] treat everything as if it were a nail."[87] This is untrue. Counter-terrorism law enforcement methodologies present valid, valuable long-term solutions; they merely suffer from some significant short-term limitations.[88] If law enforcement methodologies are not applicable to all situations, then there must be some other solution that may be applied. Admittedly, this follows a traditional Western worldview—every problem must have a solution and every wrong a remedy—but there is a strong logical component to this argument, particularly from the perspective of a State's need to protect its citizens.

Large-scale terrorism, particularly that involving a high-explosive, nuclear, biological, chemical, or radiological attack, is simply *not* a mirror of normal criminal activity. These weapons threaten more than just a few people, but rather thousands of people, an entire city, or even an entire State, depending on its size and stability. No State facing an imminent threat from a terrorist organization armed with a weapon of

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[86] JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW 460 (2d ed. 2005). Professor John Norton Moore sits on the faculty at the University of Virginia School of Law as the Director of both the Center for National Security Law and the Center for Oceans Law and Policy, and has chaired or served on a number of International Law committees. John Norton Moore, http://www.law.virginia.edu/lawweb/Faculty.nsf/FHPbI/1359 (last visited Mar. 30, 2009).

[87] This adage is one of a number of common paraphrases of a quote by psychologist Abraham Harold Maslow. The full quote appears in his book on the psychology of science: "I suppose it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail." ABRAHAM HAROLD MASLOW, THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE 15 (1966).

[88] During the reign of the Taliban, the Security Council acted on a number of occasions under Chapter VII of the U.N. Charter, including passing two resolutions which specifically directed that the Taliban turn Osama bin Laden over to a country in which he had been indicted. None of these resolutions were effective in securing the extradition of Osama bin Laden or preventing the attacks of September 11th. *See* S.C. Res. 1267, ¶ 2, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333, ¶ 2, U.N. Doc. S/RES/1333 (Dec. 19, 2000). This problem is discussed further in Part VI.A, *infra*.

mass destruction can afford to ignore that threat, nor can that State necessarily gamble with the speed and effectiveness of law enforcement methodologies. While there is danger in haste, there is also danger in waiting, and the threatened State must exercise risk management in determining the appropriate solution under the circumstances.

While the threatened State could look to both offensive and defensive solutions, it would be foolhardy to rely upon a purely defensive solution of trying to prevent the entry of such a weapon into the threatened State. If the threatened State had actionable intelligence regarding the location of the terrorist organization armed with such a weapon, the State could reasonably exercise an offensive option, either through law enforcement or through a military strike against the terrorist organization. Unfortunately, the possibility of a terrorist organization armed with a nuclear or radiological weapon is not unimaginable. While counter-terrorism law enforcement may be the appropriate long-term solution, this can leave an active, dangerous threat free to roam the world in the short-term. The key that opens the door to the use of military force is whether or not the terrorist attack is tantamount to an armed attack.[89]

B. Terrorism as an Armed Attack

The determination of whether a nominally criminal terrorist act is tantamount to an armed attack depends on the "scale and effect" of the terrorist attack.[90] This test arose out of the International Court of Justice case between Nicaragua and the United States.[91] In *Nicaragua*, the court determined that not all uses of force against a State actually trigger the application of Article 51, stating that it was "necessary to distinguish the most grave forms of the use of force (those constituting an armed attack)

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[89] *See* U.N. Charter art. 51. In addition to the exercise of individual or collective self-defense under Article 51 of the U.N. Charter, there is the possibility that the Security Council, acting under Chapter VII and Article 42, could authorize the use of military force in such an operation. *See id.* art. 42. No Security Council resolutions to date have provided such Article 42 authorization for counter-terrorism operations. The discussion of whether such an authorization could arise in the future, and its implications, lies outside the scope of this article.

[90] Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14, 103 (June 27); *see* Brown, *supra* note 6, at 27 (discussing the definition of aggression from General Assembly Resolution 3314 in relation to the decision in *Nicaragua*); SCHMITT, *supra* note 63, at 64; Murphy, *supra* note 62, at 45.

[91] *Nicaragua*, 1986 I.C.J. 14.

from other less grave forms."[92] The court further noted that a State may commit an armed attack through the use of irregular forces, if those forces "'carry out acts of armed forces against another State of such gravity as to amount to (inter alia) an actual armed attack conducted by regular forces."[93] Again ignoring the issue of attribution for the moment, the court's decision in *Nicaragua* established that the actions of irregular forces can amount to an armed attack, "if such an operation, because of its *scale and effects*, would have been classified as an armed attack . . . had it been carried out by regular armed forces."[94]

The September 11th attacks clearly represented a change in scope for terrorist attacks.[95] As Professor Sean Murphy points out:

> [T]he scale of the incidents was certainly akin to that of a military attack. The destruction wrought was as dramatic as the Japanese attack on Pearl Harbor on December 7, 1941: the complete destruction of famous twin towers in the heart of the United States' financial center and severe damage to the nerve center of the United States' military. Further, the death toll from the incidents was worse than Pearl Harbor; to find U.S. deaths on the same scale in a single day requires going back to the U.S. Civil War.[96]

Although the fatalities that occurred on September 11th are only a small percentage of the total fatalities resulting from terrorist attacks worldwide,[97] the attacks of September 11th represent the high-water

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[92] *Id*. at 101.
[93] *Id*. at 103.
[94] *Id*. (emphasis added).
[95] *See* 2001 TERRORISM REPORTS, *supra* note 74 (detailing the introductory comments by Ambassador Taylor).
[96] Murphy, *supra* note 62. Professor Sean Murphy sits on the faculty at George Washington University Law School, and has previously served as a legal counselor to the U.S. Embassy in the Hague, and as a legal advisor with the U.S. Department of State. Sean D. Murphy, http://www.law.gwu.edu/Faculty/Profile.aspx?id=1756 (last visited Mar. 30, 2009).
[97] 2001 TERRORISM REPORTS, *supra* note 74, at 173. The State Department estimates that terrorist attacks in 1996 resulted in approximately 3200 casualties, while attacks in 1998 resulted in more than 6000 casualties. *Id.* During 2005, there were approximately 11,111 incidents of terrorism world-wide which targeted non-combatants, resulting in the deaths of more than 14,000 people. 2005 COUNTRY REPORTS, *supra* note 26, Statistical Annex vi.

mark of fatalities from a single attack.[98] Even more disturbing, the U.S. deaths resulting from the attacks on September 11th were greater than those resulting from some of the United States' international armed conflicts.[99] Additionally, terrorist attacks cannot always be viewed as singular events. Turkey has been involved in an active, on-going conflict with the Kongra-Gel for over twenty years.[100] "The PKK's terrorist campaign has claimed approximately 40,000 lives since 1986."[101] It is difficult to label 40,000 deaths, including many civilian deaths, as nothing more than the activities of criminals; even when spread out over twenty-four years, these numbers instead seem more akin to casualty figures for an armed conflict.[102]

The Security Council has also recognized the scope of the terrorist threat. Acting under Chapter VII of the U.N. Charter, the Security Council has characterized international terrorism as a threat to international peace and security, and reiterated the right of self-defense.[103] Resolution 1566 couches this in particularly strong terms, stating that the Security Council "[c]ondemns in the strongest terms all acts of terrorism irrespective of their motivation . . . as one of the most serious threats to peace and security."[104]

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[98] *See* 2001 TERRORISM REPORTS, *supra* note 74 (detailing the introductory remarks by Ambassador Taylor).

[99] U.S. DEP'T OF VETERANS AFFAIRS, AMERICA'S WARS 1 (July 2007), *available at* http://www1.va.gov/opa/ fact/docs/amwars.pdf [hereinafter VA, AMERICA'S WARS]. For example, the War of 1812 resulted in 2260 battle deaths, and there were only 4435 battle deaths during the Revolutionary War. *Id.*

[100] 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3.

[101] Cayci, *supra* note 29. This number is particularly interesting when considered in light of the U.S. battle deaths which occurred during World War I, the Korean War, or the war in Vietnam, all of which had similar figures. VA, AMERICA'S WARS, *supra* note 99. During the two-years the United States was involved in World War I, it suffered 53,402 battle deaths. The three years of the Korean War resulted in 33,741 dead. Vietnam, covering eleven years, resulted in 47,424 killed in combat. *Id.*

[102] These figures should be viewed in comparison to the relative populations. Turkey's population is estimated to be around seventy-one million. CENT. INTELLIGENCE AGENCY, CIA—THE WORLD FACTBOOK—TURKEY, Mar. 6, 2008, https://www.cia.gov/library/ publications/the-world-factbook/geos/tu.html. The United States, on the other hand, has a population of almost four-and-a-half times that of Turkey; more than 303 million. U.S. Census Bureau, U.S. and World Population Clocks, http://www.census.gov/main/ www/popclock.html (last visited June 15, 2009).

[103] *See* S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) *chapeau*, ¶ 1; S.C. Res. 1373, *supra* note 12; S.C. Res. 1566, *chapeau*, ¶ 1.

[104] S.C. Res. 1566, *supra* note 12, ¶ 1. During the session vote on Security Council Resolution 1566, the members of the Security Council highlighted a number of recent

Some may argue that simply because terrorism represents a threat to "international peace and security" does not automatically mean that a terrorist attack rises to the level of an armed attack.[105] This is true, but it likewise does not mean that a terrorist attack cannot rise to that level. The determination of whether a given terrorist threat or attack is tantamount to an armed attack is necessarily factual, and essentially mirrors a normal *jus ad bellum* analysis.[106] Unfortunately, this is an area that creates confusion, as some scholars tend to either skip the initial *jus ad bellum* analysis in favor of a *jus in bello* analysis, or tend to conduct the two analyses simultaneously, either of which can result in a false dilemma.[107]

Professor McDonald, for example, effectively applies a *jus in bello* analysis to a *jus ad bellum* problem.[108] She states that "Al Qaeda could not be considered legally competent to declare war on a State, so the attacks of September 11 could not have initiated an international armed conflict" under Common Article 2 of the Geneva Conventions.[109] She then looks at the international character of the conflict, and determines that it is clearly not a non-international armed conflict under Common Article 3 of the Geneva Conventions.[110] Her conclusion that the laws of war do not apply to the terrorist threat therefore leads to conclusion that the terrorist threat is purely criminal.[111] In reaching this conclusion, she

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terrorist attacks, including attacks in Pakistan, Russia, Egypt and France. U.N. SCOR, 59th Sess., 5053d mtg., at 2-4, 6-7, U.N. Doc. S/PV.5053 (Oct. 8, 2004).

[105] U.N. Charter art. 51.

[106] Brown, *supra* note 6, at 27; SCHMITT, *supra* note 63, at 64; Murphy, *supra* note 62, at 45. The *jus ad bellum* provides the legal framework governing the use of force by States, primarily governing when States may use force. Michael N. Schmitt, *21st Century Conflict: Can the Law Survive*, 8 MELB. J. INT'L L. 443, 443 (2007).

[107] McDonald, *supra* note 8, at 58–60; *see* Schmitt, *supra* note 106, at 444 (discussing *jus in bello*).

[108] McDonald, *supra* note 8, at 58–60; *see* Schmitt, *supra* note 106, at 444 (discussing *jus in bello*).

[109] McDonald, *supra* note 8, at 60; *see* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The application of the full body of the *jus in bello* typically depends on whether or not the conflict is an "international armed conflict[] within the meaning of Common Article 2." Geoffrey S. Corn, Hamdan*, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 305 (Mar. 2007).

[110] Corn, *supra* note 109, at 307 (detailing that non-international conflicts trigger the protections contained in Common Article 3); *see* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[111] McDonald, *supra* note 8, at 62.

concludes that only a State actor can engage in an armed attack, without analyzing whether or not the attacks themselves, regardless of source, rise to the level of an armed attack.[112] Although Professor McDonald's discussion of the application of Common Article 2 to international armed conflicts and Common Article 3 to non-international armed conflicts is accurate, and her conclusion about the legal capability (or lack thereof) of a non-State terrorist organization to declare war on a State is also correct, she incorrectly identifies the question to be answered.[113] The question should not be whether or not al Qaeda can "declare war on a State";[114] the question should instead be whether the military-like actions of al Qaeda were tantamount to an armed attack, thereby allowing the United States to use military force in self-defense.[115] Professor McDonald does not address this issue.

International terrorism has been recognized as a threat to international peace and security.[116] No State can afford to ignore the threat of a terror organization armed with a weapon of mass destruction, nor is any State immune from this threat.[117] While small scale terrorist attacks mirror, and may well represent, normal criminal activity, large scale terrorist attacks do not. Large-scale terrorist attacks can, in fact, be of sufficient "scale and effect" to represent an armed attack.[118] Similarly, an ongoing series of small-scale terrorist attacks may, in a cumulative

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[112] *Id.* at 58–62.

[113] *Id.*; *see* Corn, *supra* note 109, at 305–07 (highlighting the difference between the *jus ad bellum* and *jus in bello* analyses).

[114] McDonald, *supra* note 8, at 60.

[115] Murphy, *supra* note 62, at 47; Brown, *supra* note 6, at 24. This is not to say that the provisions of Article 51 are inapplicable to international armed conflicts; on the contrary, self-defense under Article 51 may serve as the initiation of an international armed conflict that then triggers the application of the entire Geneva Conventions under Common Article 2. There is not, however, a required connection between the Article 51 self-defense analysis and the *jus in bello* analysis detailed by Professor McDonald. McDonald, *supra* note 8, at 59–62; *see also* Schmitt, *supra* note 106, at 471–76 (discussing the separation between *jus ad bellum* and *jus in bello*, and the current challenges).

[116] *See* S.C. Res. 1368, *supra* note 103, ¶ 1; S.C. Res. 1373, *supra* note 12, *chapeau*, ¶ 4; S.C. Res. 1566, *supra* note 12, ¶ 1.

[117] *See generally* U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2006 (2007), *available at* http://www.state.gov/s/ct/rls/crt/2006/ (detailing the various terrorist threats around the world).

[118] Military and Paramilitary Activities (Nicar. v. U.S.) 1986 I.C.J. 14, 103 (June 27); Brown, *supra* note 6, at 27; SCHMITT, *supra* note 63, at 64; Murphy, *supra* note 62, at 45.

fashion, rise to the level of an armed attack.[119] Under both customary international law and the U.N. Charter, a State threatened or injured by an armed attack may use military force in self-defense, either to prevent the armed attack or in response to it.[120] This rule applies equally to the use of military force in self-defense against a State-actor or against a non-State actor.[121]

Returning to your role as the Chief Executive, you have concluded that the terrorist attack against your State constituted an armed attack for purposes of Article 51. You must now determine a geographic nexus and whether the host State should be assigned responsibility for failing to prevent the attack that occurred, and for allowing the continuing threat represented by an imminent attack.

VI. Step Two: Geographic Nexus and State Responsibility

Unfortunately, even a terrorist organization has to have a home of some sort. Because the organization is located inside a host State, some scholars treat the question of the use of military force in counter-terrorism operations as a question of State responsibility, questioning whether the actions of the non-State terrorist organization may be attributed to the host State.[122] Application of the traditional models poses practical and legal concerns. Practical, because the host State may not be aware of the terrorist infestation, or may be unable to operate against the terrorists, and legal, because a failure to attribute the actions of the terrorist organization to the host State could prohibit the use of military

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[119] SCHMITT, *supra* note 63, at 64. Arguably, this is precisely what Turkey has been facing with the Kongra-Gel. Although each individual attack by the Kongra-Gel is relatively minor, taken across the spectrum of time and effect, the threat posed by the Kongra-Gel becomes significant. Cayci, *supra* note 29; O'Toole, *supra* note 3; 2005 COUNTRY REPORTS, *supra* note 26.

[120] U.N. Charter art. 51; *see* Müllerson, *supra* note 46, at 116–19 (discussing the idea that counter-terrorism may involve "deterrence, anticipation and reprisal").

[121] Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond*, *in* SYMPOSIUM: TERRORISM: THE LEGAL IMPLICATIONS OF THE RESPONSE TO SEPTEMBER 11, 2001, 35 CORNELL INT'L L.J. 533, 534 (Winter 2002); SCHMITT, *supra* note 63, at 25–26.

[122] *See generally* Brown, *supra* note 6 (discussing the various models of State responsibility); Proulx, *supra* note 6 (setting forth a strict liability model for State responsibility).

force within the territory of that host State, at least in the eyes of those applying these models.[123]

A. Attribution of the Terrorist Attack: A Red Herring

Discussions of States' responsibility for terrorist acts committed from within their borders are frequently couched in terms of whether or not the actions of the terrorist organization can be attributed to the host State.[124] Although the concept of attribution applies to situations of State-sponsored terrorism, it is a red herring when addressing a State's right of self-defense when faced with an imminent or actual terrorist attack.[125]

Attribution is an issue in State-sponsored terrorism, as the force used may need to be directed against both the State sponsor and the terrorist organization.[126] In the case of non-State-sponsored terrorism, however, the force used is directed primarily against the terrorist organization itself, and not necessarily against host State forces or facilities.[127] Similarly, if the injured State is seeking to hold the host State liable for the damages caused by the attack, attribution would be an issue.[128] It is not an issue, however, for self-defense.[129] A brief examination of attribution and State responsibility may help clear up this confusion.

There are three basic models of State responsibility—direct responsibility, endorsement, and vicarious responsibility.[130] A State is directly responsible for the acts of its government officials,[131] for the acts

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[123] Brown, *supra* note 6, at 3.
[124] *See generally id.* (discussing the various models of State responsibility); Proulx, *supra* note 6 (setting forth a strict liability model for State responsibility).
[125] Michael N. Schmitt, *Deconstructing October 7th: A Case Study in the Lawfulness of Counterterrorist Military Operations*, *in* TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES 39, 45 (Michael N. Schmitt ed., 2002).
[126] Paust, *supra* note 121, at 540.
[127] *Id*.
[128] Professor Moore Interview, *supra* note 9.
[129] Schmitt, *supra* note 125.
[130] Brown, *supra* note 6, at 7.
[131] G.A. Res. 56/83, *supra* note 67, at 2; *State Responsibility*, [2001] 2 Y.B. Int'l L. Comm'n 40–42, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (2007) [hereinafter *Commentaries on State Responsibility*] (providing commentary to G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/RES/56/83 (Jan. 28, 2002)).

of those empowered to act for the government,[132] and for the conduct of those acting "under the direction or control" of the State.[133] Direct responsibility is a function of the actions or omissions of State actors.[134]

> For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An "act of the State" must involve some action or omission by a human being or group: "States can act only by and through their agents and representatives."
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> . . . For the purposes of the international law of State responsibility . . . [t]he State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in Chapter II [referring to the Responsibility of States for Internationally Wrongful Acts].[135]

Direct responsibility applies to situations in which the host State plays a direct role in supporting, training, or otherwise assisting the terror organization.[136] Arguably, a State that "breaches its obligations not to promote, train, arm, equip or finance terrorist organization[s] must be held responsible . . . and international law should allow the injured State to respond just as if the delinquent State itself had committed the

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[132] G.A. Res. 56/83, *supra* note 67, at 3; *Commentaries on State Responsibility*, *supra* note 131, at 42–43.
[133] G.A. Res. 56/83, *supra* note 67, at 3; *Commentaries on State Responsibility*, *supra* note 131, at 47–49.
[134] *Commentaries on State Responsibility*, *supra* note 131, at 35; Proulx, *supra* note 6, at 624.
[135] *Commentaries on State Responsibility*, *supra* note 131, at 35.
[136] Brown, *supra* note 6, at 8; Proulx, *supra* note 6, at 624; SCHMITT, *supra* note 63, at 44–45.

attack."[137] Similarly, current positions support the idea that a State cannot commit aggression by proxy and shield itself. In other words, a State that "sends terrorists to operate on its behalf must be held responsible for the terrorist aggression, just as if the state had itself committed it."[138] As the link between the host State and the terrorist organization becomes less direct, though, or in a situation where there simply is no direct link, the model of direct responsibility fails, and with it fails the ability to use military force directly against the host State (as opposed to against the terrorists within the host State).[139]

A State endorses an action when the State has "the duty to exercise due diligence to prevent wrongdoing and to punish those who commit wrongful acts on its territory, that injure other states."[140] The Iran hostage crisis in the *Diplomatic and Consular Staff* case serves as a prime example of state responsibility by endorsement.[141]

On 4 November 1979, approximately 3000 militants, self-described "Muslim Student Followers of the Imam's Policy," invaded the U.S. Embassy in Tehran.[142] The Iranian government arguably had no direct role in planning or executing the attack on the U.S. Embassy.[143] The International Court of Justice did note, however, that "the Iranian Government failed altogether to take any 'appropriate steps' to protect the premises, staff and archives of the U.S. mission against attack by the militants, and to take any steps either to prevent this attack or to stop it before it reached its completion."[144] The Iranian government's endorsement of the takeover was of particular importance.[145] State

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[137] Brown, *supra* note 6, at 52–53; *see also* Proulx, *supra* note 6, at 624 (discussing a possible strict liability standard).
[138] Brown, *supra* note 6, at 52.
[139] Proulx, *supra* note 6, at 624.
[140] Brown, *supra* note 6, at 10; *see* G.A. Res. 56/83, *supra* note 67, at 4 (indicating that attribution can arise when a State "acknowledges and adopts the conduct in question"); *Commentaries on State Responsibility*, *supra* note 131, at 52–54 (providing commentary to Article 11 of G.A. Res. 56/83, Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/RES/56/83 (Jan. 28, 2002)).
[141] Brown, *supra* note 6, at 10 (discussing the Iran Hostage Crisis case).
[142] U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 12 (May 24). The U.S. Consulates in Tabriz and Shiraz were also seized, but since operations at those consulates had previously been suspended, no U.S. personnel were seized in the attacks on the consulates. *Id.* at 13.
[143] *Id*. at 30.
[144] *Id*. at 31.
[145] *Id*. at 34. The court found that "Ayatollah Khomeini himself made crystal clear the endorsement by the State both of the take-over of the Embassy and Consulates and of the

responsibility by endorsement fails from a counter-terrorism perspective, though, as it too requires some attribution of the non-State actor's actions to the State itself.[146] Without some fairly significant link between the host State and the terrorist organization, the injured State cannot rely upon endorsement to justify its use of military force against the host State.[147] If the *Diplomatic and Consular Staff* case is any guide, the host State effectively has to claim the actions of the terrorist organization as its own for the injured State to be allowed to use force in self-defense.[148]

Finally, even the fairly open model of vicarious responsibility requires some level of knowledge and inaction by the host State.[149] As Davis Brown[150] points out:

> [A] state may be held responsible for acts not committed by state organs, and not endorsed or adopted by it. The difference between original responsibility and vicarious responsibility is that in the former, responsibility flows from the injurious act, and in the latter, responsibility flows from the failure to take measures to prevent or punish the act.[151]

Thus, a State that "knowingly allows terrorist activity to take place within its borders must also be held responsible for the resulting injuries suffered by other states, just as if the state itself has committed the

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detention of the Embassy staff as hostages," both by expressing his approval of the take-over and by forbidding "members of the Revolutionary Council and all responsible officials to meet the special representatives sent by President Carter to try and obtain the release of the hostages and evacuation of the Embassy." *Id.* The final seal of governmental approval came when Ayatollah Khomeini declared that "the premises of the Embassy and the hostages would remain as they were until the United States had handed over the former Shah for trial and returned his property to Iran." *Id.* at 35.

[146] Brown, *supra* note 6, at 10.

[147] *Id*. at 12. The initial plans for Operation Eagle Claw focused on the terrorists holding the U.S. Embassy staff in Tehran hostage. The possibility of Iranian involvement, however, required the inclusion of contingency plans for dealing with Iranian interference. COLONEL (RETIRED) CHARLIE A. BECKWITH & DONALD KNOX, DELTA FORCE 249–55 (1983).

[148] U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 34–35 (May 24).

[149] Brown, *supra* note 6, at 13.

[150] Davis Brown is the former Deputy Staff Judge Advocate, Defense Information Systems Agency. *Id.* at 1.

[151] *Id*.

injuries."[152] As with other types of State responsibility, vicarious responsibility requires some degree of knowledge on the part of the host State coupled with some act or omission by that State, such as a knowing acquiescence to a planned attack against another State, to justify the exercise of force against the host State.[153]

In any case, the fact that the current terrorist threat is leaning away from State sponsorship or overt support of terrorism poses a major problem with applying any of these models to the current threat.[154] State-sponsored terrorism is less likely now than when host States only had to contend with law enforcement operations, allowing them to comply or not, as they chose, with little concern of retribution.

Afghanistan, under the Taliban regime, provides an unfortunate example of this situation. The Taliban regime was subject to no less than seven Security Council resolutions between 1996 and 11 September 2001 addressing the presence of terrorist organizations in Afghanistan.[155] Three of those resolutions were decided under Chapter VII,[156] and several resolutions called upon the Taliban government to deny the

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[152] *Id*. at 52.
[153] *Id*. at 13.
[154] In 2000, the Department of State listed seven States, including Libya, as being State sponsors of terrorism, further noting that these States had been on that list since 1993. U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 1999, at 2 (2000). The 1999 report also indicated that direct State support to terrorism was declining. *Id*. Since that time, Libya has improved its cooperation in the fight against terror, which finally resulted in Libya being removed from the list of State sponsors of terrorism in 2006. U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2006, CHAPTER 3, STATE SPONSORS OF TERRORISM OVERVIEW (2007), *available at* http://www.state.gov/s/ct/rls/crt/2006/ 82736.htm. As of the 2006 Country Reports, the Department of State listed only three countries—Cuba, Iran, and Syria—who had neither "renounced terrorism [n]or made efforts to act against Foreign Terrorist Organizations." *Id.*; *see also* Schmitt, *supra* note 106, at 458 (highlighting that only State sponsors of terrorism need to be concerned with the current interpretations of *jus ad bellum* principles).
[155] S.C. Res. 1076, U.N. Doc. S/RES/1076 (Oct. 22, 1996); S.C. Res. 1189, U.N. Doc. S/RES/1189 (Aug. 13, 1998) (referring to the 1998 attacks in Nairobi, Kenya and Dar es Salaam, Tanzania that were later linked to al Qaeda); S.C. Res. 1193, U.N. Doc. S/RES/1193 (Aug. 28, 1998); S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998) (linking UNSCR 1189 to the Taliban and Afghanistan, tied to their harboring of al Qaeda and Usama bin Laden); S.C. Res. 1267, *supra* note 88; S.C. Res. 1333, *supra* note 88; S.C. Res. 1363, U.N. Doc. S/RES/1363 (July 30, 2001).
[156] S.C. Res. 1267, *supra* note 88; S.C. Res. 1333, *supra* note 88; S.C. Res. 1363, *supra* note 155.

terrorists safe-haven and to turn Osama bin Laden over for trial.[157] Despite these actions, the attacks of September 11th still occurred.

As a result, on 12 September 2001 the Security Council issued a new resolution stating that it was "[d]etermined to combat by all means threats to international peace and security caused by terrorist acts," and that it "[r]ecogniz[ed] the inherent right of individual or collective self-defence in accordance with the Charter."[158] In the end, multiple iterations of non-military pressure failed to prevent the catastrophic attacks of September 11th.[159] Given the global effort and use of military force to combat terrorism since that time, States are arguably less willing to directly sponsor terror organizations in the face of potential military strikes in response to such support.[160]

If the use of military force against terrorist organizations in self-defense were required to follow one of the traditional models of State responsibility, then the legality of the use of military force would depend on the ability of the injured State to attribute the actions of the terrorist organization to the host State.[161] This could leave a dangerous gap. International terrorist organizations located within States who cannot or will not effectively combat terrorism within their borders could rely on host States turning a blind eye to the terrorist organization launching attacks from within their borders. It could also leave a gap where States could provide covert or tacit support to terrorist organizations operating within their borders. Ultimately, it could leave terrorist organizations

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[157] S.C. Res. 1267, *supra* note 88, ¶ 2; S.C. Res. 1333, *supra* note 88, ¶ 2.

[158] S.C. Res. 1368, *supra* note 103, *chapeau*.

[159] Admittedly, the United States engaged in military strikes in Afghanistan before this time, such as the cruise missile strike on 7 August 1998. There is a significant difference, however, between a cruise missile strike and large-scale military operations. *See* Jamie McIntyre & Andrea Koppel, *U.S. Missiles Pound Targets in Afghanistan, Sudan*, CNN, Aug. 21, 1998, http://www.cnn.com/US/9808/20/us.strikes.02/index.html?iref= newssearch.

[160] As discussed *supra* note 154, there has been a decrease in State sponsorship of terrorism over the last decade, with a particularly noticeable drop in the post-September 11th timeframe. The post-9/11 response seems to bear out the idea that most regime elites are rational utility maximizers, based on their desire to remain in power. This is part of the idea behind the U.S. National Strategy for Combating Terrorism, both in terms of using sticks with State-sponsors and carrots with international partners. NAT'L STRATEGY FOR COMBATING TERRORISM, *supra* note 4, at 15–21.

[161] *But see* Sharp, *supra* note 79, at 47 (suggesting an alternate analysis, that "all acts of international terrorism are either non-state sponsored and thus a crime addressed by national and peacetime treaty law, or are state sponsored and thus a use of force governed by the law of conflict management"). Dr. Sharp's analysis, however, was published in early 2000, more than a year before the 9/11 attacks.

free to operate within permissive environments, with little fear of reprisal.

Fortunately, there is no need to attribute the terrorist attacks to the host State when analyzing the right of self-defense in response to such attacks.[162] If the force used in self-defense is directed solely against the terrorist organization, questions of attributing the terrorist act to the host State are nothing more than a distraction.[163] Attribution is only important if either the injured State intends to use force against host State forces or facilities, or seeks to hold the host State liable for the damages resulting from the terrorist attack.[164] Instead, it is simply necessary to establish a geographic nexus.

B. Geographic Nexus

A geographic nexus is necessary, both logically and legally. First, the injured State should not be allowed to engage in random terrorist hunting expeditions throughout a given region or corner of the globe. The injured State must instead pinpoint the location of the terrorist organization posing the threat, thereby identifying the host State. Second, having identified the host State, the injured State may now call upon the legal responsibility of the host State to prevent the commission of terrorist attacks from within its borders, setting the stage for a required balancing of the injured State's right of self-defense and the host State's right to territorial integrity.[165]

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[162] Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; Paust, *supra* note 121, at 533.

[163] Schmitt, *supra* note 125; Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; *see* Paust, *supra* note 121, at 540.

[164] Professor Moore Interview, *supra* note 9; Paust, *supra* note 121, at 540.

[165] Arguably an injured State could use force in self-defense even if the host State had no responsibility to prevent the commission of terrorist acts from occurring within its borders. This would likely depend on the severity and frequency of attacks; it is not clear how severe or frequent the attacks would have to be in order to overcome the general presumption that States are not responsible for the purely private conduct of non-State actors. The existence of legal responsibility on the part of the host State, however, lends greater credence to the injured State acting inside the host State in self-defense, and helps overcome this presumption. *Commentaries on State Responsibility*, *supra* note 131, at 52–54; *see* SCHMITT, *supra* note 63, at 32 (discussing the balancing of self-defense and territorial integrity).

The first step in addressing this balance is establishing a geographic nexus; with that nexus comes the establishment of the host State's responsibility to prevent terrorist attacks from within its borders. This affirmative duty renders attribution of the terrorist act to the host State a non-issue, at least for purposes of establishing the right of self-defense against the terrorist organization. Simply put, States have an affirmative responsibility under international law to prevent the commission of terrorist acts from within their borders, both generally and specifically.[166] While this general duty originally rose as guidance from the U.N. General Assembly, since September 11th it has morphed into a specific legal obligation on the part of all States, as will be discussed in more detail below.[167]

The general duty arises from the concept of sovereignty; implied within the concept of sovereignty is the idea of control over territory, including territorial and political independence.[168] The actions of non-State actors within the host State that do not affect another State and do not affect international peace and security are generally the concern of only the host State.[169] The actions of non-State actors within the host State that do affect another State or which do affect international peace and security are the concern of more than just the host State; they are also the concern of the injured State, and in some cases, of the international community.[170]

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[166] G.A. Res. 2625 (XXV), *supra* note 12, at 122–23; G.A. Res. 49/60, at 5, U.N. Doc. A/RES/49/60 (Feb. 17, 1995); S.C. Res. 1373, *supra* note 12, ¶ 2(b); S.C. Res. 1566, *supra* note 12, ¶ 3.

[167] The original form of the obligation arose from General Assembly Resolution 2625, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*. G.A. Res. 2625 (XXV), *supra* note 12, at 122–23. The basic outline became more specific with the publication of General Assembly Resolution 49-60, *Measures to Eliminate International Terrorism*. G.A. Res. 49/60, at 5, U.N. Doc. A/RES/49/60 (Feb. 17, 1995). With the publication of Security Council Resolution 1373, the U.N. Security Council clearly established the legal responsibility of States to take steps to prevent terrorism from within their borders. S.C. Res. 1373, *supra* note 12, ¶ 2(b). This was re-affirmed in Security Council Resolution 1566. S.C. Res. 1566, *supra* note 12, ¶ 3.

[168] G.A. Res. 2625 (XXV), *supra* note 12, at 124.

[169] This idea is simply the logical extension of the concept of territorial and political independence. *Id.*

[170] *Commentaries on State Responsibility*, *supra* note 131, at 52–54. As discussed *supra* note 47, the situation in Somalia provided a great example of this principle in action. What began as a purely domestic situation eventually began to destabilize the region. United Nations, United Nations Operation in Somalia I (UNOSOM I)—Background, http://www.un.org/Depts/dpko/dpko/co_mission/unosom1backgr2.html (last visited June 12, 2009). Eventually, the Security Council, acting under Chapter VII, authorized the use

States have an obligation not to use force in their international relations, directly or indirectly, including a "duty to refrain from organizing or encouraging the organization of irregular forces or armed bands . . . for incursion into the territory of another State."[171] States are also supposed to "take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens."[172]

Actions by the U.N. Security Council since September 11th have clarified that these requirements are not just guidance—they are legal obligations. The Security Council explicitly set forth the responsibility of every State to prevent the commission of terrorist acts from within its borders in UNSCR 1373 and UNSCR 1566.[173] Per UNSCR 1373, States shall "[t]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information."[174] UNSCR 1566 reinforces that prohibition, "[*c*]*all*[*ing*] *upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature."[175] Even assuming the validity of the argument that the general duties are aspirational in nature, no such argument follows with respect to the specific requirements of UNSCR 1373: States are required to comply with the decisions of the Security Council.[176] While the language used in UNSCR 1566 casts some doubt as to whether or not it is binding, the language in paragraph 2 of UNSCR 1373 does not.[177] States are ultimately responsible for preventing terrorists acts committed from within their borders.[178] A breach of this responsibility opens the door to

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of force to address the situation. S.C. Res. 794, ¶ 10, U.N. Doc. S/RES/794 (Dec. 3, 1992).

[171] G.A. Res. 2625 (XXV), *supra* note 12, at 123; *see also* G.A. Res. 49/60, at 5, U.N. Doc. A/RES/49/60 (Feb. 17, 1995) (containing similar language aimed specifically at terrorism).

[172] G.A. Res. 49/60, at 5, U.N. Doc. A/RES/49/60.

[173] S.C. Res. 1373, *supra* note 12, ¶ 2(b); S.C. Res. 1566, *supra* note 12, ¶ 3.

[174] S.C. Res. 1373, *supra* note 12, ¶ 2(b).

[175] S.C. Res. 1566, *supra* note 12, ¶ 3.

[176] U.N. Charter art. 25.

[177] *See* S.C. Res. 1566, *supra* note 12, ¶ 3. Paragraph 3 "calls upon all States" to prevent terrorist acts. *Id.* By comparison, paragraph 2 of UNSCR 1373 directs States to act. S.C. Res. 1373, *supra* note 12, ¶ 2(b).

[178] G.A. Res. 2625 (XXV), *supra* note 12, at 122–23; G.A. Res. 49/60, at 5, U.N. Doc. A/RES/49/60 (Feb. 17, 1995); S.C. Res. 1373, *supra* note 12, ¶ 2(b); S.C. Res. 1566, *supra* note 12, ¶ 3.

possible action by injured States, although there are additional actions that must first take place.[179]

As the Chief Executive, having determined the location of the terrorist threat, you must now determine how much warning to provide the host State, including the scope and specificity of your warning, and how much time you will give the host State to act in response. These steps are necessary to overcome the prohibition against the use of force in Article 2(4).[180]

VII. Step Three: Duty to Warn; Opportunity to Act

A. Prohibition on the Use of Force

A State's failure to fulfill its international obligations ordinarily would not justify the use of military force against that State or within its territories.[181] States are generally prohibited from using force against other States; this includes a prohibition against "the threat or use of force against the territorial integrity or political independence of any state . . . ."[182] This prohibition arises from a variety of sources; the two most commonly cited are the Kellogg-Briand Pact, which outlaws "war for the solution of international controversies, and renounce[s] it as an instrument of national policy" in international relations,[183] and Article 2(4) of the U.N. Charter.[184] The prohibition against the use of force includes not only attacking a State, its forces, or facilities, but also the use of force inside a State's territory without the State's permission.[185]

The use of force is permitted, however, when authorized by the Security Council under Article 42,[186] or when acting in self-defense

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[179] *Commentaries on State Responsibility*, *supra* note 131, at 54–57.
[180] U.N. Charter art. 2, para. 4.
[181] *Id.*; *see also* G.A. Res. 2625 (XXV), *supra* note 12, at 122; *Commentaries on State Responsibility*, *supra* note 131, at 131–32; SCHMITT, *supra* note 63, at 43–44.
[182] U.N. Charter art. 2, para. 4.
[183] Treaty Providing for the Renunciation of War as an Instrument of National Policy art. 1, July 24, 1929, T.S. 796, 6 Stat. 2343, 2 Bevans 732, 94 L.N.T.S. 57.
[184] U.N. Charter art. 2, para. 4.
[185] *Id.*; *see also* G.A. Res. 3314 (XXIX), at 143, U.N. Doc. A/9631 (1974); G.A. Res. 2625 (XXV), *supra* note 12, at 122–23.
[186] U.N. Charter art. 42. Article 42 allows the Security Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and

under Article 51.[187] The Security Council has identified international terrorism as a threat to international peace and security on a number of occasions, and while the Security Council has authorized some actions under Article 41, to date it has not specifically authorized military action under Article 42.[188] Article 41 covers the entire spectrum of actions not rising to the level of the use of armed force; the various Security Council resolutions directing the criminalization of terrorist acts, the freezing of funds, and the prohibition on providing weapons or equipment to terrorist organizations fall within its scope.[189] None of the various Security Council resolutions addressing international terrorism as a threat to international peace and security under Chapter VII, including UNSCR 1368, the most explicit concerning the use of force, include any reference to the use of military force under Article 42 of the U.N. Charter.[190]

The Security Council has implicitly and explicitly allowed injured States to deal with terrorist threats under Article 51.[191] The language in UNSCR 1368 recognizes "the inherent right of individual or collective self-defence in accordance with the Charter."[192] Although UNSCR 1368 does not outright refer to Article 51, there is no other possible reading of

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security. Such action may include demonstrations, blockage, and other operations by air, sea, or land forces . . . ." *Id.*

[187] *Id.* art. 51.

[188] S.C. Res. 1267, *supra* note 88, *chapeau*; S.C. Res. 1333, *supra* note 88, *chapeau*; S.C. Res. 1368, *supra* note 103, ¶ 1; S.C. Res. 1373, *supra* note 12, *chapeau*, ¶ 4; S.C. Res. 1438, ¶ 1, U.N. Doc. S/RES/1438 (2002) (Oct. 14, 2002); S.C. Res. 1440, ¶ 1, U.N. Doc. S/RES/1440 (2002) (Oct. 24, 2002); S.C. Res. 1450, ¶ 1, U.N. Doc. S/RES/1450 (2002) (Dec. 13, 2002); S.C. Res. 1465, ¶ 1, U.N. Doc. S/RES/1465 (2003) (Feb. 13, 2002); S.C. Res. 1516, ¶ 1, U.N. Doc. S/RES/1516 (2003) (Nov. 20, 2003); S.C. Res. 1530, ¶ 1, U.N. Doc. S/RES/1530 (2004) (Mar. 11, 2004); S.C. Res. 1566, *supra* note 12, ¶ 1; S.C. Res. 1611, ¶ 1, U.N. Doc. S/RES/1611 (July 7, 2005); S.C. Res. 1618, ¶ 1, U.N. Doc. S/RES/1618 (Aug. 4, 2005); *see also* S.C. Res. 1540, S/RES/1540 (Apr. 28, 2004) (discussing the danger of weapons of mass destruction).

[189] *See* S.C. Res. 1566, *supra* note 12 (calling upon member States to criminalize terrorist acts); S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005) (calling upon member States to freeze the financial assets associated with al Qaeda and prevent the provision of arms or equipment to al Qaeda).

[190] SCHMITT, *supra* note 63, at 9; *see* S.C. Res. 1267, *supra* note 88, *chapeau*; S.C. Res. 1368, *supra* note 103, ¶ 1; S.C. Res. 1373, *supra* note 12, *chapeau*, ¶ 4; S.C. Res. 1566, *supra* note 12, ¶ 1.

[191] S.C. Res. 1368, *supra* note 103, *chapeau* (explicitly "[r]ecognizing the inherent right of individual and collective self-defense in accordance with the Charter"); *see* S.C. Res. 1566, *supra* note 12, *chapeau* (implicitly leaving the door open for force in self-defense, by "[r]eaffirming also the imperative to combat terrorism in all its forms and manifestations *by all means*" (emphasis added)).

[192] S.C. Res. 1368, *supra* note 103, *chapeau*.

its reference to "the inherent right of individual or collective self-defence," a phrase straight out of Article 51.[193] Security Council Resolution 1373 also refers to the inherent right of self-defense, identifying "the need to combat by all means, in accordance with the U.N. Charter, threats to international peace and security caused by terrorist acts."[194] Similarly, UNSCR 1566 does not include any reference to self-defense, but reiterates "the imperative to combat terrorism in all its forms and manifestations by all means . . . ."[195]

Scholars have debated whether the Security Council truly intended to allow injured States to use military force to combat terrorism, despite the reference to self-defense and the use of the term "combat."[196] Professor Jordan Paust takes this position:

> [P]hrases such as "combat by all means" and "suppress terrorist attacks and take action against perpetrators of such acts" are broad enough to provide an authorization to use military force against the perpetrators and the fact that the resolution does not contain phrases used previously in Security Council authorizations to use military force in Korea, during the Gulf War, or in Bosnia-Herzegovina, such as "by all necessary means" as opposed to "combat by all means" and "take action against," is not determinative.[197]

Others further question the applicability of Article 51 to terrorist threats, arguing that it only applies to State-on-State violence.[198] This position is further supported by the International Court of Justice's advisory opinion on Israel's construction of a wall in the occupied

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[193] *Id.*; *see* U.N. Charter art. 51.
[194] S.C. Res. 1373, *supra* note 12, *chapeau*.
[195] S.C. Res. 1566, *supra* note 12, *chapeau*.
[196] Paust, *supra* note 121, at 544.
[197] *Id.* at 544–45; *see also* Frederic L. Kirgis, *ASIL Insights—Terrorist Attacks on World Trade Center and Pentagon*, ASIL, Sept. 2001, http://www.asil.org/insights/insigh77.htm (containing a fascinating three-month running debate by a number of international legal scholars concerning the attacks, and questions of prosecution and the use of force).
[198] McDonald, *supra* note 8, at 62; *see also* MOORE & TURNER, *supra* note 86, at 490 (citing Muna Ndulo, *International Law and the Use of Force: America's Response to September 11*, 28 CORNELL L. F. 5 (Spring 2002), in which Professor Ndulo indicates a belief that the self-defense construct under Article 51 of the U.N. Charter only applies to State-on-State violence, and would only apply to the actions of non-State actors if their actions could be attributed to a specific State).

Palestinian territories.[199] In the *Wall* opinion, the court stated that "Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack *by one State against another State*."[200]

Nothing in the language of Article 51, however, limits the right of self-defense to attacks by other States.[201] As Professor Moore points out, "[t]he language of Article 51 . . . does not support this interpretation: there is no explicit statement that an 'armed attack' must be committed by a state."[202] Professor Paust concurs, stating:

> Although there is widespread agreement that an "armed attack" must occur, nothing in the language of Article 51 requires that such an armed attack be carried out by another state, nation, or belligerent, as opposed to armed attacks by various other non-state actors . . . .[203]

Even judges within the International Court disagreed on this finding. In his dissenting opinion, Judge Buergenthal points out that "the U.N. Charter, in affirming the inherent right of self-defence, does not make its exercise dependent upon an armed attack by another State."[204] In her dissenting opinion, Judge Higgins concurs, stating that "[t]here is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State."[205]

Furthermore, the Security Council's actions in response to the United States after September 11th indicated an acknowledgement of the right of self-defense under Article 51.[206] In *Wall*, the International Court of

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[199] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136 (July 9).
[200] *Id*. at 194 (emphasis added).
[201] MOORE & TURNER, *supra* note 86, at 490; Paust, *supra* note 121.
[202] MOORE & TURNER, *supra* note 86, at 490.
[203] Paust, *supra* note 121.
[204] 2004 I.C.J. 136, 242 (declaration of Judge Buergenthal).
[205] *Id*. at 215 (separate opinion of Judge Higgins).
[206] S.C. Res. 1368, *supra* note 103, *chapeau*; S.C. Res. 1373, *supra* note 12, *chapeau*. The Security Council published UNSCR 1368 on 12 September 2001, the day after the attack. This resolution recognized the severity of the attacks, and specifically references the right of self-defense. S.C. Res. 1368, *supra* note 103, *chapeau*. On 20 September 2001, President George W. Bush issued a statement to the Taliban, directing them to turn over Osama bin Laden and take other acts in order to prevent retaliation. Transcript of President Bush's Address, CNN, Sept. 21, 2001, http://archives.cnn.com/2001/US/09/20/

Justice attempted to distinguish the situation faced by Israel as a purely domestic threat, thereby taking that threat out of the self-defense rubric contained in UNSCRs 1368 and 1373.[207] The court's decision in this area has significant weaknesses as well. As Judge Buergenthal pointed out in his dissent, "[i]n neither of these resolutions did the Security Council limit their application to terrorist attacks by State actors only, nor was an assumption to that effect implicit in these resolutions. In fact, the contrary appears to have been the case."[208]

Finally, some may argue that the Security Council has "taken measures necessary to maintain international peace and security" under Article 51, thereby eliminating the right of States to act in self-defense against terrorism.[209] Although this argument could be addressed in terms of whether Article 51 requires the Security Council to take effective action, it is not necessary to go down that road. It is sufficient to point out that Security Council actions under Chapter VII bar the right of self-defense only when its actions "maintain international peace and security."[210] The Security Council acted under Chapter VII on a number of occasions prior to September 11th; none of these actions prevented the attacks.[211] Since September 11th, the Security Council has taken further action, including establishing the Counter-Terrorism Committee under UNSCR 1373.[212] None of the Security Council's actions since that time have prevented the further commission of terrorist attacks across the globe, a fact borne out by the current conflict between Turkey and the Kongra-Gel in northern Iraq.[213]

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gen.gush.transcript. On 28 September 2001, the Security Council published UNSCR 1373, "[r]eaffirming the inherent right of individual or collective self-defense as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)." S.C. Res. 1373, *supra* note 12, *chapeau*.

[207] 2004 I.C.J. 136, 194.

[208] *Id*. at 242 (declaration of Judge Buergenthal).

[209] U.N. Charter art. 51.

[210] *Id*.

[211] *See* S.C. Res. 1267, *supra* note 88; S.C. Res. 1333, *supra* note 88; S.C. Res. 1363, *supra* note 155. All three of these resolutions were decided under Chapter VII of the U.N. Charter. As discussed above, none of the Security Council resolutions pertaining to al Qaeda discouraged it, nor did they prompt the Taliban regime in Afghanistan to act to prevent the attacks which ultimately took place.

[212] *See* Counter-Terrorism Committee, UN, http://www.un.org/sc/ctc/ (last visited June 12, 2009).

[213] After a period of diplomatic discussions as well as air strikes, Turkish forces finally entered northern Iraq and spent approximately one week hunting Kongra-Gel fighters. *Turkey Sends More Troops Into Iraq*, CNN, Feb. 27, 2008, http://www.cnn.com/2008/WORLD/meast/

Given the numerous Security Council Resolutions highlighting international terrorism's continuing threat, the Security Council clearly has not restored international peace and security in this area.[214] It is difficult to conclude that the Security Council is successfully "maintaining international peace and security" against the threat of international terrorism.[215] States therefore retain their right of self-defense under Article 51.[216] No State would be willing to allow terrorist organizations to attack its citizens with impunity, simply because the Security Council, acting under Chapter VII, has directed States to prevent the commission of terrorist acts from within their borders. Such directives have not prevented the Taliban from attacking Afghanistan from their bases in the FATA area of Pakistan,[217] nor have they stopped the Kongra-Gel from attacking Turkey from Iraq.[218]

Returning to the question of self-defense under Article 51, the right of self-defense must still be balanced against the right of territorial integrity. In a situation involving State-sponsored terrorism, Articles 2(4) and 51 do not conflict, as these articles work in concert against an aggressor State.[219] In a situation involving non-State actors, however, there is still a conflict between Articles 2(4) and 51—the right of the injured State to defend itself versus the right of the host State to its territorial integrity.[220]

02/27/turkey.iraq/index.html; *Iraq Incursion Finished, Turkey Says*, CNN, Feb. 29, 2008, http://www.cnn.com/2008/WORLD/meast/02/29/iraq.main/ index.html. Since that time, Turkey has again opened fire on Kongra-Gel positions in northern Iraq. Mohammed Tawfeeq & Talia Kayali, *Turkish Troops Shell Northern Iraq*, CNN, Mar. 5, 2008, http:// www.cnn.com/2008/WORLD/meast/03/05/turkey.iraq/index.html?iref=newssearch.

[214] S.C. Res. 1267, *supra* note 88, *chapeau*; S.C. Res. 1333, *supra* note 88, *chapeau*; S.C. Res. 1368, *supra* note 103, ¶ 1; S.C. Res. 1373, *supra* note 12, *chapeau*, ¶ 4; S.C. Res. 1438, *supra* note 188, ¶ 1; S.C. Res. 1440, *supra* note 188, ¶ 1; S.C. Res. 1450, ¶ 1, U.N. Doc. S/RES/1450 (2002) (Dec. 13, 2002); S.C. Res. 1465, ¶ 1, U.N. Doc. S/RES/1465 (2003) (Feb. 13, 2002); S.C. Res. 1516, *supra* note 188, ¶ 1; S.C. Res. 1530, *supra* note 188, ¶ 1; S.C. Res. 1566, *supra* note 12, ¶ 1; S.C. Res. 1611, , U.N. Doc. S/RES/1530 (2004) (Mar. 11, 2004), ¶ 1; S.C. Res. 1618, ¶ 1, U.N. Doc. S/RES/1618 (Aug. 4, 2005).

[215] U.N. Charter art. 51.

[216] *Id*.

[217] *Saleh Interview*, *supra* note 2.

[218] Hooper, *supra* note 31.

[219] *Panel I Discussion*, *supra* note 55, at 141–42 (reporting Robert Turner's comments); SCHMITT, *supra* note 63. This assumes that the State-sponsored terrorist act rose to the level of an armed attack.

[220] U.N. Charter art. 2, para. 4; G.A. Res. 2625 (XXV), *supra* note 12, at 122; *Commentaries on State Responsibility*, *supra* note 131, at 131–32; Schmitt, *supra* note 106, at 455–56.

While the host State has the responsibility to prevent the commission of terrorist attacks from within its borders, a breach of that duty does not necessarily render the host State responsible for the terrorist attacks, nor does it automatically render the host State or its territory susceptible to attack by the injured State.[221] The legal framework involved is not one of strict liability; instead, the proper balancing of the interests of the injured State and the host State requires some act or omission on the part of the host State, even in cases where the actions of the terrorist organization cannot be attributed to the host State itself.[222] In order to establish the act or omission, the injured State must warn the host State, and provide the host State with some opportunity to act, subject to the requirements of self-defense.[223]

B. Duty to Warn; Opportunity to Act

While the injured State should provide some warning to the host State, no clear standard exists concerning the quantity, quality, and timing of such warning.[224] The injured State will be reluctant to sacrifice any level of operational surprise in providing the host State with warnings and an opportunity to act. This is true of both the warning and the amount of time provided to the host State to act on the warnings. Professor Moore supports this position. He states that the warnings do not need to be so detailed that the injured States loses operational surprise, nor do they need to immediately precede the use of military force in self-defense—"it is not necessary to give away the tactical advantage."[225] Unfortunately, the provision of knowledge can be a

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[221] U.N. Charter art. 2, para. 4; G.A. Res. 2625 (XXV), *supra* note 12, at 122; *Commentaries on State Responsibility*, *supra* note 131, at 131–32; SCHMITT, *supra* note 63, at 43–44.

[222] SCHMITT, *supra* note 63, at 31–33; *see* Proulx, *supra* note 6, at 624 (expressing his concern that "passiveness or indifference toward terrorist agendas within its own territory might trigger its responsibility . . . as though it had actively participated").

[223] G.A. Res. 56/83, *supra* note 67, Annex, art. 43; *Commentaries on State Responsibility*, *supra* note 131, at 119–20; Professor Moore Interview, *supra* note 9; SCHMITT, *supra* note 63, at 66; Schmitt, *supra* note 106, at 455–56.

[224] G.A. Res. 56/83, *supra* note 67, Annex, art. 43; *Commentaries on State Responsibility*, *supra* note 131, at 119–20; *see* Brown, *supra* note 6, at 30 (discussing the primary right of the host State to police up terrorists within its borders); *see also* Convention with Respect to the Laws and Customs of War on Land, with annex of regulations, annex art. 26, Oct. 18, 1907, 36 Stat. 2277.

[225] Professor Moore Interview, *supra* note 9. The injured State could likely meet this requirement by providing general statements to the U.N. General Assembly or Security

problem; providing sufficiently detailed knowledge to the host State could be counterproductive, and generically worded communications may be insufficient to establish sufficient knowledge on the part of the host State to allow vicarious liability.[226]

Some warning is necessary, if only to avoid a pretextual use of force.[227] In theory, the warning could come after the injured State engages in its counter-terrorism operation, rather than before, but this entails some risks. First, justifications provided after the fact may be seen as less credible. Second, if the host State does not understand the reason behind the injured State's actions, it may legitimately view an incursion by the injured State as an illegal use of force.[228]

Part of the problem in this regard is that counter-terrorism operations, both law enforcement and military, are typically based on intelligence. Every State seeks to protect sources, means, and methods of intelligence collection. As Professor Michael Schmitt notes:

> [T]he information necessary to establish the material facts will be extraordinarily sensitive. Releasing it may endanger lives of human sources, jeopardize ongoing intelligence operations of use in targeting the terrorists or foiling future attacks, surrender the element of surprise, and reveal critical information.[229]

Council, or even directly to the host State itself, detailing a general concern about the presence of the terrorist organization and the ongoing threat. *Id.*

[226] SCHMITT, *supra* note 63, at 70–72.

[227] Professor Moore Interview, *supra* note 9. If the injured State fails to warn the host State, the forces of the host State could attack the forces of the injured State, assuming that the use of force by the injured State violated international law. On the other hand, if the injured State provides proper warning to the host State, and the host State still attempts to interfere with the legitimate exercise of self-defense by the injured State, then the injured State can legitimately respond against host State forces. *Id*.

[228] Brown, *supra* note 6, at 30. The danger with explaining, rather than warning, is that the host State may initially claim that the use of force by the injured State is illegal, and may attack injured State forces based on that declaration. The injured State cannot effectively claim that the host State should have known better than to interfere with the injured State's actions if the host State did not know why the injured State was using force within the territory of the host State. A failure to warn could result in the host State viewing the situation from a *jus ad bellum* perspective. *See* Schmitt, *supra* note 106, at 443.

[229] SCHMITT, *supra* note 63, at 71.

All of this leaves open a question of evidence and proof—how much is necessary, how much must be shared with the general public vice being shared at high levels of government, and the global perception of using force based on secret evidence. Critics of the 2003 Iraq invasion cite Secretary of State Colin Powell's speech before the U.N., and question what he knew and did not know.[230]

Turkey's current operations in northern Iraq serve as an example of this as well. Although Turkey has provided general information concerning the threat posed by the Kongra-Gel, it has not provided the general public much specific information concerning that threat. Although it need not provide the public specific information, Turkey should be prepared to provide specific information in other forums, such as in a private meeting with Iraq, in front of the Security Council, or before the International Court of Justice, if required.[231]

The difficulty lies in establishing the precise standard. Professor Schmitt suggests using a clear and compelling standard, mirroring the standard used by the United States prior to the invasion of Afghanistan.[232] However, he acknowledges that evidence might not be disclosed due to its sensitivity or, if disclosed, may be disclosed only "to the extent practicable in the circumstances."[233]

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[230] *See* MICHAEL ISIKOFF & DAVID CORN, HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR 175–90 (2006) (detailing the lead-up to Secretary Powell's speech); S. REP. NO. 108-301, at 365–70 (2004) (detailing the Senate hearing concerning the intelligence relied upon by Secretary Powell).

[231] *But see* Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 189–99 (Nov. 6) (establishing that the burden of proof falls on the party acting in self-defense, but not otherwise establishing the standard).

[232] SCHMITT, *supra* note 63, at 70 (citing the Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001) [hereinafter Negroponte Letter]). Professor Schmitt defines this standard as somewhere between a preponderance of the evidence and beyond a reasonable doubt. *Id*. at 69–70. In the Negroponte Letter, *supra*, Ambassador Negroponte simply stated that the United States had "clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks." Ambassador Negroponte did not provide any specifics on the information that linked Al-Qaeda to the attacks in that letter (although such information had arguably been provided earlier); the letter instead discussed the role of the Taliban as the de facto government in Afghanistan. Negroponte Letter, *supra*.

[233] SCHMITT, *supra* note 63, at 70–71.

Dr. Sharp also believes that the information provided to the general public need only be general, and that the injured State has the right to protect its intelligence sources, means, and methodologies.[234] In his view, the term "burden of proof" effectively has no meaning because the decision to use force is a political one. The threshold ultimately depends on the audience and the level of evidence necessary to persuade them, such as persuading the host State to allow intervention, or persuading the domestic population to allow for the use of military force.[235]

Although it may seem that warning the host State will hinder the injured State, this step has a positive side. The injured State is not limited to simply asking the host State to deal with the problem; the injured State can also ask the host State's permission to act in its place, inside its territory.[236] If the host State consents to the presence of law enforcement or military operations by the injured State, the analysis effectively ends.[237] Consent eliminates the conflict between the injured State's right of self-defense and the host State's right of territorial integrity.[238]

Additionally, at this stage the injured State needs to determine whether the counter-terrorism operation will involve law enforcement, military force, or both. This determination is very fact dependent, both in terms of the situation faced and in terms of the capabilities of, and relationship with, the host State. If the injured State has good relations with the host State, and if the host State tends to follow the rule of law, then law enforcement is likely to be the most appropriate response.[239] On the other hand, if the injured State does not have good relations with the host State, if the host State does not follow the rule of law, or if the

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[234] Dr. Sharp Interview, *supra* note 9.

[235] *Id*. International courts have not established a clear level of proof. *See* Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 189–99 (Nov. 6). The burden of proof in the domestic courts of injured States is also unclear. This raises the question, could the host State hold the injured State liable for damages caused by the injured State, should the intelligence turn out to be inaccurate? If the standard of proof is low, then liability may be necessary to limit pretextual uses of force; if high, however, such liability may not be necessary.

[236] Dr. Sharp Interview, *supra* note 9; Professor Moore Interview, *supra* note 9.

[237] Dr. Sharp Interview, *supra* note 9; Professor Moore Interview, *supra* note 9; G.A. Res. 56/83, *supra* note 67, Annex, art. 20; *Commentaries on State Responsibility*, *supra* note 131, at 72–74; SCHMITT, *supra* note 63, at 66.

[238] Dr. Sharp Interview, *supra* note 9; Professor Moore Interview, *supra* note 9; G.A. Res. 56/83, *supra* note 67, Annex, art. 20; *Commentaries on State Responsibility*, *supra* note 131, at 72–74; Schmitt, *supra* note 106, at 455.

[239] Dr. Sharp Interview, *supra* note 9.

host State lacks the capability to address the problem, then military force may be permissible.[240]

Returning yet again to your role as the Chief Executive, you have determined that military force is necessary to stop the terrorist threat. Your diplomatic personnel make contact with the host State, providing them with the necessary warnings and asking them either to act or to allow your personnel to act in their stead. Although the host State acknowledges the existence of the terrorists, they indicate that they are unable to police that portion of their country and unwilling to allow you to do so. The host State believes that the presence of your troops in their State would destabilize the political situation and could trigger riots or insurrection. This brings you to step four in the analysis; you must now determine whether your right of self-defense is subordinate or superior to the host State's right to territorial integrity.

VIII. Step Four: Use of Military Force in Self-Defense

At this stage in the hypothetical, let us assume that the injured State has sufficient intelligence to prove the existence and location of the terrorist threat, and you, as Chief Executive, have determined that the host State has the legal responsibility to prevent the type of attack that has occurred and is about to recur. You have also determined that the host State is unwilling or unable to comply with its international legal obligations, and that its breach of those obligations poses a continuing threat to your civilians. So which prevails—the right of self-defense, or the right of territorial integrity?

A. Authority to Use Military Force

As discussed earlier, Article 2(4) of the U.N. Charter prohibits "the threat or use of force against the territorial integrity or political independence of any state."[241] A State's failure to fulfill its international obligations would not normally justify the use of military force against

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[240] *Id.*; *see also* MOORE & TURNER, *supra* note 86; Lietzau, *supra* note 85; Sharp, *supra* note 79, at 39.
[241] U.N. Charter art. 2, para. 4.

that State or within its territories.[242] In this situation, however, the host State's continuing breach poses a risk to the injured State. Based on the principle of self-defense, the injured State may use military force inside the territory of the host State to eliminate the threat.[243] As Professor Schmitt discusses:

> Lest the right to self-defense be rendered empty in the face of terrorism, in certain circumstances the principles of territorial integrity must yield to that of self-defense against terrorists.
>
> . . . [T]he balancing of self-defense and territorial integrity depends on the extent to which the State in which the terrorists are located has complied with its own responsibilities vis-à-vis the terrorists.[244]

At this point, the problem can be approached in two possible ways. First, the failure of the host State to act could be viewed as de facto state sponsorship, a position espoused by Dr. Sharp.[245] This approach follows the attribution models discussed earlier, and allows the injured State to use force against host State facilities and personnel, as well as against terrorist facilities and personnel.[246] Despite some deterrent appeal, this course of action creates a greater risk of expanding the conflict beyond what is necessary to address the threat.[247]

Second, the injured State could rely on the host State's unwillingness or inability to address the threat, avoid the question of attribution, and simply act in place of the host State, limiting operations to terrorist targets only.[248] This position better preserves the friendly relations between the injured and host States, while simultaneously retaining the ability of the injured State to act directly against the host State, if it

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[242] *Id.*; *see also* G.A. Res. 2625 (XXV), *supra* note 12, at 122; *Commentaries on State Responsibility*, *supra* note 131, at 132–32; SCHMITT, *supra* note 63, at 43–44.
[243] U.N. Charter art. 51; G.A. Res. 56/83, *supra* note 67, annex, art. 21; *Commentaries on State Responsibility*, *supra* note 131, at 74–75; SCHMITT, *supra* note 63, at 66.
[244] SCHMITT, *supra* note 63, at 32.
[245] Sharp, *supra* note 79, at 44.
[246] *Id*. at 47.
[247] SCHMITT, *supra* note 63, at 73.
[248] Professor Moore Interview, *supra* note 9; SCHMITT, *supra* note 63, at 66; Paust, *supra* note 121, at 540.

actively interferes with the counter-terrorism operation.[249] The proportionality analysis, discussed briefly in the next section, is also somewhat cleaner following this model.

The extent and duration of the use of military force by the injured State will depend on the circumstances. Regardless of whether the injured State views the lack of cooperation by the host State as de facto State-sponsorship, the injured State's military operations should demonstrate "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[250] Additionally, the actions of the injured State must not be "unreasonable or excessive."[251] These requirements are often expressed as a three-pronged test of necessity, proportionality, and imminency.[252] While a full analysis of the application of necessity, proportionality, and imminency is outside the scope of this article, a brief discussion places their role in the context of the suggested analysis.

B. Necessity, Proportionality, and Imminency

Employing the traditional view of necessity and imminency, the State was not supposed to take military action while other avenues of problem solving, such as diplomacy, still remained.[253] Counter-terrorism operations face different challenges in adhering to these principles when the terrorist threat is hard to locate, often acts from within civilian population bases, and generally does not provide the warnings that tend to appear in more traditional armed conflicts, such as breaking off

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[249] Professor Moore Interview, *supra* note 9; SCHMITT, *supra* note 63, at 66–67; Müllerson, *supra* note 46, at 109–10, 122. This is another aspect to the requirement to warn. *See supra* note 225. If the injured State fails to warn the host State, the forces of the host State could attack the forces of the injured State, assuming that the use of force by the injured State was a violation of international law; in such situation, it would be hard for the injured State to successfully argue that the host State should not have interfered. On the other hand, if the injured State provides proper warning to the host State, and the host State still attempts to interfere with the legitimate exercise of self-defense by the injured State, then the injured State can legitimately respond against host State forces. Professor Moore Interview, *supra* note 9.

[250] TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, VOLUME 4, DOCUMENTS 80–121: 1836–1846, at 449 (Hunter Miller ed., 1934) (detailing the 1842 letter from Daniel Webster to Lord Ashburton regarding the *Caroline* incident).

[251] *Id*.

[252] Brown, *supra* note 6, at 38.

[253] Schmitt, *supra* note 106, at 454.

diplomatic communications.[254] Professor Schmitt expresses concern with this standard in that "acts of self-defence must occur only during the last feasible window of opportunity in the face of an attack that is almost certainly going to occur."[255] He further proposes an alternative method of evaluating the requirement for self-defense: "the confluence of an attacker's capability and intent to conduct an attack with a defender's last reasonable chance to foil an attack before it begins."[256] His proposed model recognizes the inherent difficulties in fighting a non-traditional enemy, and recognizes that the terrorist threat tends to model criminal activity with military effects.[257]

The current fight between the United States and al Qaeda provides a good example of the application of this model. Osama bin Laden made it clear as early as 1998 that al Qaeda intended to attack American targets.[258] Some of al Qaeda's pre-September 11th attacks on Americans, such as the bombing of the embassies in Kenya and Tanzania, provided evidence of its capability.[259] Unfortunately, the true proof of al Qaeda's capability to attack American targets was not presented until September 11th.[260] Since then, many have questioned whether the United States had the opportunity to eliminate Osama bin Laden prior to September 11th, and if so, why the opportunity was not taken.[261] This hindsight view highlights a truism in counter-terrorism

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[254] *Id*. at 463–68; *see also* GANOR, *supra* note 34, at 6–8.
[255] Schmitt, *supra* note 106, at 454.
[256] *Id*.; *see also* Jane Dalton, *Panel V Commentary—The Road Ahead*, *in* 79 INTERNATIONAL LAW STUDIES 479 (Fred L. Borch & Paul S. Wilson eds., 2003) (discussing the use of indicators and past conduct to gauge the need for action).
[257] *See* Schmitt, *supra* note 106, at 458–68 (discussing the asymmetric aspects of the war on terror).
[258] Jerrold M. Post, *Killing in the Name of God: Osama Bin Laden and Al Qaeda*, *in* 18 COUNTERPROLIFERATION PAPERS FUTURE WARFARE SERIES 2002, at 8 (Nov. 2002), *available at* http://www.au.af.mil/au/awc/awcgate/cpc-pubs/post.pdf; THE 9/11 COMMISSION REPORT 47 (n.d.) [hereinafter 9/11 COMMISSION REPORT].
[259] *See* Jamie McIntyre & Andrea Koppel, *U.S. Missiles Pound Targets in Afghanistan, Sudan*, CNN, Aug. 21, 1998, http://www.cnn.com/US/9808/20/us.stroles/02/index.html?iref=newssearch (reporting on the link between the embassy bombings and al Qaeda, and subsequent cruise missile strikes); 2005 COUNTRY REPORTS, *supra* note 26, at 218 (detailing al Qaeda's involvement in the bombings of the U.S. Embassies); S.C. Res. 1267, *supra* note 86, *chapeau* (directing that Osama bin Laden be turned over for prosecution for his involvement in the bombing of the U.S. Embassies).
[260] *See* 9/11 COMMISSION REPORT, *supra* note 258. Although the entire report is devoted to the background and events of September 11th, chapter 9 focuses on the actual attacks. *Id.* at 278–323.
[261] *See id*. Chapter 4, in particular, looks at a number of pre-9/11 situations in which action could have been taken against Osama bin Laden. Although we cannot change the

operations: it is sometimes difficult to recognize a "final opportunity" when it appears, and States need to take advantage of these opportunities when they become available.[262] Based on the difficulty in establishing traditional necessity and immediacy principles with respect to terrorist threats, States should be able to rely to some degree upon the demonstrated capability and stated intent of the terrorist organization.[263]

Proportionality also poses some difficulties in counter-terrorism operations. The proportionality analysis in this context often depends on whether the attack has already taken place, or is merely imminent.[264] If the attack is imminent, proportional force may be viewed as the force reasonably necessary to stop the attack, gauged against the likely severity of the attack.[265] In the case of an actual attack, proportionality may be viewed in relation to both the actual damage from the terrorist attack, and the deterrence of future attacks by the terrorist organization.[266] While military operations should focus on the current terrorist threat, dealing with imminent future threats is acceptable as well.[267] "[W]hen a terrorist organization is responsible for an attack, a state may use counter-force not only against the individuals, but also against the entire organization."[268]

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past, we can look to the lessons contained in *The 9/11 Commission Report*, and apply Professor Schmitt's formula to future opportunities to kill or capture terrorists, both operatives and leaders.

[262] Schmitt, *supra* note 106, at 454; NAT'L STRATEGY FOR COMBATING TERRORISM, *supra* note 4, 11–13. To put it another way—sometimes the best time to hit a moving target is when you have it in your sights. Dalton, *supra* note 256, at 478 (discussing the use of indicators and past conduct to gauge the need for action).

[263] Schmitt, *supra* note 106, at 454. This argument seems to relax the traditional standards for the use of force in self-defense. However, its purpose is not to relax the standards, but to recognize the need for different methods and types of proof, and the need to tighten the observe-orient-decide-act loop when dealing with an imminent terrorist attack. Failure to act quickly can provide terrorist organizations sufficient freedom of maneuver to escape and go to ground. Worse, disrupting a terrorist organization's base of operations will not necessarily prevent the imminent attack. Thus, this author recommend adopting some version of Professor Schmitt's "final opportunity" model. *Id*.

[264] SCHMITT, *supra* note 63, at 65–66; Müllerson, *supra* note 46, at 116–19, 122.

[265] SCHMITT, *supra* note 63, at 65–66; Müllerson, *supra* note 46, at 116–19, 122; Brown, *supra* note 6, at 35.

[266] SCHMITT, *supra* note 63, at 65–66; Brown, *supra* note 6, at 3–4, 35.

[267] SCHMITT, *supra* note 63, at 65–66; Müllerson, *supra* note 46, at 116–19, 122; Brown, *supra* note 6, at 35.

[268] Brown, *supra* note 6, at 3–4.

It is also critical to distinguish targeting host State's facilities and personnel from using force solely against the terrorist organization.[269] If the host State has been warned, given the opportunity to address the problem, and fails to do so, then the injured State may act in self-defense against the terrorist threat, regardless of whether the actions of the terror organization are attributable to the host State.[270] Under these circumstances, however, the injured State can use force only against terrorist facilities and personnel.[271] Host-state facilities and personnel are not lawful targets unless the injured State warns the host State, and the host State then attempts to interfere with the injured State's response to the terrorist threat.[272]

There are two primary exceptions to the prohibition against targeting host State facilities and personnel. First, if the lack of host State cooperation is viewed as de facto State sponsorship, then the injured State may target host State facilities and personnel as well as terrorist targets.[273] In this situation, proportionality may also be gauged by the need to discourage future host State sponsorship of terrorism, or to encourage the host State to cooperate in counter-terrorism operations.[274] Second, if the host State, having been warned of the injured State's actions and supporting reasons, nonetheless attacks the forces of the injured State, then the host State may be seen as supporting the terrorist organization or engaging in its own illegal act, instead of defending its territory.[275] This would allow the injured State to defend itself against the attacking host State troops.[276] It may also open the door to further attacks against host State forces to accomplish the counter-terrorism mission.[277]

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[269] Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; Paust, *supra* note 121, at 540; Brown, *supra* note 6, at 17; Sharp, *supra* note 79, at 47.
[270] SCHMITT, *supra* note 63, at 33; Müllerson, *supra* note 46, at 122.
[271] Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; Paust, *supra* note 121, at 540; Brown, *supra* note 6, at 17; Sharp, *supra* note 79, at 47.
[272] Professor Moore Interview, *supra* note 9; Dr. Sharp Interview, *supra* note 9; Paust, *supra* note 121, at 540; Brown, *supra* note 6, at 17; Sharp, *supra* note 79, at 47.
[273] Brown, *supra* note 6, at 17; Sharp, *supra* note 79, at 47; Müllerson, *supra* note 46, at 122.
[274] SCHMITT, *supra* note 63, at 65–66; Müllerson, *supra* note 46, at 116–19, 122; Brown, *supra* note 6, at 3–4, 35.
[275] SCHMITT, *supra* note 63, at 52–53; Sharp, *supra* note 79, at 47; Müllerson, *supra* note 46, at 122.
[276] SCHMITT, *supra* note 63, at 52–53; Sharp, *supra* note 79, at 47; Müllerson, *supra* note 46, at 122.
[277] SCHMITT, *supra* note 63, at 52–53; Sharp, *supra* note 79, at 47; Müllerson, *supra* note 46, at 122. An additional danger of both possibilities is mission creep, in which a

IX. Factual Predicates: Revisited

Returning to the hypothetical, the first question is whether or not the attacks by the Kongra-Gel and the Taliban may be considered armed attacks triggering Article 51. Although the Taliban has taken some reconciliation actions, "the Taliban-led insurgency remain[s] a capable and resilient threat to stability."[278] As discussed earlier, the Taliban continues to attack civilians.[279] Similarly, continuing attacks by the Kongra-Gel into Turkey resulted in the Turkish Parliament authorizing the use of military force in northern Iraq.[280] In both cases, Turkey and Afghanistan appear to be sufficiently justified to claim that they are the subject of armed attacks by terrorist organizations, thereby triggering their right of self-defense under Article 51.

Second is the question of the geographic nexus. Both Turkey and Afghanistan have provided some information to the general public expressing their belief as to the locations of terrorist threats.[281] Assuming, *arguendo*, that they have established the geographic nexus, international law in turn establishes the legal obligation on the part of the host States to prevent the commission of terrorist attacks from within their borders.[282]

Third, Afghanistan and Turkey have both warned host States concerning the presence of the terrorist threats. At this point the situations diverge. Although Afghanistan has alleged some level of

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surgical strike operation enlarges significantly in scope, perhaps even rising to an attempt to impose political change on the host state. Depending on the circumstances, political change may be viewed as disproportionate, if not outright illegal. in addition, without indicators of an imminent attack, the use of force in a host state would violate Article 2(4). U.N. Charter art. 2(4); G.A. Res. 2625, *supra* note 12, at 122–23.

[278] 2006 COUNTRY REPORTS—SOUTH AND CENTRAL ASIA, *supra* note 2; *see Saleh Interview*, *supra* note 2 (detailing his concerns about the current Taliban threat).

[279] *Saleh Interview*, *supra* note 2.

[280] 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3; Martin Fletcher & Suna Erdem, *Interview with Recep Tayyip Erdogan*, TIMES ONLINE, Oct. 21, 2007, http://www.timesonline.co.uk/tol/news/world/europe/article2707933.ece [hereinafter *Erdogan Interview*] (transcribing the *London Times* interview with Turkish Prime Minister Recep Tayyip Erdogan).

[281] *Saleh Interview*, *supra* note 2; Andrew Purvis & Pelin Turgut, *Bracing for a Turkish Strike in Iraq*, CNN, Oct. 17, 2007, http://www.time.com/time/world/articled/0,8599,1672508,00.html?xid=feed-cnn-topics.

[282] G.A. Res. 2625 (XXV), *supra* note 12, at 122–23; G.A. Res. 49/60, at 5, U.N. Doc. A/RES/49/60 (Feb. 17, 1995); S.C. Res. 1373, *supra* note 12, ¶ 2(b); S.C. Res. 1566, *supra* note 12, ¶ 3.

Pakistani government involvement with the Taliban, it has continued to seek a diplomatic solution without sending troops into Pakistan.[283] The failure of the Pakistani government to suppress the activities of the Taliban in the FATA may be seen as Pakistan's failure to live up to its international obligations. Given the history of the FATA, however, Pakistan faces enormous challenges in imposing any significant degree of control over that historically unstable area.[284] The Pakistani government arguably has its own problems with the Taliban-al Qaeda alliance in Pakistan.[285] Given the religious and political situation in Pakistan, the Pakistani government is not necessarily in a good position to invite non-Pakistani forces into Pakistan to assist in combating the Taliban, particularly Afghan troops, whose mere presence could easily be seen as an invasion. Just the same, failure to control the misuse of the FATA as a jumping-off point for terrorist attacks leaves Pakistan in breach of its international legal obligations, and leaves the door open for Afghanistan, or an ally tied to Afghanistan through a mutual security treaty, to use military force in Pakistan against the Taliban. Afghanistan remains, for the time being, at step three.

Turkey took a different tack, which carried them through to step four. It is clear that Iraqi President Jalal Talabani and Prime Minister Nouri al-Maliki, facing a situation in which many resources are tied up in national reconciliation and sectarian violence, may be unable to shift resources to suppress the Kongra-Gel in the largely autonomous regions of northern Iraq.[286] Nonetheless, Iraq's failure to suppress the terrorist activities of the Kongra-Gel opens the door for Turkey to effect counter-terrorism operations of its own, including the use of military force in

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[283] *Saleh Interview*, *supra* note 2.

[284] FATA DEVELOPMENT PLAN, *supra* note 17, at 5–6.

[285] On 27 December 2007, Benazir Bhutto, recently returned from exile and considered a significant political opponent to President Musharraf, was assassinated. Naqvi, *Benazir Bhutto Assassinated*, *supra* note 14. Following Bhutto's assassination, opposition parties achieved staggering victories in the Parliamentary election. Reza Sayah, *Anti-Musharraf Parties to Form New Government*, CNN, Mar. 9, 2008, http://www.cnn.com/2008/ WORLD/asiapcf/03/09/pakistan/ index.html?iref=newssearch (detailing the current plan of the two opposition party leaders whose parties took more than half of the Pakistani Parliament seats in a recent election to work together).

[286] *See* 2006 COUNTRY REPORTS—FOREIGN TERRORIST ORGANIZATIONS, *supra* note 3; O'Toole, *supra* note 3; Hooper, *supra* note 31; *Iraq's PM Longs to Leave Office*, BBC, Jan. 3, 2007, http://news.bbc.co.uk/ 2/hi/middle_east/6226953.stm; Mohammed Tawfeeq & Joe Sterling, *In One Day, Bombings, Battles and Shooting Kill 48 in Iraq*, CNN, Mar. 12, 2008, http://www.cnn.com/2008/WORLD/meast/03/11/iraq.main/ index.html?iref= newssearch (discussing a series of attacks which took place on Mar. 11, 2008).

self-defense, a position with which Turkey clearly concurs.[287] In September and October 2007, Kongra-Gel forces, supposedly operating from within northern Iraq, again attacked Turkish forces.[288] After negotiations with Iraq failed to resolve the situation, and without any further action by Iraq to deal with the terrorists, the Turkish Parliament voted overwhelmingly to authorize the use of military force in Iraq.[289] Turkish Prime Minister Erdogan characterized the situation admirably, stating that "[t]he target of this operation is definitely not Iraq's territorial integrity or its political unity. The target of this operation is the terror organisation based in the north of Iraq."[290]

Following a series of airstrikes on Kongra-Gel positions, Turkey sent troops into Iraq to engage the terrorists directly.[291] This attack lasted approximately one week, after which Turkish troops withdrew.[292] The attacks appear to have been focused on terrorist facilities and personnel, and do not appear to have involved either Iraqi or coalition forces.[293] Turkey's actions in northern Iraq appear to have complied with the proportionality, necessity, and immediacy principles from the *Caroline* case, as well as with Professor Schmitt's capability, intent, and final opportunity test.[294]

In the end, both Iraq and Pakistan provide examples of States that are unwilling or unable to act effectively against the terrorist organizations present within their borders. This failure opens the door for the use of military force in self-defense by Turkey and Afghanistan, respectively, regardless of whether the actions of the Taliban or Kongra-Gel may be

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[287] *Erdogan Interview*, *supra* note 280.
[288] Purvis & Turgut, *supra* note 281.
[289] *Erdogan Interview*, *supra* note 280.
[290] *Id*.
[291] *Turkish Copters Pound Kurd Rebels*, CNN, Oct. 30, 2007, http://www.cnn.com/2007/WORLD/meast/10/30/turkey.kurds.ap/index.html?iref=newssearch; *Turkey Sends More Troops Into Iraq*, CNN, Feb. 27, 2008, http:// www.cnn.com/2008/WORLD/meast/02/27 turkey.iraq/index.html.
[292] *Iraq Incursion Finished, Turkey Says*, CNN, Feb. 29, 2008, http://www.cnn.com/2008 /WORLD/meast/02/29/iraq.main/index.html; Mohammed Tawfeeq & Talia Kayali, *Turkish Troops Shell Northern Iraq*, CNN, Mar. 5, 2008, http://www.cnn.com/2008/WO RLD/meast/03/05/turkey.iraq/index.html?iref=newssearch.
[293] *Iraq Incursion Finished, Turkey Says*, *supra* note 292.
[294] Although debatable, Turkey appears to believe it met the final opportunity test. Jomana Karadsheh et al., *Turkey "Can't Wait Forever" on PKK*, CNN, Oct. 23, 2007, *available at* http://paperdragon.newsvine.com/_news/2007/10/24/1045933-turkey-cant-wait-forever-on-pkk-.

attributed to the host States.[295] Although the Security Council has acted under Chapter VII in the past, and will likely do so in the future, neither Turkey nor Afghanistan has lost its inherent right of self-defense under Article 51. This right does not, however, give them an open license to invade northern Iraq or western Pakistan and engage in extended "hunting expeditions"; any military operations must comply with the basic requirements of proportionality, necessity and immediacy, and their forces must withdraw once the objectives are met.[296]

X. Conclusion

States have a responsibility to protect their citizens from terrorist attacks. For purposes of analyzing the right of self-defense against a terrorist organization, it is immaterial whether the terrorist attack originates with a State or a non-State actor, nor does it matter whether the actions of a non-State actor can be attributed to the host State itself. To require otherwise would leave the citizens of the injured State unprotected from a wide variety of threats that could arise simply because a host State turns a blind eye to the terrorist threats within its borders. This unacceptable answer calls to Professor Moore's mind "a comment made by former U.S. Secretary of State Dean Acheson that the 'law is not a suicide pact.'"[297] The U.S. *National Strategy for Combating Terrorism* discusses this point as well, stating that "[a] government has no higher obligation than to protect the lives and livelihoods of its citizens."[298]

Host States are responsible for preventing the commission of terrorist attacks from within their borders. If they cannot live up to this responsibility, their failure to do so may trigger the injured State's right of self-defense under Article 51 of the U.N. Charter. As the suggested analysis details, the injured State, having determined that the terrorist threat constitutes an armed attack, and having determined the geographic nexus, should then provide the host State with some warning and opportunity to respond to the problem. This overcomes the prohibition against the use of force under Article 2(4) of the U.N. Charter, because

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[295] Dr. Sharp Interview, *supra* note 9; Professor Moore Interview, *supra* note 9; SCHMITT, *supra* note 63, at 33.
[296] SCHMITT, *supra* note 63, at 33.
[297] MOORE & TURNER, *supra* note 86, at 490.
[298] NAT'L STRATEGY FOR COMBATING TERRORISM, *supra* note 4, at 11.

the host State must then address the problem, provide consent for the injured State to act inside its territory, or subordinate its right of territorial integrity to the injured State's right of self-defense. If the host State cannot or will not resolve the problem or allow the injured State to act inside its borders, then the injured State may act without the host State's consent, provided their actions comply with the basic requirements of proportionality, necessity, and immediacy.

As current events have shown, Afghanistan and Turkey have reached this conclusion. Afghanistan relied mostly on diplomatic efforts to get Pakistan to engage the Taliban, with some limited use of force by allies on its behalf, while Turkey, having determined that Iraq either cannot or will not resolve the problem of the Kongra-Gel in northern Iraq, has engaged in much larger scale uses of military force. In both cases, Turkey and Afghanistan, as injured States, are applying what should be the model for the use of military force in counter-terrorism operations, a model that falls within the scope of current international law.

DUE PROCESS AND EVICTION FROM PRIVATIZED MILITARY HOUSING—IS THE COMMANDER KING?

MAJOR GREGORY S. MUSSELMAN*

> *[P]laintiffs have asserted that Mr. Adamski's interest in access to the Presidio of Monterey premises is that of a lessee's leasehold interest in real property. Such an interest is somewhat stronger than the interests at issue in* Albertini I & II *(interest as an invitee to open house at military reservation) and* Cafeteria and Restaurant Workers Union *(restaurant worker's interest in access to her place of employment). However, plaintiffs cite no cases that provide that a property interest outweighs the "substantial" interest of a base commander in maintaining control over who may enter a military reservation.*[1]

I. Introduction

Does a commander have plenary authority to bar civilians from military installations? The Supreme Court has addressed this question in a variety of cases involving issues such as the right to free speech and

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[1] Adamski v. Martis, 2007 U.S. Dist. LEXIS 53160, at *13 (order denying Petitioner's Application for Temporary Restraining Order).

employment rights.[2] In most of these cases, the Court has upheld the commander's authority to bar civilians from a military installation. There have been exceptions, however, where courts have found that the Government has limited or no authority to exercise its exclusionary authority.[3] Against this backdrop, recent litigation in the Northern District of California has brought to the forefront a contemporary issue that has yet to be addressed by the courts. During the past decade, the Department of Defense (DoD) has implemented the Military Housing Privatization Initiative (MHPI). The MHPI authorizes the government to lease land located on military installations to private contractors. The private contractors then construct housing units and lease those units to military personnel, DoD personnel, and private citizens. Due to the implementation of the MHPI, commanders must now craft appropriate procedures to exclude from the installation civilians who are leasing a home from a private contractor within the confines of the installation.

In May of 2007, Mr. Joseph Adamski, a civilian, was barred from the Presidio of Monterey installation by the Garrison Commander.[4] The Commander barred Mr. Adamski because he was a registered sex offender and his presence was affecting the "good order and discipline of the military community" and "the well being of other residents in the military housing community."[5] Although bar actions are an everyday occurrence throughout the military, this particular case is unique because Mr. Adamski resided in housing located within the confines of the military installation.[6] When the garrison commander barred him from the installation, she was in effect evicting Mr. Adamski from his residence.[7] Mr. Adamski's suit against the garrison commander alleged that the "eviction" violated the Constitution.[8] In support of his petition to the court, Mr. Adamski raised a variety of issues involving various aspects of the Fifth Amendment.[9]

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[2] *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976) (holding that the commander has the authority to exclude political speech from the installation); Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886 (1961) (holding that the commander has the authority to summarily exclude civilians from the installation).

[3] *See, e.g.*, Flower v. United States, 407 U.S. 197, 198 (1972) (holding that the commander had forfeited the right to exclude political speech from a thoroughfare that had been opened up by the military to public use).

[4] *Adamski*, 2007 U.S. Dist. LEXIS 53160, at *4.

[5] *Id.*

[6] *Id.* at *2.

[7] *Id.* at *5.

[8] *Id.*

[9] *Id.*

The first portion of this article analyzes the court's denial of Mr. Adamski's Petition for a Temporary Restraining Order directing the commander to halt the "eviction proceedings."[10] This article focuses on the court's treatment of Mr. Adamski's assertion that his unilateral eviction from the installation violated his procedural due process rights. The second portion of this article places the constitutional issues raised in *Adamski* within the context of the MHPI. Problems with the MHPI have been identified in the past, most notably in a 2002 *Air Force Law Review* article.[11] With developments such as Mr. Adamski's suit arising, however, a closer look at the particular issue of barment, or exclusion from the installation, is needed.[12] It is probable, given the ongoing expansion of the MHPI, that Mr. Adamski's suit is not the last of its type and that future courts may disagree with the Northern District of California. Indeed, this article concludes that the procedures currently in place lack the prerequisite guarantees of due process for the potentially excluded civilian tenant. Finally, this article considers the constitutional principles that arose in *Adamski* and develops courses of action for commanders to remove unwanted tenants from privatized housing that will satisfy both constitutional and military operational concerns.

II. The Commander's Power to Bar Civilians from Military Installations

A. Authority of a Commander to Exclude

A commander's authority to exclude civilians from military installations is grounded in both statutory and case law.[13] The primary statutory authority is found in 18 U.S.C. § 1382.

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[10] *Id.* at *1.

[11] Captain Stacey A. Remy Vest, *Military Housing Privatization Initiative: A Guidance Document for Wading Through the Legal Morass*, 53 A.F. L. REV. 1 (2002). This article addressed a number of MHPI issues including the history of the initiative, contract formation and contract performance issues. *Id.*

[12] *Id.* at 29.

[13] *See* Cafeteria & Rest. Union Workers, Local 437 v. McElroy, 367 U.S. 886, 890 (1961) (stating that the "control of access to military base is clearly within constitutional powers granted to both Congress and President," and Navy Regulations approved by the President are endowed with sanction of law, thus, commanding officer of a Naval installation has power summarily to deny access to such installation to any person because of determination by installation's security officer that such person fails to meet security requirements); Greer v. Spock, 424 U.S. 828 (1976) ("A necessary concomitant of the basic function of a military installation has been the historically unquestioned

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or **installation,** for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or **installation,** after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
> Shall be fined under this title or imprisoned not more than six months, or both.[14]

This statutory authority has also been implemented in a variety of DoD and military service regulations.[15] A civilian who violates or ignores a commander's order not to enter the installation can be charged with trespassing.

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power of its commanding officer summarily to exclude civilians from the area of his command."); United States v. Floyd, 477 F.2d 217 (10th Cir. 1973).

> It is within the sole discretion of the commanding officer of a "closed base" to promulgate rational regulations excluding people from the military installation in the interest of the national security. He has practically exclusive and extensive power to exclude persons from the base in the interest of good order and military discipline.

Id. at 223.

[14] 18 U.S.C. § 1382(E) (2006).

[15] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM para. 3-22(d) (10 Oct. 2007).

> *Bar from installation.* A commander of an installation in the United States has the inherent authority to permanently bar any civilian from entering the installation, regardless of whether or not the installation is generally open or closed to public access. A bar order can be imposed on a civilian spouse or parent whose continued presence on the installation represents a threat to the safety of any adult or child living on the installation. Violations of bar orders are crimes (18 USC 1382) which are separately punishable before a Federal magistrate or Federal district court judge.

Id.

Although the power of the commander to exclude is extremely powerful, it is not absolute. The presumption is that the commander has the authority to exclude persons from areas under his control. There are, however, three baseline requirements that must be met in order for the commander to exercise this authority. First, the area from which the person is to be excluded must be under sufficient military control.[16] Generally, courts make a factual determination as to whether the commander has the requisite control over an area in order to bar.[17] Second, a commander must also balance the military's interest in preventing entry against the interests of the civilian in entering the installation.[18] Finally, there must not be any infringement on the constitutional rights of the person seeking entrance to the military installation.

Most of the outstanding case law deals with the issue of control over the military installation. The general principle described in this line of cases is that the more the commander relinquishes his exclusive control of an installation, the less authority the commander has to exclude civilians from the installation. The seminal case in this area is the Supreme Court's holding in *Flower v. United States.*[19] In *Flower*, the petitioner had been barred from the installation for prior attempts to distribute leaflets in contravention of orders by the deputy commander.[20] He was later arrested by military police for distributing leaflets on a street within the Fort Sam Houston military installation.[21] Fort Sam Houston was an open post, without sentries or guards at the entrances.[22] The street on which he was distributing leaflets was an important traffic artery used by private vehicles, military vehicles, and public transportation.[23] The road also had sidewalks which were used extensively at all hours of the day by civilians as well as by military

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[16] Vest, *supra* note 11, at 30 (citing United States v. Watson, 80 F. Supp. 649 (D. Va. 1948)); *see also* United States v. Mowat, 582 F.2d 1194 (9th Cir. 1978) (holding that in a prosecution under 18 U.S.C. § 1382, the Government is required to prove as element of offense that it has absolute ownership or exclusive right to possession of property upon which violation occurred).
[17] Vest, *supra* note 11, at 30.
[18] *Id.* at 29. This requirement for a balancing test is cited in several cases, but its basis is not explicitly stated. It appears that this is a substantive due process test that is applied when the Fifth Amendment guarantees of procedural due process are not applicable.
[19] 407 U.S. 197 (1972).
[20] *Id.*
[21] *Id.*
[22] *Id.* at 198.
[23] *Id.*

personnel.[24] Based on these facts, the *Flower* Court held that the commander had given up the requisite control of the area of the installation from which he sought to bar Flower.[25] By giving up that requisite control, the commander had converted the area into a First Amendment public forum, and he could not exclude speakers under his authority as commander of the installation.[26] This is very similar to the case of *United States v. Watson*, where the conviction of a civilian under 18 U.S.C. § 1382 was overturned.[27] In *Watson*, even though the civilian had been barred from traveling on a road owned by the military, the exclusion was found to be invalid because the road had been traditionally used as a public thoroughfare and the Government did not have exclusive control of the road.[28]

Despite the Court's holding in *Flower*, it is rare that the commander's authority to exclude from the installation is abridged or abrogated. The majority of cases have found that the asserted rights of the citizens seeking entrance to military installations were subordinate to the commander's authority to bar access to those installations. In this line of cases, individuals were attempting to enter the installation in order to exercise rights such as the right to employment,[29] the right to exercise political speech and activities,[30] and the right to enter the installation for attendance at an open house hosted by the Government.[31] In these cases, the individuals' asserted "rights" were trumped by the commander's authority to maintain control of his installation. A further review of these cases and the historical power of the commander to exclude are required to place the current issue into context. Does Mr. Adamski's situation line up with *Flower* and with *Cafeteria & Restaurant Workers Union v. McElroy* and its successors, or does it open up a novel area of jurisprudence?

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] Vest, *supra* note 11, at 30 (citing United States v. Watson, 80 F. Supp. 649 (D. Va. 1948)).
[28] *Watson*, 80 F. Supp. at 651.
[29] Cafeteria & Rest. Union Workers, Local 437 v. McElroy, 367 U.S. 886 (1961).
[30] Greer v. Spock, 424 U.S. 828 (1976).
[31] United States v. Albertini, 472 U.S. 675 (1985).

B. First Amendment Challenges to Commander's Authority

Most litigation involving access to military installations involves persons desiring to access installations in order to protest social and political issues or to distribute political materials.[32] The courts in these cases use traditional First Amendment analyses to reach their holdings.[33] In such analyses, the courts first look to see if the speech being restricted qualifies as "protected speech" and is therefore deserving of First Amendment protections.[34] If the speech is protected, then the court looks to the type of forum in which the speech is being conducted. If the forum is public, the court conducts a "time, place, and manner" analysis.[35] Under this analysis, if the speaker is in a traditional public forum, the restriction on speech must serve a compelling state interest and be narrowly drawn to achieve that end.[36] If the speaker is in a forum that is traditionally non-public, but that has been temporarily opened up

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[32] *See, e.g.*, *Greer*, 424 U.S. 828; *Albertini*, 472 U.S. 675; United States v. Quilty, 741 F.2d 1031 (7th Cir. 1984).

[33] *See, e.g.*, *Greer*, 424 U.S. 828; *Albertini*, 472 U.S. 675; *Quilty*, 741 F.2d 1031.

[34] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. (citations omitted); Times Film Corp. v. Chicago, 365 U.S. 43, 47 (1961) ("It has never been held that liberty of speech is absolute.").

[35] *See* Cox v. Louisiana, 379 U.S. 536, 558 (1965) ("It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials."); *Greer*, 424 U.S. at 866 ("The imposition of prior restraints on speech or the distribution of literature in public areas has been consistently rejected, except to the extent such restraints sought to control time, place, and circumstance rather than content.").

[36] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

by the Government to speakers, the same compelling state interest and narrow restrictions apply.[37]

In contrast to the First Amendment protections given to speakers in public forums, in non-public forums speech may be restricted by the Government if the restrictions are reasonable and not for the purpose of silencing the speech merely because the Government opposes the speaker's viewpoint.[38] Except for the rare occasion, as in *Flower*, courts have consistently found military installations to be non-public forums for First Amendment free speech purposes.[39] Garrison commanders may thus refuse access to civilians seeking to exercise their First Amendment rights if the commander has a reasonable reason to do so other than his personal opposition to the content of the speech. Courts have explained this rule by consistently stating that "[t]he guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'"[40] Additionally, military commanders have the "power to preserve the property under [their] control for the use to which it is lawfully dedicated."[41] Thus, so long as a military commander has a reasonable purpose for excluding a speaker from post, and this purpose is not merely the commander's opposition to the speaker's viewpoint, the commander may do so.[42]

C. Due Process (Fifth Amendment) Challenges to Commander's Authority

In the context of barring civilians from military installations, an analysis of Fifth Amendment cases is more complex than an analysis of First Amendment cases. The seminal Fifth Amendment case addressing the deprivation of access to military installations is *Cafeteria & Restaurant Workers Union v. McElroy*.[43] In *Cafeteria*, the commander revoked a contracted employee's security clearance.[44] This revocation

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[37] *Id.* at 46.
[38] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985) (citing *Perry*, 460 U.S. at 46).
[39] *See* Flower v. United States, 407 U.S. 197 (1972).
[40] *Greer*, 424 U.S. at 836 (quoting Adderly v. Florida, 385 U.S. 39, 48 (1966)).
[41] *See id.* (quoting *Adderly*, 385 U.S. at 47).
[42] *Id*. at 834–36; *see also* United States v. Albertini, 472 U.S. 675, 690 (1985).
[43] Cafeteria & Rest. Union Workers, Local 437 v. McElroy, 367 U.S. 886 (1961).
[44] *Id.* at 888.

was, in effect, a bar from the installation and resulted in the person losing his job.[45] The *Cafeteria* Court held that it was well-settled that a commanding officer had the power to exclude civilians from the area of his command, and that depriving a person of his on-post employment by barring him from post does not entitle him to due process protection under the Fifth Amendment."[46]

The *Cafeteria* Court applied the traditional two-part due process test to determine if the worker's constitutional rights had been violated.[47] The first issue is whether the property interest in dispute is of such import as to be afforded protection under the Fifth Amendment.[48] If the

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[45] *Id.*
[46] *Id.* at 893.

> This power has been expressly recognized many times. "The power of a military commandant over a reservation is necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand." 26 Op. Atty. Gen. 91, 92. "It is well settled that a post commander can, in his discretion, exclude all persons other than those belonging to his post from post and reservation grounds." JAGA 1904/16272, 6 May 1904. "It is well settled that a Post Commander can, under the authority conferred on him by statutes and regulations, in his discretion, exclude private persons and property therefrom, or admit them under such restrictions as he may prescribe in the interest of good order and military discipline (1918 Dig. Op. J. A. G. 267 and cases cited)." JAGA 1925/680.44, 6 October 1925.

Id.; *id.* at 898.

> But to acknowledge that there exist constitutional restraints upon state and federal governments in dealing with their employees is not to say that all such employees have a constitutional right to notice and a hearing before they can be removed. We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist. It does not follow, however, that she was entitled to notice and a hearing when the reason advanced for her exclusion was, as here, entirely rational and in accord with the contract with M & M.

Id.
[47] *See* Wallace v. Tilley, 41 F.3d 296, 299 (7th Cir. 1994) ("In examining these claims, we first must determine whether there was a deprivation of a protected interest. If so, we then decide whether the procedures surrounding the deprivation were constitutionally sufficient." (citing Forbes v. Trigg, 976 F.2d 308, 315 (7th Cir. 1992)).
[48] *Cafeteria & Rest. Union Workers, Local 437*, 367 U.S. at 894.

property right is constitutionally protected, the second issue is whether the procedural safeguards that are in place are sufficient to ensure a fair and just outcome.[49] In *Cafeteria,* the worker lost her case because the Court held that employment was not a protected property right and thus she was not entitled to due process under the Fifth Amendment.[50] Because employment was not a protected interest, there was no requirement for the Government to provide the prescribed constitutional due process.[51]

The principles espoused in *Cafeteria* are directly applicable to Mr. Adamski's case. But, although the Northern District of California cites *Cafeteria* as precedent, the court's application of the *Cafeteria* Court's principles is questionable.[52] In particular, the court did not identify that the facts surrounding the Petitioner's case were matters of first impression that did not necessarily fit under the rubric of the existing case law.

III. Legal Analysis of *Adamski v. Martis*

A. Fifth Amendment Guarantees

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*[53]

Due process is one of the primary protections that the U.S. Constitution gives to individuals. Although the Constitution does not

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[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] Adamski v. Martis, 2007 U.S. Dist. LEXIS 53160, at *8, *12 (N.D. Cal. July 9, 2007).
[53] U.S. CONST. amend. V (emphasis added).

define due process, courts have established a solid base of due process jurisprudence. Due process comes in both procedural and substantive forms.[54] The Constitution mandates that before the Government may take life, liberty, or property from an individual, it must go through certain steps intended to protect the interests of that individual. This is the procedural form of due process.[55] Under the concept of procedural due process, the mere taking of an individual's life, liberty, or property is not unconstitutional. What is unconstitutional is the deprivation of these interests without the proper safeguarding procedures.[56]

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[54] 16B AM. JUR. 2D *Constitutional Law* § 901 (2007).

> In its present stage of development, the concept of due process of law has a dual aspect, substantive and procedural, for the Due Process Clause of the Fourteenth Amendment not only accords procedural safeguards to protected interests, but likewise protects the substantive aspects of liberty against impermissible governmental restrictions. The Due Process Clause of the Fourteenth Amendment provides distinct guarantees of substantive due process and procedural due process; substantive due process includes both the protections of most of the Bill of Rights, as incorporated through the Fourteenth Amendment, and also the more general protection against certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. Procedural due process guarantees that a state proceeding which results in a deprivation of property is fair, while substantive due process insures that such state action is not arbitrary and capricious.

Id. (citations omitted).

[55] *E.g.*, Fuentes v. Shevin, 407 U.S. 67, 80–81 (1972).

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

Id.

[56] 16B AM. JUR. 2D *Constitutional Law* § 890.

In addition to procedural due process, the Constitution provides the less explicit, judicially formulated, guarantee of substantive due process. Substantive due process guarantees that laws are essentially fair and reasonable and do not infringe upon an individual's fundamental constitutional rights.[57] Instead of being concerned with *how* the Government takes one's life, property, or liberty, substantive due process is concerned with whether the law that authorizes the Government taking is "in contravention of the fundamental principles of liberty and justice inherent to our Constitution and legal system."[58] If the law that authorizes the taking is fundamentally unfair, it violates the concept of substantive due process and no amount of procedural safeguards are adequate to protect the individual's protected interests. Finally, and closely connected to both types of due process, is the final section of the Fifth Amendment, commonly called the "Taking Clause." This section guarantees that if private property is taken from an individual for public use, the Government must reimburse that individual the value of that property.[59]

B. Procedural Due Process

Mr. Adamski argued that his due process rights were violated when COL Martis barred him from post.[60] He alleged that by barring him from post, COL Martis effectively evicted him from his home, thus depriving

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[57] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967).

> These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.

Id.

[58] 16B AM. JUR. 2D *Constitutional Law* § 911.

[59] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[60] Adamski v. Martis, 2007 U.S. Dist. LEXIS 53160, at *5 (N.D. Cal. July 9, 2007).

him of a property interest in that home.[61] Colonel Martis, the garrison commander, unilaterally decided this "eviction action" under her authority as a commander of a military installation.[62] Mr. Adamski did not challenge the authority of a commander to exclude civilians from a military installation. What he did challenge was that in the legitimate exercise of command authority, the garrison commander violated his right to due process.[63]

1. What Is a Protected Property Interest?

"When protected interests are implicated, the right to some kind of prior hearing is paramount."[64]

Pursuant to the Fifth Amendment, if the Government takes constitutionally protected property from an individual, the minimum procedural due process requirements are the right to notice of the Government's intent to deprive of a liberty or property interest, and the opportunity to speak and present evidence before the interest is taken by the Government. In *Adamski*, Mr. Adamski had neither the notice of a hearing nor the opportunity to present evidence.[65] The garrison commander unilaterally decided to prohibit Mr. Adamski from entering the installation.

Despite the absence of any procedural safeguards, the court held that Mr. Adamski's due process argument had no merit.[66] The court found that even though Mr. Adamski held "a lessee's leasehold interest in real property," and that "[s]uch an interest is somewhat stronger than the interests at issue in *Albertini I & II* . . . and *Cafeteria and Restaurant Workers Union* . . . ," nonetheless, "no cases . . . provide that [such] a property interest outweighs the 'substantial' interest of a base commander in maintaining control over who may enter a military reservation."[67] For the following reasons, the court failed to apply the appropriate due process analysis to support its determination.

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[61] *Id.*
[62] *Id.* at *4.
[63] *Id.* at *6, *11.
[64] Board of Regents v. Roth, 408 U.S. 564, 569–70 (1972).
[65] *Adamski*, 2007 U.S. Dist. LEXIS 53160, at *8.
[66] *Id.* at *14–15.
[67] *Id.* at *13–14.

First, the court improperly concluded that Mr. Adamski's property interest was "somewhat stronger" than that of an invitee's interest in attending an on-post open house event, but did not rise to the level of a protected property interest.[68] The Supreme Court has given general guidance as to when deprivation of a property interest is entitled to the protection guaranteed by the Fifth Amendment. In *Board of Regents v. Roth*, the Court held:

> To have a property interest in a benefit, a person must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.[69]

Numerous federal cases provide more specific guidance. These cases establish that ownership of real property is the epitome of the type of property interest that the Due Process Clause is intended to protect. In *Sentell v. New Orleans & Carrollton R.R. Co.*, the Court held that "[n]o property is more sacred than one's home,"[70] and in *United States v. Parcel I, Beginning at A Stake* that "[m]ost importantly, the Governmental interest in providing minimal due process is . . . scant when compared with the claimants' overriding interest in their homes."[71] The fact that *Adamski* dealt with a leasehold rather than a fee simple estate is irrelevant. Courts have found that leaseholds are as deserving of protection as fee simple estates.[72] The court erred by holding that Mr.

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[68] *Id.*
[69] *Roth*, 408 U.S. at 577.
[70] Sentell v. New Orleans & Carrollton R.R. Co., 166 U.S. 698, 704–05 (1897).
[71] 731 F. Supp. 1348, 1354 (S.D. Ill. 1990); *see also* United States v. 850 S. Maple, 743 F. Supp. 505, 510 (E.D. Mich. 1990) ("It is well settled that courts have traditionally drawn a distinction between personal property and a home, affording the latter far greater protection under the law.").
[72] *See* Rucker v. Davis, 237 F.3d 1113, 1125 (9th Cir. 2001) (public housing tenants have a property interest in their tenancy); Greene v. Lindsey, 456 U.S. 444, 451 (1982); Geneva Towers Tenants Org. v. Federated Mortgage Investors, 504 F.2d 483, 488–89 (9th Cir. 1974); Perry v. Sindermann, 408 U.S. 593, 601 (1972).

Adamski's leasehold was not a significant enough property right to be afforded due process.

Second, the court improperly applied a weighing test to determine that no due process was required.[73] Due process is *required* when protected property is taken by the Government. Once it is determined that due process is required, then a weighing test that the Supreme Court describes in *Matthews v. Eldridge* is used to determine the *degree* of due process that is required.[74] In an error of reasoning, the *Adamski* court used the weighing test to determine that no due process was required.[75] *Matthews* described this weighing test as follows:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[76]

The Supreme Court has given further guidance by stating that "[t]he relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process. But *some* form of notice and hearing—formal or informal—is required before

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> [P]roperty interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather "property" denotes a broad range of interests that are secured by "existing rules or understandings." A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

Id.

[73] *Adamski*, 2007 U.S. Dist. LEXIS 53160, at *14–15.

[74] 424 U.S. 319 (1976).

[75] *Adamski*, 2007 U.S. Dist. LEXIS 53160, at *14.

[76] *Matthews*, 424 U.S. at 334–35.

deprivation of a property interest that 'cannot be characterized as *de minimis*.'"[77]

Appropriately applying the *Matthews* weighing test yields the following result. First, the possession and use of one's home ranks at the top of an individual's property interests.[78] This concept harkens back to the seventeenth century when, in 1644, English jurist Sir Edward Coke is quoted as saying: "For a man's house is his castle, *et domus sua cuique tutissimum refugium*" (one's home is the safest refuge for all).[79] James Otis, U.S. patriot, echoed Coke's sentiments when in 1761 he argued against the English writs of assistance in Boston, Massachusetts: "Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and while he is quiet, he is well guarded as a prince in his castle."[80] This emphasis on the sanctity of one's home was permanently embodied in the Constitution. The Third Amendment's prohibition of involuntary quartering of troops in one's home, the Fourth Amendment's proscription against unreasonable search and seizure, and the Fifth Amendment's protections of property, all indicate the how much the Constitution values a person's home.[81]

Second, application of the current procedures creates the risk of an erroneous deprivation of a constitutionally protected property interest. Commanders generally bar individuals from the installation based upon information such as subordinate commanders' recommendations and military police reports. These sources are biased towards the exclusion of the alleged offender from the installation, as they are generally provided to the commander for that specific purpose. If the commander were to hear the other side of the story, she may come to a different decision. A pre-exclusion hearing would greatly reduce the risk of erroneous deprivation.

Finally, the Government's interest is great in maintaining control over who has access to the installation. Good order, discipline, and morale are basic requirements for a functioning military. The exclusion of disruptive influences from the installation is important to the military

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[77] Fuentes v. Shevin, 407 U.S. 67, 90 n.21 (1972).
[78] Sentell v. New Orleans & Carrollton R.R. Co., 166 U.S. 698, 704–05 (1897); United States v. Parcel I, Beginning at A Stake, 731 F. Supp. 1348, 1354 (S.D. Ill. 1990).
[79] *Semayne's Case*, 77 Eng. Rep. 194 (1604).
[80] JAMES OTIS, AGAINST WRITS OF ASSISTANCE (1761), *available at* http://www.nhinet.org/ccs/docs/writs.htm.
[81] *See* U.S. CONST. amends. III to V.

commander. The additional procedural requirement of a pre-exclusion hearing, however, would place a minimal administrative burden upon the command. These administrative burdens are already present in that the individual may appeal the commander's initial decision to bar (albeit the appellate authority is usually the barring commander himself). The additional procedural safeguard would simply require the administrative burdens to come before, rather than after, the decision is made by the commander.

The *Adamski* court failed in its application of the Supreme Court's holdings on due process by relying on these tests to conclude that no due process is required, rather than the degree that due process required.[82] The only time that no due process is required is when the property is not of the type that is protected by the Fifth Amendment. If the court had utilized the tests laid out in *Matthews*, it should have held that a pre-decisional hearing was necessary to satisfy due process requirements.

There are exceptions to the normal due process requirements for a prior hearing, but these exceptions are narrowly tailored. The *Adamski* court did not rely on any of these exceptions in its ruling. As the Supreme Court stated in *Fuentes v. Shevin*:

> There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic

[82] Adamski v. Martis, 2007 U.S. Dist. LEXIS 53160, at *14–15 (N.D. Cal. July 9, 2007).

> disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food.[83]

Applying the *Fuentes* test to *Adamski* yields the following results. First, there was arguably an important governmental interest in excluding Mr. Adamski from the military installation. The good order, discipline, and welfare of the military are of paramount importance. This prong supports finding an extraordinary situation that weighs against providing extensive due process. Second, there was no need for immediate action. The actual actions taken by the commander demonstrate such a lack of imperative. In early May 2007, the landlord discovered that Mr. Adamski was a sex offender.[84] On 21 May 2007, the commander sent a letter to Mr. Adamski stating that effective 21 June 2007, Mr. Adamski was barred from the installation.[85] Thus, over thirty days passed from the discovery of the "threat" to good order, discipline, and welfare until the commander excluded Mr. Adamski from the installation. Obviously, there was no need for very prompt action. Rather, there was ample time to conduct a hearing prior to the decision to exclude. This prong supports the requirement for due process and does not support finding an extraordinary situation warranting a pre-hearing seizure of property. Finally, although there is a single government official, the commander, responsible for initiating the "seizure," there does not exist a narrowly drawn statute with identifiable standards. On the contrary, the commander's authority to exclude is purposefully vague and wide ranging. Also, this final prong does not support finding an extraordinary situation warranting a pre-hearing seizure of property. Given that *Adamski* fails to meet two of the three *Fuentes* factors, it is highly unlikely that a future court would find situations like this to be extraordinary and would therefore not require a hearing prior to the deprivation of property.

2. What Does "Due Process" Require?

The *Adamski* court correctly identified the relief requested by the petitioner in its recitation of the case background.

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[83] 407 U.S. 67, 90–92 (1972).
[84] *Adamski*, 2007 U.S. Dist. LEXIS 53160, at *2.
[85] *Id.* at *3.

> Plaintiffs complain that defendant's actions have deprived Mr. Adamski of his property interest in a leasehold to his home . . . *without due process and without compensation* in violation of the Fifth Amendment of the United States Constitution.[86]

The petitioner alleges lack of due process and lack of compensation. Thus, the basis of the suit is not that the commander's decision was incorrect. It is, rather, that the petitioner had not been given the right to state his case prior to his leasehold being taken and that the petitioner must be made whole after the commander had unilaterally taken his leasehold.

The court held that "[i]t is well-settled that a commanding officer has the power to exclude civilians from the area of her command."[87] This holding resulted from an overly simplistic treatment of the plaintiff's complaint. The court failed to conduct any real formal constitutional analysis because it felt that the exclusion from the installation was warranted based upon the facts.

Further into its opinion, the court attempts to give several reasons why there is no requirement for due process. First, the court stated that the petitioner "cite[s] no cases that provide that a property interest outweighs the 'substantial' interest of a base commander in maintaining control over who may enter a military reservation."[88] Second, the court stated that the petitioner's false answer on the rental application should weigh against demand for due process.[89] Third, the court noted that the petitioner had not shown that the commander had acted capriciously or arbitrarily in issuing the bar letter.[90] These may be valid assertions, but they fail to meet the requirements of *Fuentes* and *Matthews*.

Mr. Adamski made no assertion that the garrison commander did not have a substantial interest in controlling access to the installation or that there were errors on the application, or that the commander acted outside the boundaries of her authority. Mr. Adamski's claim simply contends that the *manner* of the exclusion and eviction was unlawful.[91] He asserts

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[86] *Id.* at *5 (emphasis added).
[87] *Id.* at *8.
[88] *Id.* at *14.
[89] *Id.*
[90] *Id.*
[91] *Id.* at *11.

that the Government's procedure to extinguish his property rights lacked the substance to ensure that his property interest was not taken unfairly.[92] The *Adamski* court's reliance on the commander's historical authority to exclude civilians from the confines of the military installation is inapposite because the exclusion of a civilian tenant from privatized housing on a military installation is a case of first impression that does not lend itself to reliance on historical precedents.

The court also denied Mr. Adamski any due process protection because he failed to demonstrate that the garrison commander "acted capriciously or arbitrarily in issuing the bar letter."[93] The arbitrary and capricious test, however, is irrelevant to Mr. Adamski's request for relief. The arbitrary and capricious test is a lesser form of protection that comes into play only when no formal due process is required.[94] In all probability the court used the test because it had already erroneously concluded that the tenancy did not rise to the level of a protected property interest.[95] The court in *Adamski* should not have decided whether the commander acted in an arbitrary and capricious manner, but rather should have decided whether the process of barring Mr. Adamski from post was sufficiently robust to protect against an arbitrary deprivation.

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[92] *Id.*
[93] *Id.* at *15.

> Finally, although plaintiffs contend that no one has asserted that Mr. Adamski has committed any illegal acts within the base, harassed anyone on the base, or committed any sexual offense on the base, it is not within the purview of this court to question a commanding officer's decision to issue a bar letter that is not otherwise capricious or arbitrary.

Id.
[94] *See, e.g.*, R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 348 (1935).

> [W]hen the question is whether legislative action transcends the limits of due process guaranteed by the Fifth Amendment, decision is guided by the principle that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

Id. (citing Nebbia v. New York, 291 U.S. 502, 525 (1934)); *see also* E. Enters v. Apfel, 524 U.S. 498, 524 (1998) ("[T]he burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.").
[95] *Adamski*, 2007 U.S. Dist. LEXIS 53160, at *14–15.

> The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision-making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.[96]

Mr. Adamski had a significant property interest that he was deprived of when the military commander barred him from the installation. The commander unilaterally made the decision to exclude Mr. Adamski from the installation. There were few, if any, procedures in place to safeguard Mr. Adamski's constitutional rights. Specifically, the commander failed to establish those procedures that the Supreme Court has made mandatory when depriving individuals of protected property interests. These procedures are that the "[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."[97] Furthermore, the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[98] The established procedures in Mr. Adamski's case did not comply with these mandates.

The court's holding indicates that civilians in privatized housing have no Fifth Amendment protections and, as a consequence, in all future actions civilian tenants would have no due process protections. Such a circumstance would be particularly troubling when the civilian tenant has not violated his lease nor done anything wrong at all. For example, commanders have the potential to bar civilians from post because of elevated force protection concerns. Should this occur, civilian tenants would not be entitled to due process to adjudicate their

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[96] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170–72 (1951).
[97] Baldwin v. Hale, 68 U.S. 223, 233 (1863).
[98] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

exclusion nor would they be entitled to compensation should their exclusion from post be enduring or permanent.

C. Substantive Due Process

For the typical civilian, the denial of entry onto a military installation does not raise any substantive due process issues. In *Adamski*, however, serious substantive due process concerns were raised. A law which summarily denies a tenant access to his home without due process and recourse could easily be found overly burdensome. The substantive due process issue is as follows: Is it fair that the Government leases a portion of the installation to a private contractor, allows that contractor to rent to private citizens, and then summarily denies that citizen, without any recourse available, access to his rental home? Property rights are so strongly protected that a law which allows for such a deprivation fundamentally offends our concept of justice and liberty.

D. The Takings Clause

The Fifth Amendment to the Constitution prevents the Government from taking an individual's property for public use without compensating the individual.[99] The Government is also forbidden from taking the

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[99] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see also* United States v. Russell, 80 U.S. 623, 627 (1871).

> Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent.

Id.; United States v. Miller, 317 U.S. 369, 373 (1943).

> Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken.

private property of an individual for the private use of another individual.[100] What constitutes "property" has been highly litigated in our legal system. It has been determined that the concept of property enumerated in the Fifth Amendment includes more than only tangible, physical property owned outright.[101] The Fifth Amendment protection of property has been found to extend to items such as materialmen's liens,[102] trade secrets,[103] and the airspace above one's property.[104] Not all property, however, qualifies for protection under the Takings Clause. "Unilateral expectations" of economic benefit are not protected, nor are benefits or expectations that are shielded from arbitrary action by some form of procedural protection such as federal social security benefits.[105] Contractual rights and obligations are more than unilateral expectations and generally fall within the protections of the Takings Clause[106]:

> An enforceable contract right can provide the necessary property right in support of a Fifth Amendment takings claim. Valid contracts are property protected by the Fifth Amendment against taking by the federal government, and by the Fourteenth Amendment against taking by a state, unless just compensation is made to the owner. Therefore, where contract rights are taken for the public use, there is a constitutional right to compensation in the same manner as when other property rights are taken, provided the interest or estate created by the contract is not so remote as to be incapable of valuation.[107]

Id.; Nat'l Educ. Ass'n–R.I. v. Ret. Bd. of the R.I. Employees' Ret. Sys., 172 F.3d 22, 30 (1st Cir. 1999).

[100] Kelo v. City of New London, 545 U.S. 469, 477 (2005).

[101] United States v. Willow River Power Co., 324 U.S. 499, 502–03 (1945).

[102] Armstrong v. United States, 364 U.S. 40, 44 (1960).

[103] Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

[104] McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1119 (Nev. 2006).

[105] *See* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) (unilateral expectations); Flemming v. Nestor, 363 U.S. 603, 611 (1960) (social security benefits).

[106] *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid." (citing Contributors to Pa. Hosp. v. Philadelphia, 245 U.S. 20 (1917)).

[107] 26 AM. JUR. 2D *Eminent Domain* § 160 (2007).

Mr. Adamski alleges that the Government took his property, in the form of his leasehold, without just compensation.[108] Additionally, by barring him from the installation, the Government effectively abrogated Mr. Adamski's contract with his landlord. In its order denying the Petitioner's request for relief, the court does not directly address these assertions, apparently because the court found petitioner's property interest not to be of significance in its procedural due process analysis. If so, then the court's reasoning was faulty. The Takings Clause analysis under the Fifth Amendment is separate and distinct from the due process analysis. The *Adamski* court failed to determine whether the petitioner is due compensation pursuant to the Fifth Amendment for the taking of his property.[109]

A Fifth Amendment Takings Clause analysis is a three-step process.[110] First, was there a protected property interest? Second, was the property taken by the Government? Third, was the taking for a private or a public use? In *Adamski* the first question is answered by a wealth of case law that leaves little doubt that Mr. Adamski's leasehold was indeed a protected property right under the Fifth Amendment. Courts have specifically found that leases are a protected form of property.[111] "It is settled law that a leasehold is 'property' and,

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[108] Adamski v. Martis, 2007 U.S. Dist. LEXIS 53160, at *5 (N.D. Cal. July 9, 2007).

[109] Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U.L. REV. 899, 900 (2007) (("*Lingle* stands for the proposition that both asserted government *takings* of property, and asserted government *deprivations* of property without due process of law, raise separate, legitimate legal issues to be resolved using different legal standards." (citing Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005))).

[110] The facts of each case determine the precise issues required to be analyzed. For example, in *Buse Timber & Sales, Inc., v. United States* the appropriate Fifth Amendment test was stated as follows: "In order to determine whether the complaint states a claim under the Fifth Amendment, this court must first define the plaintiff's property interest and then determine whether, according to the facts alleged in the complaint, the government interfered with plaintiff's use of that property." 45 Fed. Cl. 258, 262 (Ct. Cl. 1999).

[111] *See* United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945).

> That interest may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years," as in the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess.

Id.; *see also* Air Pegasus of D.C., Inc. v. United States, 60 Fed. Cl. 448, 456 (Ct. Cl. 2004).

accordingly, that if realty under lease is taken by the Government for public use, just compensation must be paid to the leaseholder."[112] In addition to the leasehold being a protected property right, the underlying contract may also be a protected form of property.[113] In any case, the contract or the leasehold itself is property that is protected under the Fifth Amendment's Taking Clause.

The second question is whether the Government did, in fact, take Mr. Adamski's protected property.[114] The Supreme Court in *Pennsylvania*

> Leases are compensable property interests within the meaning of the Takings Clause of the Fifth Amendment. As the United States Supreme Court has stated, property deals with what lawyers term the individual's "interest" in the thing in question. That interest may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years" . . . .

Id.; Dep't of Natural Res. v. Thurston County, 92 Wn. 2d 656, 668 (Wash. 1979) ("Lake Lawrence, Inc., as lessee of the land, has a private real property interest which entitles it to raise the question whether its leasehold has been taken for public use without compensation."); Foster v. United States, 221 Ct. Cl. 412, 423–24 (Ct. Cl. 1979) ("Initially, we note that plaintiffs' leasehold interest in the reserved mineral rights is compensable. As an estate in real property, the Government must compensate for any taking."); Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295, 303 (U.S. 1976) ("It has long been established that the holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation by the United States.").

[112] Pewee Coal Co. v. United States, 142 Ct. Cl. 796, 801 (Ct. Cl. 1958). "It is established that a leasehold interest is property, the taking of which entitles the leaseholder to just compensation for the value thereof." Lemmons v. United States, 204 Ct. Cl. 404, 421 (Ct. Cl. 1974).

[113] *See* Buse Timber & Sales, Inc. v. United States, 45 Fed. Cl. 258, 262 (Ct. Cl. 1999). In this case, the claims court held that

> [t]he "classic" takings cases deal with appropriations of tangible property by the government, especially the taking of land. In this case, however, the property taken was plaintiff's right to performance under the contract. Thus, it was the contract itself that was the subject of the taking. Plaintiff is correct in stating that a contract constitutes property within the meaning of the Fifth Amendment. In *Lynch v. United States*, the Supreme Court explained that valid contracts are property which is protected by the Fifth Amendment, regardless of whether the obligor is a private party, a municipality, a State or the United States.

Id.

[114] *See* Pumpelly v. Green Bay Co., 80 U.S. 166, 179 (1871) ("[A] serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and

Coal Co. v. Mahon stated that whether a particular governmental restriction amounted to a constitutional taking is a question properly turning upon the particular circumstances of each case.[115] The taking of property can be by the Government's acquisition of title (through eminent domain proceedings), or through the occupancy or physical invasion of the property whereby the Government has destroyed the owner's use and enjoyment of his property (inverse condemnation).[116] The manner in which the Government takes property is not, however, dispositive as to whether a Fifth Amendment taking has occurred. The courts have held that it is the loss by the owner, not the method used by the Government, which is the defining characteristic of a taking.[117] It does not matter that the Government does not acquire complete title or possession of the property. If its actions are so complete as to deprive the owner of all or most of his interest in the subject matter, the Government has accomplished a taking.[118] In *Adamski*, the commander had deprived Mr. Adamski of any use of his home and stripped him of any of his rights bargained for in his lease. The same line of cases that give leaseholds protection under the Takings Clause define what constitutes a taking of those leaseholds. These cases state that if the Government prevents the owner from the possession and use of his leasehold, then the Government has effectuated a taking.[119]

The final issue is whether Mr. Adamski's leasehold was taken for private or for public use. If it was taken for use by a private individual, the Government's action was per se unconstitutional. If the leasehold was taken for public use, the Government's actions are allowable under the Takings Clause, but require that compensation be made. The Supreme Court discusses the difference in *Lingle v. Chevron U.S.A. Inc*.[120]

> The Clause expressly requires compensation where government takes private property "*for public use*." It

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that under the constitutional provisions it is not necessary that the land should be absolutely taken.").

[115] 260 U.S. 393, 416 (1922).

[116] Yuba Natural Res., Inc. v. United States, 821 F.2d 638, 640 (Fed. Cir. 1987).

[117] United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945).

[118] *Id.*

[119] *See, e.g.*, *id.* at 378 ("Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.").

[120] 544 U.S. 528, 543 (2005).

> does not bar government from interfering with property rights, but rather requires compensation "in the event of *otherwise proper interference* amounting to a taking." Conversely, if a government action is found to be impermissible—for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.[121]

At first glance, it may seem as if the leasehold was not taken for public use. Indeed, after Mr. Adamski's exclusion from the installation, the leasehold reverted back to the private contractor. The Supreme Court has adopted the principle that a "broader and more natural interpretation of public use [is] as 'public purpose.'"[122] In *Adamski*, the exclusion from the installation was for a public purpose—the health, welfare, and morale of the command—even though the property itself (the leasehold) was given back to a private entity, the MHPI contractor.[123] It is not determinative that the Government did not actually acquire the property.

IV. Military Housing Privatization Initiative

The housing that Mr. Adamski was "evicted" from was leased and managed by a private contractor under the MHPI.[124] The housing was not leased by the tenant from the Government. The court, in its analysis, failed to take into account the anomalies created by MHPI. The following section will discuss the constitutional complications that the MHPI presents to the commander.

A. Overview of the MHPI

In 1996, the National Defense Authorization Act (NDAA) enacted the MHPI.[125] The initiative was later made permanent by the 2005

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[121] *Id*. at 543 (citations omitted).
[122] Kelo v. City of New London, 545 U.S. 469, 480 (2005).
[123] Adamski v. Martis, 2007 U.S. Dist. LEXIS 53160, at *4 (N.D. Cal. July 9, 2007).
[124] *Id.* at *2.
[125] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, §§ 2801–2802, 110 Stat. 186, 544 (codified at 10 U.S.C. §§ 2871–2885 (2006)).

NDAA.[126] This legislation was enacted because the DoD faced two looming housing problems: the extremely poor condition of DoD housing, and the shortage of affordable and quality housing in the private housing market to meet the needs of servicemembers and their families.[127] These issues were of such magnitude that Congress concluded that government resources were inadequate to address the problems. The MHPI, therefore, authorized public and private ventures in which real-estate developers could "own, operate, maintain, improve and assume responsibility for military family housing, where doing so is economically advantageous and national security is not adversely affected."[128] The authorities given to DoD included the ability to make loan and rental guarantees, the conveyance or leasing of existing property and facilities, differential lease payments, direct loans to developers, and the authority to invest in non-governmental entities involved in the acquisition or construction of family housing.[129]

The primary mechanism for MHPI is the leasing of land on military installations for a term of years (typically fifty years).[130] The contractor agrees to renovate existing housing or to construct new housing. The contractor must lease to servicemembers and may lease to civilians if occupancy is low.[131] The contractor has an agreement with the DoD or

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[126] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118. Stat. 1811 (2004).
[127] DoD Military Housing Privatization, http://www.acq.osd.mil/housing/overview.htm (last visited June 15, 2009) [hereinafter Mil. Housing Privatization].
[128] *Id.* (follow "FAQs" hyperlink).
[129] *Id.*
[130] Ernst & Young, LLP, Military Housing Privatization Initiative (MHPI) 101 (Sept. 2006), *available at* www.acq.osd.mil/housing/docs/mhpi101.ppt (PowerPoint Presentation) [hereinafter MHPI 101].
[131] Mil. Housing Privatization, *supra* note 127 (follow "FAQs" hyperlink).

> Priority to occupy homes is given to Service members assigned to the installation. However, if there is not enough demand for housing from military personnel and, as a result, occupancy rates drop below a certain level for a defined period of time, the developer can rent to other personnel. The developer must follow a priority list of other possible tenants as defined by the tenant waterfall. For example, the waterfall could be: (1) other military members not assigned to the installation or unaccompanied service members, (2) federal civil service employees, (3) retired military, (4) guard and reserve military, (5) retired federal civil service employees, (6) DoD contractors/permanent employees and then the (6) general public.

Id.

Service Department regarding construction and management of the housing units.[132] The contractor also has a lease agreement with the tenants regarding the rental.[133] There is no privity of contract between DoD and tenants of privatized housing.

B. The Problems that MHPI has Brought to the Table

1. Restating the Issue

The goal of this article is to develop courses of action for commanders to remove unwanted tenants from privatized housing. The implementation of privatized housing has unintentionally muddied the waters as to what the procedures for such "evictions" should be. Currently, there is no set standard and the practice for excluding tenants from privatized housing on the installation varies from post to post. Most glaring is the lack of distinction between a commander barring a tenant from the installation vice a contractor removing a tenant from housing.

The MHPI contractor at Fort Carson uses the following eviction clause in his lease:

> 23. EVICTION:
>
> a. The *Landlord may terminate this Lease and evict the Tenant* in accordance with applicable law for Tenant's failure to pay rent or for one or more material violations by Tenant of this Lease or any other actions that:
>
> i. affect or threaten to affect the health or safety of other residents in the community;
>
> ii. substantially interfere with the right to quiet enjoyment of other residents of the community; or
>
> iii. involve a violation of any applicable law or regulation; or
>
> iv. *involve misconduct resulting in a situation in which Tenant would not be eligible for referral (such as, but not limited to, bar from the housing area by military authorities).*

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[132] *Id.*
[133] MHPI 101, *supra* note 130.

> b. If the Tenant remains in possession without the Landlord's consent after termination of this Lease, the Tenant is deemed to be in breach of this Lease and the Landlord may commence an eviction action. An eviction action may be filed no earlier than the first day following the termination of this Lease. On retaining possession beyond the rental period without consent of the Landlord, the Tenant shall be obligated to pay the Landlord's attorneys' fees, court costs, and any ancillary damages due to the holdover by the Tenant.[134]

This clause of the lease raises several interesting issues. First, the landlord may initiate eviction proceedings for the violations listed. But in what court and following what law? Eviction is a legal proceeding through which a court of competent jurisdiction grants relief to a Landlord seeking to remove a tenant from the property due to a tenant's breach of the lease.[135] The legal action takes place in the jurisdiction in which the property is physically located. Second, the lease makes it clear that this is a tenancy between the contractor and the individual. Only the contractor may legally evict the tenant. The opening paragraph of the lease states, "This is a private business arrangement between the parties. The premises leased are not military housing. Landlord is a civilian corporation and not a part of the United States Government, the U.S. Army, or Fort Carson."[136] Hence, the Government is not the landlord. Any discussion of the Government enforcing the terms of the lease is an inaccurate application of law. Third, the lease specifically differentiates between being "barred from post" and being evicted from housing. The tenant must maintain access to the installation according to the terms of the lease. If the tenant is barred from post, the tenant has violated a term of the lease and the landlord has grounds for eviction. Being barred from the installation, however, does not equate to an immediate legal eviction. The tenant still has full rights to the housing unit, pursuant to the terms of the lease, until a court of competent jurisdiction issues an eviction order. Finally, the terms of the lease are very broad—perhaps overly broad and unenforceable. For example, a "violation of any applicable

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[134] Balfour Beatty Communities, Fort Carson, Forms & Guides, Lease Packet—Military *available at* http://www.fortcarsonfamilyhousing.com/communityfiles/24/pdf/Lease%20 Packet%20-%20Military%20.pdf (last visited June 22, 2009) [hereinafter Balfour Beatty Mil. Housing Lease] (emphasis added).
[135] BLACK'S LAW DICTIONARY 555 (6th ed. 1990).
[136] Balfour Beatty Mil. Housing Lease, *supra* note 134.

law or regulation" is a term of the lease. What is an applicable law or regulation? How would a court interpret and apply this term?

The same contractor uses a modified clause for the lease at an Air Force installation:

> 26. EVICTION:
>
> (a) *The Landlord may terminate this Lease and evict the Resident* in accordance with applicable law for Resident's failure to pay rent or for one or more material violations by Resident of this Lease or any other actions that:
>
> (i) affect or threaten to affect the health or safety of other residents in the community;
> (ii) substantially interfere with the right to quiet enjoyment of other residents of the community; or
> (iii) *upon notice that Resident or a member of his or her family is or has been barred from entry onto the military installation by the Base Commander*.[137]

These leases make it quite clear that the leasing agreement is between the contractor and the individual. Yet, embedded in the contract is the right of the military commander to effectively terminate the lease by barring the individual from the installation. On most Army installations, the reality is that these eviction clauses are rarely utilized. Rather, the expedient method of barring the offending individual from the installation is the preferred method of terminating the tenancy. Thus, all the constitutional due process and takings issues are created.

These contractual, procedural, and constitutional concerns surrounding MHPI have never before been present on military installations. Although the commander's power with regard to running his installation and military operations is held in the utmost regard, the commander is not exempt from complying with the law in the exercise of this power. Outside the context of privatized housing, the commander still has almost absolute power to exclude persons from the military installation. Statutes and regulations give him this power and there are

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[137] Balfour Beatty Communities, Altus AFB, Forms & Guides, Lease (Military Resident), *available at* http://www.altusfamilyhousing.com/communityfiles/12/pdf/lease.pdf (last visited June 22, 2009) (emphasis added).

few laws that restrict it. But because occupants of privatized housing are a different class of person than those individuals who live outside of the installation and seek to enter, these occupants have additional constitutional rights and protections under the law. Because of the structure of MHPI, the commander must now deal with due process and Fifth Amendment takings concerns, landlord/tenant law, and possible issues with contractual obligations with the contractor and interference with the contractual obligation between the contractor and its tenant.

2. Landlord/Tenant Law

Landlord/tenant law is a complex and diverse area of law.[138] The law is based on both common law and statutes. Each state has developed its own legal framework for defining the relationship between lessee and lessor. Typically, state law sets out detailed requirements and procedures for landlords who want to end a tenancy. The terms of a lease are subordinate to the requirements of the law. Because of the importance of the procedures, and the recognition of the important property rights involved, every state requires at least a minimal level of due process prior to the eviction of a tenant to include notice and the right to appear at a hearing. Typically, landlords are held to a high standard of performance when attempting to evict a tenant. The failure of a landlord to stringently adhere to state rules and procedures normally results in a failed eviction proceeding.[139]

The ever-present difficulty in practicing landlord/tenant law is that, despite legislatures' sincere attempts to delineate the law, state statutes are often incomplete. Courts, in these instances, rely on case law to fill the gaps. This application of the common law, however, presents its own difficulties. Over the last several decades, the legal environment has become much more protective of tenants and their property rights. New trends and developments in the law have replaced published case law that has not been formally overruled. Thus, practitioners and judges are often presented with cases and facts that statutes do not address and for which the common law is antiquated and inapplicable. This is the

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[138] *See generally* RESTATEMENT (SECOND) OF PROPERTY (LANDLORD AND TENANT) (1983). The conclusions and statements of law contained in this section are based upon the author's practice of landlord and tenant law during his tenure as Chief, Legal Assistance at XVIII Airborne Corps, Fort Bragg, N.C.
[139] *Id.*

framework of the law in which the military commander and MHPI contractor may now have to operate. The challenge is to reconcile the requirements of the military with the required protections of tenants.

Do the concepts of landlord/tenant law and consumer protectionism apply on the military installation? Is the commander a landlord, despite what the lease states, or has he relinquished that role to the private contractor under MHPI? If future courts find that the command has maintained the authority of a landlord, then it is likely that those courts will insist upon some application of landlord/tenant protections when the tenant is excluded from the installation. This will entail at least a minimal amount of due process. If future courts find that the private contractor is the actual landlord, it is almost certain that the contractor will be bound by the body of landlord/tenant law.

One of the primary purposes of MHPI was to remove the Government from the property management business. Private contractors could more efficiently build and manage housing projects. Because the Government took this positive step in relinquishing control, it is unlikely that a court would find that the Government is a de facto landlord. Thus, the Government would not be bound by landlord/tenant law. The Government also, however, would have none of the rights to evict a tenant that belong to a landlord for a breach of the lease. We are back to the vexing situation where, by excluding a tenant from the installation, a commander would be effectively terminating a private lease and participating in a Fifth Amendment taking of property.

V. Courses of Action

Having identified many of the legal issues that now face a commander when deciding to exclude a civilian tenant from privatized housing located on a military installation, the difficult task is to recommend a course of action that addresses all of these legal concerns. There exists a spectrum of courses of action for future exclusions of tenants from their homes in privatized housing. The following are some options along that spectrum:

1. Maintain the status quo (i.e., commander has plenary authority to bar)
2. Hearing by commander *prior* to bar from installation

3. Hearing by neutral board prior to bar from installation
4. Formal eviction proceeding—federal magistrate
5. Formal eviction proceeding—state magistrate

Each of these options should be analyzed with the following concerns in mind. Does the method provide the necessary due process for the individual? Will the method be found to violate the substantive due process rights of the individual? Is the Government's action an interference with the contract between the contractor and tenant? Is the action a taking of the tenant's property that requires compensation? Who is the proper party to initiate an eviction proceeding, the commander or the housing contractor? Should any imposed procedures be administrative or judicial in nature? A quick comparison of the five courses of action show that the option of utilizing a neutral board prior to the bar from the installation comes closest to addressing the majority of the legal concerns while at the same time maintaining the commander's maximum level of control over the administration of his installation.

A. Military Retains Authority

1. Maintain the Status Quo

For all of the reasons discussed, this course of action does the least to address the concerns voiced in the preceding sections. The primary advantage of the option is, of course, that it requires no change. Additionally, although this method may be questionable, no court has yet held that barring a tenant from the installation violates any constitutional, statutory, or common law legal principle. Given that the MHPI is still a relatively new program, it is highly likely that additional cases like *Adamski* will arise. It is also likely that the number of civilians who are tenants on the installation, with no military affiliation whatsoever, will increase in the future. The current method of a commander unilaterally barring tenants from the installation and their homes is almost certain to draw future legal criticism.

2. Hearing by the Commander Prior to "Bar-from-Post"

A second course of action is for the commander to give notice and hold a hearing prior to initiating the bar from the installation. This

would, on its face, address the most disturbing of the identified problems—the deprivation of a property interest with virtually none of the required due process. But, while superficially addressing that issue, there remain outstanding legal concerns, along with some newly created military operational concerns.

Does the initiation of a pre-action hearing by the commander truly address the due process concerns? The primary purpose of the required hearing is a fair and open evaluation of the facts and a weighing of the costs and benefits to each party. The commander is being asked to adjudicate an issue in which he has a direct and pressing interest. Can the commander be objective enough to give the tenant's property interest in his home the proper weight when comparing it to his own interests involving the safety, welfare, morale, and operational concerns of managing the installation? It is likely that courts would frown upon the commander remaining the unilateral decision maker, even if an opportunity to be heard is provided pre-decision.

Even if the pre-decisional hearing meets due process requirements, some of the other problems remain. One of these problems is the Takings Clause. Should a commander bar the tenant because he feels that the tenant is a security risk, the commander has taken an action that has deprived the tenant of his property interest. The tenant has in no way, however, forfeited his property interest. Even if the tenant committed acts that were in violation of his lease, those actions would not terminate his property interest. That property interest was created through a contract between the tenant and private contractor and remains in existence until the lease naturally expires or until a court of proper jurisdiction rules that a breach of the lease entitles the private contractor (landlord) to possession of the property. Any action by the commander to exclude the tenant from the installation would be a unilateral termination of the leasehold by the Government. It is likely that courts conducting a proper Fifth Amendment analysis would require the Government to compensate the tenant for the taking of his property.

A final concern is the effect of a commander's exclusion of the tenant on the contractual obligations between the Government and the contractor, and between the contractor and the tenant. By barring the tenant from the installation, the Government is in effect unilaterally terminating the lease agreement. This action interferes with the rights of both the contractor and tenant. Since contract rights are property rights, if the Government takes these contract rights it is a taking under the Fifth

Amendment and must be compensated.[140] Additionally, although the Contract Clause of the Constitution at Article I, Section 10 (prohibition on the impairing of contracts) only applies to the states, the Court has ruled that the impairment of contracts by the federal government must comply with the Fifth Amendment's due process requirements.[141] It is important to remember that there are two contracts in play here: government-contractor and contractor-tenant. It is foreseeable that there are circumstances where the contractor would not want its contract with the tenant terminated by the commander's institution of a bar from the installation. If the situation was not covered by the MHPI agreement, the contractor would be entitled to some form of due process because of the Government's unilateral interference with the contractor's agreements.

The form and substance of this due process that the federal government must provide to the private contractor is convoluted. The Supreme Court has stated that there is a "clear distinction" between the Government interfering with private party contracts vice the Government acting to alter or repudiate its own contractual obligations.[142] In order to avoid these legal issues, the contractual concerns could be addressed with modifications of the terms of the contracts themselves. Indeed, MHPI contracts already give certain protections to the contractors regarding occupancy rates and guaranteed rental rates. It would be a small step to ensure that additional terms covering these issues are included.[143] It would be more difficult to make modifications to existing

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[140] *See* Contributors to Penn. Hosp. v. Philadelphia, 245 U.S. 20 (1917); *see also* El Paso v. Simmons, 379 U.S. 497, 533–34 (1965) ("[T]he Fifth Amendment forbids Texas to do so without compensating the holders of contractual rights for the interests it wants to destroy. Contractual rights, this Court has held, are property, and the Fifth Amendment requires that property shall not be taken for public use without just compensation.").

[141] Pension Ben. Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984) ("[W]e have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clauses."); *see also id.* at 733 n.9.

> It could not justifiably be claimed that the Contract Clause applies, either by its own terms or by convincing historical evidence, to actions of the National Government. Indeed, records from the debates at the Constitutional Convention leave no doubt that the Framers explicitly refused to subject federal legislation impairing private contracts to the literal requirements of the Contract Clause.

Id.

[142] *See* Perry v. United States, 294 U.S. 330, 350–51 (1935).

[143] Mil. Housing Privatization, *supra* note 127.

MHPI contracts and the benefit of doing so may not be worth the cost of making those modifications.

3. Hearing by an Army Board Prior to "Bar-from-Post"

Providing individuals a pre-barment hearing before a standing military administrative board goes one step further towards providing sufficient due process to withstand judicial scrutiny. Arguably, if the commander, who has a direct interest in the exclusion issue, is removed from the decision making, the hearing will be fairer than a decision made directly by the commander. Additionally, the creation of a board would remove from the commander the burden of conducting these exclusion hearings. Unfortunately, the creation of a barment board does not alleviate the other legal concerns discussed in the preceding section. The board is still a government actor that will be depriving tenants of property rights, depriving contractors and tenants of contractual rights, and acting as the decision maker for a dispute in which it has a direct stake in the outcome. But this option is a further step towards providing procedural due process entitlements in the form of a more impartial decision maker.

The first three courses of action retain military control over the decision to remove tenants from the installation. Removing the "eviction" authority from the commander and his representatives to truly independent bodies would make great strides in providing tenants both the appearance of and actual due process rights. It would also help to address the Fifth Amendment takings issue. Giving the authority to exclude to independent bodies is not, however, a simple solution. It is one thing to say that a court will resolve these issues; it is quite another to say how the court will resolve these issues. Of course, by relinquishing these decisions to an authority outside of the command, we would be abdicating the very power that the commander had been seeking to exercise—the authority to bar from the installation individuals who are disruptive to health, welfare, morale, security, and mission accomplishment. The following sections will discuss the implications of allowing courts to handle "evictions" in lieu of the commander taking action.

It is important to remember that this article is not concerned with the exclusion of "normal" individuals from the installation. Rather, it is solely concerned with the exclusion of individuals who have defined

property rights within the installation boundaries—tenants in MHPI housing. An exclusion from the installation is a de facto eviction from that housing or a governmental taking of property. These disputes that would be brought before independent courts would be "true" eviction proceedings.

B. Formal Eviction Proceedings by the Courts

There are three distinct areas of concern when considering authorizing courts to evict tenants residing in privatized housing on military installations. First, are the jurisdictional requirements of such legal proceedings. Would state courts have personal and subject matter jurisdiction over the dispute? Would federal courts have subject matter jurisdiction? Second, is the choice of law puzzle. If the case were brought in federal court, what law would be used? If the case were brought in state court, would federal law, current state law, or prior state law apply? Finally, one must consider the logistics of such legal proceedings. Who would bring the eviction suit—the Government or the contractor? What if the Government and contractor disagree? Has the contractor simply sublet the housing to the tenants, with the true landlord remaining the Government?

Why use the courts to remove tenants? By using the federal court system to evict MHPI tenants, one removes the eviction authority from the commander but retains that authority with the federal government. Action by a court would also successfully address all of the constitutional issues that have been raised in this article. Procedural due process requirements would be fully met with a pre-eviction court hearing. If the tenant is successfully evicted, any Fifth Amendment takings issue disappears because with the return of possession of the leasehold to the landlord, any of the tenant's property rights are extinguished. The same benefits are true with hearing these cases in state court, but this option further removes the authority from federal control.

1. Jurisdiction on Military Installations

The quagmire involving jurisdiction on military installations is well-documented and discussed.[144] Military installations have historically been under the exclusive control and jurisdiction of the federal government. This is commonly referred to as the "state within a state" situation where the military installation is its own sovereign within the boundaries of a surrounding state.[145] The federal government solely owns and controls the installation. It is possible, however, to have situations where the federal government does not have sole and total jurisdiction over its installation.[146] This typically occurs where the federal government has acquired real estate from a state. The transfer/deed documents at the time of transfer states whether the state was reserving some sort of jurisdiction over the land or whether the state was ceding all jurisdiction to the federal government.[147] Generally, states ceded most jurisdiction to the federal government.

Additional shifting of jurisdiction over military installations has been accomplished through positive actions by the federal government. Over time, much jurisdiction and "control" has been retroceded back to local and state governments. This shift was accomplished by court rulings, statutory enactment, and executive action releasing issues from federal control into the jurisdiction of state governments.[148] As a result of this

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[144] *See* Major Stephen E. Castlen & Lieutenant Colonel Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113 (Oct. 1997) (providing a contemporary discussion of these issues).
[145] Howard v. Comm'rs, 344 U.S. 624, 626 (1953).
[146] Castlen & Block, *supra* note 144, at 117.
[147] *Id.*
[148] *Id.* at 135. Congress has authorized the Secretaries of the military services to relinquish jurisdiction to states through the passage of 10 U.S.C. § 2683.

> (a) Notwithstanding any other provision of law, the Secretary concerned may, whenever he considers it desirable, relinquish to a State, or to a Commonwealth, territory, or possession of the United States, all or part of the legislative jurisdiction of the United States over lands or interests under his control in that State, Commonwealth, territory, or possession. Relinquishment of legislative jurisdiction under this section may be accomplished
>
> (1) by filing with the Governor (or, if none exists, with the chief executive officer) of the State, Commonwealth, territory, or possession concerned a notice of relinquishment to take effect upon acceptance thereof, or
>
> (2) as the laws of the State, Commonwealth, territory, or possession may otherwise provide.

shift, many installations now have a mixture of exclusive federal jurisdiction, concurrent state and federal jurisdiction, and split or partial jurisdiction.[149] The jurisdiction attached to any particular piece of real estate is derived from the terms of the grant through which the property was obtained and by actions of the government following the acquisition.[150]

The type of jurisdiction attached to a military installation will determine the authority of a state or federal court to adjudge a complaint. As discussed above, the issue becomes complex because military installations have been acquired over many years through numerous devices.[151] One portion of the installation may be land with exclusive federal jurisdiction attached, while one block away may be land upon which federal and state authorities exercise concurrent jurisdiction. The determination of what jurisdiction is attached to various portions of a military installation entails a historical analysis of the acquisition of the property and of the various legislative measures taken since acquisition.[152] In addition to this historical analysis, however, the Supreme Court has also significantly eroded the concept of exclusive jurisdiction in a variety of holdings. In *Howard v. Commissioners*, the Court held that "[t]he fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is not interference with the jurisdiction asserted by the Federal Government."[153] Thus, residents living in areas of exclusive jurisdiction on military installations are afforded the right to vote, hold public office, qualify for welfare, etc.[154] In addition to the *Howard* concept, Congress has seen fit to pass legislation that specifically gives states jurisdiction over certain matters located on military installations. These matters include personal injury laws, workers' and unemployment compensation, and state income taxes.[155] There still are many areas of law, however, that have not been explicitly

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> (b) The authority granted by subsection (a) is in addition to and not instead of that granted by any other provision of law.

10 U.S.C. § 2683 (2006).

[149] Castlen & Block, *supra* note 144, at 118.

[150] *See id.*

[151] *See id.* at 117–18.

[152] *Id.*

[153] *Id.* at 123 (citing Howard v. Comm'rs, 344 U.S. 624, 626 (1953)).

[154] *See id.*

[155] *Id.* at 123–24.

opened to the states in areas of exclusive jurisdiction, among which is landlord/tenant law.[156]

2. Choice of Law on Military Installations

Should federal courts be given the authority to exercise jurisdiction over eviction proceedings on military installations, they would have to decide what body of law to use. The choice of law is largely dependent on the type of jurisdiction present over the land on which the privatized housing is located. Choice of law could be particularly problematic on areas of the installation where the federal government has acquired land from the state and has gained exclusive jurisdiction over that land.

There is currently no federal law governing landlord/tenant issues, and current state laws do not govern in areas of exclusive federal jurisdiction. Thus, there appears to be a void in governing law. In this situation it is possible that the state law that was in existence when the federal government acquired the land is still attached to that land.[157] In the case of *Chicago, Rock Island & Pacific R.R. v. McGlinn*, the Supreme Court held that "whenever political jurisdiction and legislative power over any territory are transferred from one . . . sovereign to another, the . . . laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign."[158] Thus, since the federal government has not legislated landlord/tenant law, the landlord/tenant law in existence at the time of the annexation from the state currently governs.[159] State laws that have been enacted since the annexation have no effect within the enclave.[160]

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[156] *Id.* at 124.
[157] *Id.*
[158] *Id.* at 125 (quoting Chicago, Rock Island & Pac. R.R. v. McGlinn, 114 U.S. 542, 546 (1855)).
[159] *Id.*
[160] *Id.*

The *McGlinn* doctrine provides a particularly convoluted solution to the choice of law when portions of the military installation have been acquired over time. In this situation, there may be a different body of landlord/tenant law for each such portion of the installation. Even more troubling are the cases when there was no state law in effect when the transfer occurred. In this case, the common law at the time of the acquisition would govern.[161] Finally, there are instances where the federal government has always had ownership of the property. In these situations, there is no governing law. State law is inapplicable and the federal government has failed to enact its own appropriate legislation.

3. Federal Court Course of Action

The morass of jurisdictional and choice of law problems presented by adjudicating eviction proceedings in federal court could be addressed in several ways. The first option would be to allow the directives of *McGlinn* to take their natural course. For some installations located in states with longstanding landlord/tenant law, this option may be painless. Likewise, if the property on which the privatized housing is located is recently acquired from the state, it would be likely that modern landlord/tenant law is attached to the property. But in other, more convoluted situations, this option would simply be untenable. The Government could be left with a hodge-podge of law or with no law at all.

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[161] *Id.* at 125–26 (discussing Orlovetz v. Day & Zimmerman, Inc., 848 P.2d 463 (Kan. App. 1993)).

> When the plaintiff attempted to sue the defendant for breach of implied contract of employment and wrongful termination of a whistleblower, both the district court and the appellate court found that under the applicable Kansas law of 1942 (the time of the federal enclave's acquisition) the state did not recognize either of the plaintiff's causes of action. The plaintiff, a victim of a harm committed on a federal enclave, was without a remedy since the state ceded the property to the federal government in 1942, when protection from such contract violations was nonexistent. Furthermore, since Congress never passed legislation specifically adopting subsequently enacted Kansas law, the plaintiff only could obtain relief under the Kansas law in effect at the time the federal government acquired the property. That old Kansas law became the present federal law.

Id.

A second option would be to enact federal legislation that would expressly assimilate the current laws of the host state. Landlord/tenant law on exclusive jurisdiction areas of the military installation would then mirror the off-post law. Federal courts, however, would be administering the law rather than state courts. A primary issue with this approach is that state law does not take into account the unique needs of the commander in maintaining good order and discipline within the confines of his installation. State law would often be at odds with the operational concerns of the commander.

A third option could go a long way in remedying the conflict with operational priorities present in the first two options. Congress could legislate, in part or in whole, a new federal body of landlord/tenant law. The likelihood of Congress drafting an entire new body of landlord/tenant law is low, but there is an option that would not require the enactment of an entire new body of law. Congress could enact "gap-filler" eviction legislation in order to conform State law to the military commander's special interests. Simply put, the legislation would have the federal courts adopt the local jurisdiction's landlord/tenant law with certain additional provisions. These provisions could include the ability to evict tenants for reasons outside of the four corners of the lease. These provisions could include areas such as operational security, military necessity, and health, morale, and welfare of the military community. Federal law, through the Supremacy Clause,[162] would win out over state law in the event of conflicts. This would resolve many of the problems inherent in state landlord/tenant law by giving it a distinctly military flavor.

None of these options remedy the other major stumbling block of pursuing evictions in federal court. It is the contractor who is the landlord and will be bringing eviction actions in all of these instances. The commander would not have the ability to evict under the traditional application of landlord/tenant law—he is not the landlord. If the commander desires to evict the tenant but the contractor does not, the commander could not proceed under eviction laws. The commander would be left with barring the individual from the installation and we would be back at square one with our original concerns about due process. This problem could be remedied by making the Government a party to the lease agreement. The commander could then be considered a landlord and empowered to evict. But this involvement would contradict

[162] U.S. CONST. art. VI, § 2.

the very purpose of the MHPI, which was intended to get the Government out of the landlord business.

4. State Court Course of Action

If the Government retains exclusive jurisdiction on the enclave, it would still be possible, under *Howard*, for state courts to hear landlord/tenant issues arising on the enclave. *Howard* dictates that if there is no federal law on point, the state courts should apply the current local law since it would not be conflicting with federal law.[163] This adoption of state law, however, is not automatic. *Howard* also requires that the adoption of state law not create any "friction" with federal functions.[164] Under the "no friction" analysis it is possible that a court might come to the conclusion that local landlord/tenant law should not be used because it impedes the military mission too much. Scenarios are easy to envision where it is in the commander's interest to have people removed from the installation simply because they are disruptive to the military community, but those people are not in violation of the terms of their lease. *Howard* would not allow courts to utilize state law to evict the tenant in these circumstances because of the friction with the federal function.

The most extreme fix to the MHPI problem is to retrocede jurisdiction of all MHPI eviction proceedings to the state courts. The Government could cede jurisdiction of the particular parcels of land upon which the privatized housing is located and create an area of concurrent jurisdiction. Congress could also chose to legislate the assimilation of state landlord/tenant law. State courts would then be free to utilize state law despite the friction it would create with military operations. This

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[163] Howard v. Comm'rs, 344 U.S. 624, 627 (U.S. 1953).

> The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.

Id.

[164] *Id.*

approach was recommended in a 1997 *Military Law Review* article.[165] It is also current Department of the Army policy to retrocede jurisdiction when exclusive federal jurisdiction is unnecessary.[166] The decision to retrocede is more than a legal issue. It is a policy decision on whether the maintenance of exclusive jurisdiction in the area of landlord/tenant law is necessary on the installation in order to safeguard the commander's responsibility to maintain good order and discipline.

VI. Conclusion

The legal conundrum created by the MHPI is not satisfactorily addressed under current law or procedures. Three major areas need to be addressed by the Government: due process, Fifth Amendment takings, and military operational requirements. It is arguable which solution is "best," as all of the proposed courses of action have shortcomings. However, the implementation of a neutral review board to hear cases prior to barring tenants from the installation should be adopted as policy. Adoption of this course of action grants an additional level of due process that may stave off future court action. At the same time, this course of action retains military control over access to the installation.

In conjunction with the implementation of a review board, the government should consider restructuring MHPI agreements. The restructuring of these agreements could require private contractors to utilize leases that clearly outline what constitutes a breach of good order, discipline, and morale, and could result in an "eviction" from the installation. The leases currently in use are vague and overly broad in what constitutes a breach. Again, this restructuring would not remedy the identified constitutional shortcomings, but it would go a long way toward providing more concrete procedural and substantive due process.

Finally, the Government should be prepared to adopt the courses of action that utilize the court systems if required. It is possible that future courts will not show the extreme deference to the military that the *Adamski* court exercised. In that case, the use of the MHPI may require that the commander relinquish some of his control of the installation to the judiciary.

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[165] *See* Castlen & Block, *supra* note 144.
[166] *Id.* at 136.

> A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken. "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."[167]

[167] Fuentes v. Shevin, 407 U.S. 67, 92 n.22 (1972) (quoting Stanley v. Illinois, 405 U.S. 645, 656 (1972) (citations omitted)).

AN END TO "TIL DEROS DO US PART": THE ARMY'S REGULATION OF INTERNATIONAL MARRIAGES IN KOREA

CAPTAIN DANA MICHAEL HOLLYWOOD*

I. Introduction

On 2 March 2007, U.S. Forces Korea (USFK) promulgated Regulation 600-240, *International Marriages in Korea*. The regulation applies to the 28,000 American servicemembers[1] stationed in the Republic of Korea (ROK) and delineates a number of procedural requirements to marry a non-U.S. citizen. The regulation's purposes go far beyond counseling young servicemembers before they make life-altering decisions. For American military personnel stationed in the ROK, micro-decisions often have macro-consequences. Prior to the regulation, marriages between U.S. servicemembers and foreign nationals[2] garnered USFK negative publicity and enervated an already fragile alliance.[3] Since its publication, the regulation has successfully reversed this trend. Nonetheless, problems with interpretation and implementation have hampered the regulation's full effectiveness. Moreover, the regulation raises a number of constitutional concerns.

This article considers several aspects of the military's decision to regulate servicemember marriages in South Korea. Section II considers the regulation in the larger context of U.S.-ROK relations, as one can

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[1] Although this regulation applies to all U.S. servicemembers on the Korean peninsula, the author's experiences pertain solely to U.S. Soldiers. Furthermore, although the regulations cited and the analysis in this article apply equally to male and female spouses, the author refers predominantly to foreign national wives as most often falling into the problematic groups of abandoned and waiting spouses. *See infra* notes 51–59 and accompanying text.

[2] Throughout the article, "foreign nationals" refers to both Koreans and non-Koreans.

[3] *See, e.g.*, U.S. FORCES KOREA, REG. 600-240: INTERNATIONAL MARRIAGES IN KOREA summary (2 Mar. 2007) [hereinafter USFK REG. 600-240] ("Insufficient regulation of international marriages involving U.S. Forces, Korea (USFK) personnel has resulted in numerous void marriages and others in which the 'spouse' is ineligible for marriage and/or immigration to the United States, creating a logistical burden and negative publicity for USFK.").

only ascertain USFK Regulation 600-240's rationale with an understanding of the U.S.- Korean partnership.

Section III traces the history of the military's regulation of marriage. The section begins with The Judge Advocate General of the U.S. Army's exhortation following the Civil War that a military directive seeking to regulate marriage would be *ultra vires* of a commander's authority. The section next reviews the changes in thinking and policy reversals witnessed as a result of World Wars I and II. A particular focus is the promulgation of Army Regulation (AR) 600-240, the 1953 regulation upon which USFK Regulation 600-240 is based. This section also evaluates two cases brought before the Court of Military Appeals in the 1950s challenging a Navy directive requiring command involvement in the marriage process. The section concludes with the public debate surrounding the controversial proposal by the Commandant of the Marine Corps to refuse to accept married recruits into the Marine Corps beginning in 1995.

Section IV reviews the regulation's constitutional ramifications, emphasizing the status of marriage as a fundamental right. The right to marry has enduring antecedents as a fundamental right in Supreme Court jurisprudence. Governmental action impinging on that right should therefore trigger the highest standard of judicial review. Nonetheless, recent Supreme Court decisions have refused to extend this standard, thereby exposing an inherent dichotomy in a declaration of the right to marry as fundamental. This section also examines the presumption that the military is a "specialized community" invoking judicial deference. As will be analyzed, both the application of a standard of review other than strict scrutiny in recent right to marry cases and the treatment of the military as a "specialized community" have far-reaching implications for a possible constitutional challenge to USFK Regulation 600-240.

Section V offers a critical analysis of USFK Regulation 600-240's purposes, procedures, policy, and applicability.[4] Particular consideration is given to two provisions that render the regulation constitutionally suspect. The article concludes in Section VI with several recommendations.

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[4] Based on the author's professional experience as Chief of Administrative Law for Second Infantry Division during USFK Regulation 600-240's promulgation.

II. The Enduring Alliance?

The U.S.-ROK alliance's strategic importance is matched only by its complexity. In the words of one Korea commentator, there has long been "[a] virulent and violent form of anti-Americanism" in South Korea.[5] Fissures in the relationship can be traced back to the Kwangju Uprising of May 1980.[6] The Kwangju Uprising, or "South Korea's Tiananmen Square," refers to the massacre of Koreans protesting the military rule of the American-backed dictator, General Chun Doo-Hwan, in the city of Kwangju.[7] Charges of American complicity in the crackdown led to violent anti-American demonstrations and have been ineffaceable as a source of tension in the relationship.[8]

Both before and since the Kwangju Uprising, an incident seems to occur every decade that further destabilizes the already frail U.S.-ROK alliance. The 7th Infantry Division withdrew in the 1970s, one of two American Army divisions that had been in Korea since the end of the Korean War.[9] The 1980s saw the Kwangju Uprising, and the 1990s brought the murder of Kum E. Yoon, a Korean prostitute, by a 2d Infantry Division (2ID) Soldier.[10] In the first decade of the twenty-first century there was the uproar over the decision to resume the importation of American beef.[11]

It is difficult to overstate the deleterious impact on the alliance brought about by the rape and murder of Kum E. Yoon by Private Kenneth Markle. At the time of the crime, Markle was assigned to 2ID and stationed at Camp Casey in Dongducheon.[12] Yoon worked as a "juicy girl"[13] in one of the camptown clubs. On 28 October 1993,

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[5] Bruce Cumings, *Anti-Americanism in Korea*, DIPLOMAT, July 1, 2007, *available at* http://www.the-diplomat.com/article.aspx?aeid=3262.

[6] For a through treatment of the Kwangju Uprising, see DON OBERDORFER, THE TWO KOREAS 124–33 (2001).

[7] Becky Branford, *Lingering Legacy of Korean Massacre*, BBC NEWS, May 18, 2005, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/4557315.stm.

[8] *See, e.g.*, Edward J. Button, *Social-Cultural Changes in South Korea Since 1991: An American View*, IIX INT'L J. OF KOREAN STUD. 199, 211 (2004).

[9] KATHARINE H.S. MOON, SEX AMONG ALLIES: MILITARY PROSTITUTION IN U.S.-KOREAN RELATIONS 59 (1997).

[10] *See infra* notes 12–14.

[11] *See infra* notes 40–41.

[12] MOON, *supra* note 9, at 21.

[13] Women working in the camptown clubs are referred to as "juicy girls" or "juicies." A juicy girl is a young woman, often from the Philippines (favored because of her fluency

Markle raped Yoon and bludgeoned her to death with a soda bottle.[14] Yoon's landlord discovered her naked, blood-caked body.[15] Her legs had been spread apart, a bottle inserted into her vagina, and an umbrella inserted eleven inches into her rectum.[16] Markle had also covered the body and the entire crime scene with laundry detergent—apparently believing it would act as lye and destroy the evidence.[17] Markle was sentenced to fifteen years in prison by a Korean court.[18]

Yoon's death brought the widely acknowledged but seldom discussed topic of crimes committed against Koreans by USFK Soldiers to the forefront of the Korean psyche.[19] Per the National Campaign for the Eradication of Crime by U.S. Troops in Korea (an umbrella organization composed of forty-six Korean non-governmental organizations formed in response to Yoon's murder), American Soldiers in Korea committed 39,452 criminal offenses between the years 1967 and 1998.[20] In the year Yoon was murdered, USFK Soldiers committed 850 crimes.[21]

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in English) or a former Soviet Republic, hired by a bar owner to encourage Soldiers to spend money on watered-down alcoholic drinks for themselves and non-alcoholic fruit drinks for the "juicy girl." *See, e.g.*, Michael Hurt, *Sex Business Lives on Despite Crackdown,* KOREA HERALD, May 27, 2005.

[14] MOON, *supra* note 9, at 21.

[15] *Id.*

[16] *Id.*

[17] *Id.*; Interview with Lieutenant Colonel Kevin M. Boyle, U.S. Army Judge Advocate General's Corps, in Uijongbu, S. Korea (Dec. 7, 2007). Lieutenant Colonel Boyle served as Private Markle's defense attorney in Markle's administrative separation hearing from the Army. *Id.*

[18] ANNI P. BAKER, AMERICAN SOLDIERS OVERSEAS: THE GLOBAL MILITARY PRESENCE 161 (2004).

[19] *See, e.g.*, MOON, *supra* note 9, at 31 (quoting a letter from forty-six Korean organizations to the Commander, 2ID, as explaining, "This [crime] has been presented as an accidental homicide, committed by one individual soldier—a 'Private crime' between the victim and the perpetrator. However, we the people believe that this is an example of how American soldiers treat Korean women.").

[20] 212TH GEN. ASSEMBLY OF PRESBYTERIAN MINISTRIES, POLICY STATEMENT TO MIDDLE GOVERNING BODIES, CONGREGATIONS, PARTNER CHURCHES, AND OTHERS FOR STUDY AND CONSIDERATION OF ITS IMPACT ON THEIR RESPECTIVE MISSION MINISTRIES app. 6, at 73 (2003), *available at* http://www.pcusa.org/gac/minutes/app103.pdf.

[21] REV. K. M. KIM, ASIAN HUMAN RIGHTS COMM'N—HUMAN RIGHTS SOLIDARITY, RISING U.S. CRIMES: KOREAN PEOPLE'S STRUGGLE TO ERADICATE THE CRIMES BY U.S. ARMY TROOPS IN KOREA (1994), *available at* http://www.hrsolidarity.net/mainfile.php/1994vol01no01/1937/.

With the turn of the century, the U.S.-ROK alliance entered a further period of decline, due largely to fundamental differences with the Bush administration over how to deal with North Korea.[22] As the U.S. President was declaring North Korea a member of the Axis of Evil, the ROK was pushing ahead with its "Sunshine Policy," seeking to emphasize peaceful cooperation with the Democratic People's Republic of Korea (DPRK) as a prelude to eventual reunification.[23] Furthermore, in October 2002, the Bush administration's doctrine of preemption replaced containment and deterrence as the cornerstone of American defense policy.[24] To America's South Korean partners, this signaled a dangerous new development in which a war could be launched against the DPRK without the ROK's consent or approval.[25]

Against this background, in June 2002, two young South Korean girls were killed when a U.S. Army engineering vehicle accidentally ran them over as they were walking to a birthday party.[26] Their deaths rallied the South Korean people, many of whom viewed the American military presence as a humiliation.[27] A military court's acquittal[28] of the two Soldiers driving the vehicle further inflamed tensions, leading to

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[22] *See, e.g.*, Cumings, *supra* note 5 ("Over 35 years of closely following Korean-American relations, I can think of no time when affairs have been allowed to deteriorate so drastically, nor can I think of an administration that has struck more dissonant notes than the Bush administration.").

[23] *See generally* KONGDAN OH, THE ASIA SOC., TERRORISM ECLIPSES THE SUNSHINE POLICY: INTER-KOREAN RELATIONS AND THE UNITED STATES (2002), *available at* http://www.asiasociety.org/publications/KoreanUpdate2002. pdf.

[24] David E. Sanger, *Beating Them to the Prewar*, N.Y. TIMES, Sept. 28, 2002, at B7.

[25] *See, e.g.*, Michael Dobbs, *N. Korea Tests Bush's Policy of Preemption; Strategy Seems to Target Weaker Nations,* WASH. POST, Jan. 6, 2003, at A01.

[26] *See, e.g.*, Howard W. French with Don Kirk, *American Policies and Presence are Under Fire in South Korea, Straining an Alliance*, N.Y. TIMES, Dec. 8, 2002, at A20.

[27] *See* Interview with Major Sean Kilkenny, U.S. Army Trial Def. Serv., in N.Y., N.Y. (Apr. 22, 2009) [hereinafter Kilkenny Interview].

[28] *See* U.S. Dep't of State, Agreement Under Article IV of the Mutual Defense Treaty between the United States of America and the Republic of Korea, Regarding the Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, Pub. L. No. 89-497, 80 Stat. 271 (1966). This agreement explained that "military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces . . . in relation to: (ii) offenses arising out of any act or omission done in the performance of official duty." In response to Korean accusations that the U.S. Army convened a mock court, the trial counsel in the court-martial at the time stated the following: "The panel had all the evidence and came to their result after lengthy deliberations. It is unfortunate that the South Korean people did not view the court-martial as anything but a kangaroo court." Kilkenny Interview, *supra* note 27.

widespread demonstrations against USFK and contributing in no small measure to the 2002 election of President Roh Moo Hyun, "the first president in South Korean history with no experience with or attachments to the United States."[29] One analyst at the Brookings Institute has referred to the Roh-Bush relationship as "the 'single rockiest' of Bush's tenure."[30]

During Roh's tenure as president of the ROK, the United States accused him of being overly nationalistic and anti-American.[31] Not only did President Roh consistently criticize the American approach to North Korea as "hardline,"[32] but President Roh also made the thorny issue of restructuring the U.S.-ROK military alliance a chief objective of his administration. Although the United States abdicated peacetime troop command to South Korea in 1994, an American four-star general continues to head the Combined Forces Command (CFC).[33] This means that although the United States accounts for less than two percent of the active duty forces in the ROK, an American general officer would command ROK forces in a war with the DPRK.[34] In 2007, the United States and the ROK agreed that the CFC would be deactivated and wartime control would shift to the ROK by 17 April 2012.[35]

In December 2007, ROK voters elected Lee Myung-Bak as President Roh's successor.[36] President Lee immediately pledged to commit his administration to rebuilding the U.S.-ROK relationship.[37] As one analyst explained in June 2008, "If what troubled Roh's presidency was too much nationalism, Lee's problem is a lack of it."[38] In April 2008, President Lee decided to lift the ban on American beef imports as part of

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[29] Cumings, *supra* note 5; *see also* Cho Hyo-young, *Roh's Victory Seen to Lead Bourse to Short-Term Rally*, KOREA HERALD, Dec. 21, 2002.
[30] Posting of Matthew Yi to S.F. Chronicle's The Ross Report, http://www.sfgate.com/cgi-bin/blogs/foreigndesk/detail?blogid=16&entry_id=8930 (Sept. 15, 2006, 15:35 PST) (quoting The Brooking Institute's Michael O'Hanlon).
[31] *See, e.g.*, Choe Sang-Hun, *An Anger in Korea Over More than Beef*, N.Y. TIMES, June 12, 2008, at A1.
[32] *See, e.g.*, French with Kirk, *supra* note 26, at A20.
[33] *See, e.g.*, David H. Gurney & Jeffrey D. Smotherman, *An Interview with B.B. Bell*, 47 JOINT FORCES Q. 76, 76 (2007).
[34] *Id.* at 76–77.
[35] *Id.* at 78.
[36] Normitsu Onishi, *Conservative Wins Presidential Elections in South Korea*, N.Y. TIMES, Dec. 20, 2007, at A8.
[37] *See, e.g.*, Betsy Pisik, *Seoul's New Chief Brings Sea Change,* WASH. TIMES, Apr. 17, 2008, at A01.
[38] Sang-Hun, *supra* note 31, at A1.

a larger free-trade deal with the United States.[39] American beef imports had been banned since 2003 after a case of mad cow disease was detected in the United States.[40] Beef-loving South Koreans saw the decision as kowtowing to the Bush administration. The move sparked massive and virulent anti-American and anti-government demonstrations, paralyzing the Lee government and culminating in a mammoth 10 June 2008 demonstration that "appear[ed] to be the largest in the capital since the 1980s . . . ." [41] Following this demonstration, President Lee's entire cabinet offered to resign;[42] it was only after President Lee offered a public mea culpa, dismissed several of his presidential aides, and revised the trade deal that a tense equilibrium was restored.[43]

Like the outrage provoked by the murder of Kum E. Yoon in 1993 and the accidental killing of the two young Korean girls in 2003, the furor over beef was less about the event and more about the tenuous state of U.S.-ROK relations. Taken as isolated incidents, neither Yoon's murder nor the decision to import beef would have unleashed such a torrent of anti-Americanism. Nonetheless, in a markedly fragile relationship built upon feelings of humiliation and intense nationalism, these incidents proved to be the tipping point.

In this light, it is easy to understand why something as celebratory as a marriage could further strain the troubled U.S.-ROK partnership. One contributing factor is the rate at which Soldiers marry foreign nationals in Korea. Although Soldiers marry foreign nationals in every country in which they are stationed, certain circumstances make such marriages in Korea far more common. Policies implemented by the Defense Finance Accounting System (DFAS) in 2005 provide incentives to USFK Soldiers to marry foreign nationals. Effective 1 October 2005, DFAS approved overseas housing allowance (OHA) for Soldiers whose

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[39] Choe Sang-Hun, *South Korea Will Lift its Ban on American Beef*, N.Y. TIMES, Apr. 19, 2008, at A3.

[40] Choe Sang-Hun, *15,000 in Seoul Defy a Warning on Protests*, N.Y. TIMES, June 29, 2008, at A11.

[41] *U.S. Beef Flap Challenges South Korea's President* (Nat'l Pub. Radio Morning Edition radio broadcast June 11, 2008), *available at* http://www.npr.org/templates/story/story.php ?storyId=91372079.

[42] On 7 July 2008, President Lee dismissed the minister of agriculture along with two other ministers. *See* Choe Sang-Hun, *South Korean President Fires 3 Cabinet Ministers*, N.Y. TIMES, July 8, 2008, at A1.

[43] Choe Sang-Hun, *Beef Furor Provokes a Turnover in Seoul*, N.Y. TIMES, June 21, 2008, at A10.

dependents were overseas with them on a non-command-sponsored tour.[44] While the policy was implemented to allow Soldiers who had served tours in Iraq and Afghanistan the opportunity to bring their Families to Korea and thus avoid another year of separation, the practical effect of this policy is to encourage overseas marriage. Although USFK Soldiers married foreign nationals prior to the DFAS policy change and accepted living in the barracks while their spouses lived off-post, the change has alleviated most of the economic burdens associated with overseas marriages. Thanks to the change in policy, a Soldier who marries a foreign national in Korea now gets to leave a sub-standard barracks room, get away from his First Sergeant, and live in a spacious, completely furnished apartment off-post—all at no additional cost to the Soldier.

Married servicemembers also earn more than single servicemembers, as the former receive family-separation pay[45] and higher basic allowance for housing (BAH), which varies by dependency status.[46] Since the formation of the Armed Services, servicemembers who do not live in government housing have received BAH.[47] The allowance is tax-exempt and represents the average rental cost in a particular geographic area.[48] For example, in addition to his base pay, a Private First Class (PFC) with dependents living in Washington, D.C. receives $1790 per month while a single PFC living in the same location receives $1388.[49] If the Soldier with dependents were to move to Fort Polk, Louisiana, his BAH would decrease to $820 per month, and the single PFC's to $703.[50]

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[44] U.S. Defense Finance Accounting Service, Military Pay Advisory (MPA) 40.05—Changes to Overseas Housing Allowance, Oct. 17, 2005, *available at* http://www.dkassociation.org/fourm/topic.asp?TOPIC_ID=154.

[45] Family separation pay of $250 per month is paid to servicemembers who are involuntarily separated from their families for thirty calendar days or more. *See* Family Separation Allowance (FSA), http://www.dfas.army.mil/militarypay/woundedwarriorpay/familyseparationallowancefsa.html (last visited June 15, 2009). A married servicemember serving a one year tour in Korea therefore receives an additional $3000. *See id.*

[46] U.S. DEP'T OF DEF., 1 REPORT OF THE TENTH QUADRENNIAL REVIEW OF MILITARY COMPENSATION 81 (2008) (cash compensation).

[47] *Id.* at 77.

[48] *Id.* at 88.

[49] U.S. Dep't of Defense, Per Diem, Travel, & Transp. Allowance Comm., Basic Allowance for Housing (2009), http://perdiem.hqda.pentagon.mil/perdiem/bah.html (last visited June 15, 2009).

[50] *Id.*

The foregoing is not meant to suggest that *all* Soldiers make a life-altering decision such as marriage simply to get away from their command, make more money, and enjoy better living conditions. Nonetheless, it would be naïve to believe that such considerations do not prove to be a determinative factor in a young Soldier's thought process on whether to marry in Korea.

So how is it that a personal decision such as marriage can deleteriously impact the U.S.-ROK strategic relationship? The answer is that Soldiers do not always act responsibly. Prior to USFK Regulation 600-240, many Soldiers either failed to assist their wives in obtaining visas to the United States, or the wives proved to be ineligible for immigration. Specifically, marriages prior to the regulation created two distinct, problematic groups: abandoned spouses and waiting spouses.

Abandoned spouses are spouses left behind when their Soldier-husbands return to the United States.[51] These Soldiers likely married their brides with no intention of taking them back to the United States after completing their tours. While these women and any children fathered by the Soldier are legally entitled to access the commissary and post exchange (PX), the services of the medical clinic, and legal assistance, the spouse's ration control card (granting access to the PX and commissary) expires within ninety days of the husband's departure. The same is true for the spouse's military dependent identification card (granting access to USFK installations). Furthermore, many of the abandoned spouses are third country nationals in the ROK illegally due to an expired visa, and are afraid to contact the Army or the U.S. Embassy for help.[52] Many of these women wrongly believe that if they come forward they will be deported and their children (who have American citizenship through their fathers) will be taken away from them and sent to the United States. Consequently, most abandoned spouses choose to suffer in silence and work low-wage, dangerous jobs as undocumented laborers. For this reason, it is impossible to accurately determine how many abandoned spouses are in the ROK.

Waiting spouses are those spouses who have remained behind in the ROK because their visas to the United States had not been approved

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[51] Interview with Ms. Linda S. Rieth, IMCOM/KORO/HHC Area I, Camp Red Cloud, in Uijongbu, S. Korea (Dec. 11, 2007).
[52] *Id.*

when it came time for the husbands to return stateside.[53] As Korea is a "short tour," with most USFK Soldiers serving a single year, it is exceedingly rare that a foreign-born spouse is able to accompany her husband back to the United States, as the processing time for the visa to the United States typically takes between nine and twelve months.[54] Without the assistance of her husband, the visa process becomes even more difficult; in time, many waiting spouses become abandoned spouses. Waiting spouses face the same legal and logistical challenges accessing USFK installations as do abandoned spouses, and have the same reluctance to seek assistance. An individual working on the issue estimates there are approximately 300 waiting families in Area I[55] of the ROK.[56]

The predicament of abandoned and waiting spouses has negatively impacted U.S.-ROK relationship in two respects. First, both groups of spouses serve as a drain on the Korean economy. Although, in the author's experience, these women and their children are typically non-Korean citizens, they still receive generous benefits under the Korean social welfare system.[57] Second, the population has led Koreans to view USFK Soldiers as irresponsible or immoral and USFK leaders as ineffective. Indeed, the summary to USFK Regulation 600-240 acknowledges the "negative publicity" abandoned and waiting spouses have caused USFK.[58] Given the precarious state of U.S.-ROK affairs, USFK realized it had to counter this perception. One plausible measure would have been revision of the U.S.-ROK Status of Forces Agreement (SOFA) entered into in 1966. Unlike the U.S.-German SOFA, the U.S.-ROK SOFA does not ensure that the U.S. Army will cooperate with South Korean officials in finding fathers and ensuring that they will provide

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[53] *Id.*

[54] Interview with Ms. Elizabeth Samarripa, Army Cmty. Serv., Area I, Korea, Camp Casey, in Dongducheon, S. Korea (Dec. 3, 2007) [hereinafter Samarripa Interview].

[55] Today, Area I has approximately 7000 Soldiers in the two main garrison enclaves of Camps Casey/Hovey and Camp Red Cloud. Camps Casey/Hovey are located in the city of Dongducheon, twelve miles from the DMZ and home to both 1st Heavy Brigade Combat Team and 210th Fires Brigade. Camp Red Cloud serves as the Second Infantry Division's Headquarters located in Uijongbu. *See* U.S. Army Installation Management Command, USAG-Red Cloud, History of Area I Support Activity, http://ima.korea.army.mil/area1/sites/about/history.asp (last visited June 15, 2009).

[56] Samarripa Interview, *supra* note 54.

[57] *See, e.g.*, Young-Hwa Kim, *Productive Welfare: Korea's Third Way?*, 12 INT'L J. SOC. WELFARE 61 (2003).

[58] USFK REG. 600-240, *supra* note 3, summary.

child support to the mothers.[59] Rather, USFK chose to implement USFK Regulation 600-240, *International Marriages in Korea*, which mandates command involvement in ensuring that Soldiers assist their dependents in seeking immigration to the United States. As explored below, USFK Regulation 600-240 is just one example of the military regulating servicemembers' marriages.

III. A History of Military Regulation of Marriage

A. Precursors

Between the American Civil War and the Global War on Terror, military thinking on the permissibility of regulating servicemembers' marriages has undergone a stunning about-face. In an opinion issued on 13 April 1876, The Judge Advocate General, Brigadier General W.M. Dunn, stated:

> Nothing can be clearer, in my opinion, than that, in the absence of an express statute restraining soldiers from contracting marriage . . . no officer can be authorized to prohibit the soldiers of his command from taking wives, or to bring them to trial if they do so without his permission. While this matter is generally regulated by specific provision in the European Codes, our statute law is silent on the subject, nor have we even an Army regulation relating to the same: indeed the imposing of restrictions upon marriage would be quite beyond the proper scope of executive rules or orders . . . .[60]

Brigadier General Dunn's admonishment would guide military policy until the post-World War I era, when security and legal impediments brought about a reversal.[61] With the fight against Fascism and National Socialism, marriages to foreign nationals raised security

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[59] *See, e.g.*, Gwyn Kirk et al., *Women and the U.S. Military in East Asia*, 9 FOREIGN POL'Y IN FOCUS 1, 2 (2000).

[60] A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY 450 (William Winthrop ed., 1901).

[61] *E.g.*, U.S. Dep't of State, Under Sec'y for Pub. Diplomacy & Pub. Affairs, The Immigration Act of 1924 (The Johnson-Reed Act), *available at* http://www.state.gov/r/pa/ho/time /id/87718.htm (last visited June 19, 2009).

concerns reflected in restrictive immigration laws.[62] Even when a foreign bride was allowed to immigrate to the United States, anti-miscegenation laws in thirty states meant that she might not be able to co-habit with her husband without facing criminal penalties.[63]

In 1939, the War Department took the first step in regulating marriages between Soldiers and foreign nationals by promulgating AR 600-750.[64] This regulation stipulated that the Army could refuse to re-enlist Soldiers in the grades of E1 to E3 who married without their commander's permission.[65] Three years later, the War Department requested an opinion from The Judge Advocate General of the U.S. Army regarding the permissibility of a broader regulation, which the War Department hoped to issue based upon a recommendation of the Commanding General, Caribbean Defense Command.[66] In response, Major General Myron C. Cramer, The Judge Advocate General of the U.S. Army, rendered an opinion reversing Brigadier General Dunn's 1876 guidance. General Cramer wrote:

> [I]f in the considered judgment of the Secretary of War the military efficiency of foreign commands requires the prohibition of marriages by members of those commands except with official permission, a regulation such as that proposed, would be subject to no legal objection. To the extent that prior opinions of this office express a contrary view, they are hereby overruled.[67]

With Major General Cramer's blessing, the War Department published Circular No. 179 on 8 June 1942, holding that "[n]o military personnel on duty in any foreign country or possession may marry without the approval of the commanding officer of the United States Army forces stationed in such foreign country or possession."[68]

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[62] *Id.* (citing "[t]he uncertainty over national security during World War I" as the impetus behind the legislation implementing literacy tests and excluding immigrants from certain geographic areas).
[63] Nancy K. Ota, *Flying Buttresses*, 49 DEPAUL L. REV. 693, 720 (2000).
[64] *See* U.S. DEP'T OF ARMY, REG. 600-750, RECRUITING FOR THE REGULAR ARMY AND THE REGULAR ARMY RESERVE para. 14 (10 Apr. 1939).
[65] *Id.*
[66] Richard B. Johns, *The Right To Marry: Infringement by the Armed Forces*, 10 FAM. L. Q. 357, 361 (1977).
[67] *Id.*
[68] U.S. WAR DEP'T, CIR. NO. 179 § 1 (8 June 1942).

Approval to marry was based solely upon the commanding officer's "subjective assessment of the probable success of marriage";[69] given the number of states with anti-miscegenation laws, it was relatively facile for a commander to conclude that an interracial marriage would not succeed.

Circular No. 179 failed to exempt Soldiers who had fathered foreign children. This remission resulted in a number of American Soldiers being forced to leave their Families behind.[70] Congress responded with the War Brides Act of 1945.[71] The act, rescinded in 1948, waived certain visa requirements for women who had married servicemembers during World War II. This resulted in the immigration of 92,465 foreign wives to the United States for fiscal years 1946 through 1948.[72] A year after passing the War Brides Act, Congress passed the G.I. Fiancées Act, facilitating the admission into the United States of alien fiancées of servicemembers.[73] More than 5000 individuals entered the United States between 29 June 1946 and 30 June 1948 as a result.[74]

Four years after the expiration of the G.I. Fiancées Act, Congress passed the Immigration and Nationality Act (INA) of 1952 over the veto of President Truman.[75] The INA was a landmark piece of legislation. Not only did it combine all previous immigration and naturalization statutes into one act, but it also reorganized the structure of immigration law by eliminating race-based quotas.[76] One of the three articulated goals of the INA was the reunification of families.[77] Consequently, the INA continued to give preference to U.S. servicemembers' spouses and children immigrating to the United States.[78]

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[69] Ota, *supra* note 63, at 722.
[70] One author estimated that American Soldiers had abandoned some 120,000 British and German "war babies." *See* Norman M. Lobsenz, *The Sins of the Fathers*, REDBOOK, Apr. 1956, at 109.
[71] War Brides Act of 1945, Pub. L. No. 79-271, 59 Stat. 659.
[72] S. REP. NO. 1515 ch. IID3 (1948) (Conf. Rep.).
[73] G.I. Fiancées Act of 1946, Pub. L. No. 79-471, 60 Stat. 339.
[74] S. REP. NO. 1515, *supra* note 72, pt. I., ch. IIE6.
[75] *See* McCarran-Walter Act, Pub. L. No. 82-414, 66 Stat. 163 (1952).
[76] *See, e.g.*, Adam B. Cox & Eric A. Posner, *The Second Structure Order of Immigration Law*, 59 STAN. L. REV. 809, 817 (2007).
[77] *See, e.g.*, Leah Phelps Carpenter, *The Status of the H-1B Visa in These Conflicting Times*, 10 TULSA J. COMP. & INT'L L. 553, 556 (2003); Fernando Colon-Navarro, *Familia E Inmigracion: What Happened to Family Unity?*, 19 FLA. J. INT'L L. 491, 491 (2007).
[78] *See, e.g.*, § 319, 66 Stat. at 339.

B. Army Regulation 600-240

The year after Congress passed the INA, the Departments of the Army, Navy, and Air Force issued a sweeping joint-service regulation titled *Marriage in Overseas Command.* [79] The directive applied to all Soldiers, Sailors, Airmen, and Marines stationed overseas wishing to marry a third country national, and provided explicit regulatory guidance for gaining the permission of the overseas commander. The regulation specifically authorized overseas commanders to issue ancillary regulations setting forth particular rules for that command.[80]

Army Regulation 600-240 was revised in 1957, 1959, 1965, 1977, and 1978, and rescinded on 1 January 1996. [81] Despite the flurry of paperwork created with each revision, the substance of the regulation remained intact. In setting out its purpose, AR 600-240 explained that while Soldiers have "basically the same right to enter into marriage as any other citizens of the United States," [82] the regulation was required to protect both aliens and U.S. citizens "from the possible disastrous effects of an impetuous marriage entered into without appreciation of its implications and obligations."[83] To achieve this goal, AR 600-240 mandated that all military personnel stationed overseas seeking to marry an alien receive written authorization from their senior commander.[84] Approval was given in all cases provided that two determinations could be made. First, neither a medical examination nor an investigative background check revealed that the intended alien spouse would "certainly or probably" be denied entry to the United States for failure to meet physical,[85] mental,[86] or character[87] standards. Second, the

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[79] U.S. DEP'T OF ARMY, REG. 600-240; BUPERSINT (BUREAU OF PERSONNEL INSTRUCTION) 1752.1; U.S. AIR FORCE, REG. 211-18; MARINE CORPS ORDER 1752.1C, MARRIAGE IN OVERSEAS COMMANDS (Oct. 14, 1953) [hereinafter AR 600-240].

[80] Johns, *supra* note 66, at 363.

[81] *See, e.g.*, ADMIN. & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S SCH., JA 263, LEGAL ASSISTANCE FAMILY LAW GUIDE (1998), *available at* http://www.louisville law.com/federal/ArmyPubs/JA263FamilyLawGuide.pdf.

[82] AR 600-240, *supra* note 79, para. 4a.

[83] *Id.* para. 1a.

[84] *Id.* para. 4a.

[85] Disqualifying physical characteristics included alcoholism, infection with various sexually transmitted diseases, leprosy, or tuberculosis. *Id.* para. 5b(3)–(4).

[86] Disqualifying mental characteristics include mental retardation, insanity, psychopathy, and sexual deviation. *Id.* para. 5b(1)–(2).

[87] "Chronic alcoholics, paupers, professional beggars, [and] vagrants," as well as those having been convicted of "[a] crime involving moral turpitude," were all ineligible to meet the requisite character standards. Further disqualifying character traits included

servicemember seeking approval had to "demonstrate[] financial ability . . . to prevent the alien spouse from becoming a public charge."[88]

Applicants were encouraged, but not required, to seek the counsel of a military chaplain.[89] Later iterations of the regulation, to include USFK Regulation 600-240, mandate rather than merely encourage non-religious pre-marital counseling from a military chaplain. Army Regulation 600-240 concluded with the suggestion that in order to avoid "overwhelming adjustment problems," alien spouses should participate in English classes and other "Western cultural activities" prior to arrival in the United States.[90]

C. Early Challenges

Two years after AR 600-240 appeared, the Commander of the United States Naval Forces, Philippines, promulgated an ancillary instruction. Like AR 600-240, the instruction, U.S. Naval Forces, Philippines (NAVPHIL) 5800.1E 60, required all members of the command wishing to marry an alien obtain the written consent of the commander.[91] Unlike AR 600-240, the Navy instruction required a mandatory six-month waiting period before a commander would grant approval to marry. The rationale behind this deviation was that it would prevent young Sailors from making impetuous decisions to marry.[92]

On 16 July 1956, Navy Seaman Nation, a U.S. Sailor stationed in the Philippines, submitted an application to marry his Filipina fiancée. Seaman Nation waited the required six months but never received a response from his command. Consequently, he married on 19 January 1957 without his commander's written authorization.[93] When the command learned of Nation's marriage, he was charged with disobeying

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having engaged in prostitution, having engaged in polygamy, or having been "anarchists, opposers of organized government, advocates of forceful or violent overthrow of organized government, members of or affiliated with the Communist or any other totalitarian party or association." *Id.* para. 5b(5)–(7).

[88] *Id.* para. 4a.

[89] *Id*. para. 5b(1)–(2).

[90] *Id*. para. 15e.

[91] *See* COMMANDER, U.S. NAVAL FORCES PHILIPPINES, NAVPHIL 5800.1E 60: MARRIAGE OF UNITED STATES NAVAL PERSONNEL WITHIN THE PHILIPPINE ISLANDS para. 5 (7 Apr. 1955).

[92] *See, e.g.*, United States v. Nation, 26 C.M.R. 504, 506 (C.M.A. 1958).

[93] *Id.*

a lawful regulation[94] in violation of Article 92, Uniform Code of Military Justice.[95] A special court-martial convicted Seaman Nation; he received a bad-conduct discharge from the Navy, forfeitures, confinement, and reduction in rank.[96] A review board in the Office of the Navy's Judge Advocate General set aside the conviction on the grounds that the regulation was not a lawful order.[97] The case eventually made its way to the Court of Military Appeals (COMA).[98] The court held the six-month waiting period to be an "arbitrary and unreasonable interference with the [servicemember's] personal affairs" and affirmed the decision reached by The Judge Advocate General's office that the regulation was unlawful.[99] Of particular note, the court found the regulation so broad that it refused to "probe the question" of whether servicemembers had the right "to marry while serving overseas."[100] Such a determination would be left to a future case.

Less than three years after *Nation*, COMA again heard what was becoming an increasingly familiar story of a Sailor stationed in the Philippines who had married his Filipina fiancée without command authorization.[101] A special court-martial convicted Seaman Wheeler, who would not prove as fortunate as Seaman Nation. Shortly after the *Nation* decision, the Navy revised NAVPHIL 5800.1E 60 and omitted the six-month waiting period COMA had condemned.[102] With the offending waiting period removed, COMA turned to the issue it had sidestepped in *Nation*—the right of servicemembers to marry overseas. The decision hints of Justice Jackson's "specialized community" theory enunciated in *Orloff v. Willoughby*.[103] Nonetheless, COMA did not stop

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[94] An order or regulation is lawful provided that it relates to military duty. Military duty is an expansive term and "includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service." MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV ¶ 14c(2)(a)(iv) (2008). Provided that an order has a valid military purpose, it may "interfere with private rights or personal affairs." *Id.*

[95] *Nation*, 26 C.M.R. at 505.

[96] *Id.*

[97] *Id.*

[98] On 5 October 1994, the U.S. Court of Military Appeals (COMA) was renamed the U.S. Court of Appeals for the Armed Forces (CAAF).

[99] *Nation*, 26 C.M.R. at 507.

[100] *Id.* at 506.

[101] *See* United States v. Wheeler, 30 C.M.R. 387 (C.M.A. 1961).

[102] *Id.* at 390.

[103] 345 U.S. 83, 94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian.").

there; it further dissected the "specialized community" among Soldiers serving overseas and Soldiers serving in the continental United States.[104] The former, it declared, were subject to greater restrictions than the latter. Dismissing Judge Ferguson's dissenting argument that there was a "complete lack of connection between the order and any requirement of the military service,"[105] COMA found the regulation "a wholly reasonable limitation of the individual's freedom of action in a command located on foreign soil"[106] and affirmed Seaman Wheeler's conviction.

D. The Mundy Directive

Following the *Wheeler* decision, the issue of military regulation of servicemember marriages received scant attention for the next three decades. This changed in the summer of 1993. That August, the Commandant of the Marine Corps, General Carl E. Mundy Jr., signed a directive prohibiting the Marine Corps from accepting married recruits as of 30 September 1995.[107] The directive cited the alarming number of married Marines failing to re-enlist after completion of their initial period of enlistment, as well as the costs associated with supporting a Marine's family.[108] Despite the directive's legitimate intentions, it was never implemented. In fact, the very day President Clinton's Secretary of Defense, Les Aspin, learned of the policy, he reversed it.[109] While the Pentagon acknowledged that the Armed Services have the authority to promulgate personnel policies, it explained that Secretary Aspin viewed "family values as sufficiently important [to] require his review."[110]

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[104] *Wheeler*, 30 C.M.R. at 389. "Activities of American military personnel in foreign countries may have different consequences from the same activities performed in the United States . . . . [A] military commander may, at least in foreign areas, impose reasonable restrictions on the right of military personnel of his command to marry." *Id.*
[105] *Id.* at 390 (Ferguson, J., dissenting).
[106] *Id.* at 388.
[107] Eric S. Montalvo, *The Constitutional Right to Marry . . . Fundamental Right or Façade? A Review of the Constitutionality of Military Restrictions on the Right to Marry . . . and Even if They Could . . . Whether They Should*, 52 NAVAL L. REV. 239, 239–40 (2005).
[108] Military Families receive generous benefits to include free housing, free medical care, free child care, and free counseling services. *See*, *e.g.*, Clifford Krauss, *Marine Leader Contritely Admits He Erred on "Singles Only" Order,* N.Y. TIMES, Aug. 13, 1993, at A1.
[109] Clifford Krauss, *The Marines Want Singles Only, But They Are Quickly Overruled*, N.Y. TIMES, Aug. 12, 1992, at A1.
[110] *Id.*

In a keen post-mortem of the directive, Senator Jim Webb (D-Va.), a former Assistant Secretary of Defense, applauded General Mundy's decision to put money into the warfighters rather than their dependents.[111] Nonetheless, Senator Webb was one of the directive's few advocates. The policy was ridiculed by members of Congress[112] and civil libertarians who claimed that it raised "constitutional questions involving discrimination and privacy."[113] In a mea culpa, General Mundy was forced to concede that he "blind-sided" President Clinton and it was "not one of [his] prouder moments in history."[114] The mêlée that erupted over the Mundy directive is instructive. Although a Service may have legitimate ends in enacting personnel policy, it may prove to be so socially unpalatable and politically untenable that it becomes impossible to implement.

IV. Constitutional Considerations

A. Tiers of Scrutiny

Modern constitutional analysis relies upon a hierarchy of standards when government action is challenged as a violation of liberty under either the Due Process Clause or the Equal Protection Clause. Courts strictly scrutinize government action that impinges upon fundamental liberties[115] or involves the use of a suspect classification.[116] Strict scrutiny is the highest standard of judicial review; under this analysis a law will be struck down unless the "infringement is narrowly tailored to serve a compelling state interest."[117] For an infringement to be narrowly tailored, courts have held that it can be neither "overinclusive" (affecting more people than necessary) nor "underinclusive" (failing to affect

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[111] James Webb, *The Military Is Not a Social Program,* N.Y. TIMES, Aug. 18, 1993, at A19.

[112] See for example comments made by Rep. Pat Schroeder (D-Colo.): "If they are not allowed to be homosexuals and they're not allowed to be married . . . what are they supposed to do, take cold showers?" Krauss, *supra* note 109, at A1.

[113] *Id.*

[114] *Id.*

[115] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 503–04 (1965).

[116] The Court has declared that race, national origin, and in certain cases, alienage, are suspect classifications subject to strict scrutiny. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (race); Korematsu v. United States, 323 U.S. 214 (1944) (national origin); Graham v. Richardson, 403 U.S. 365 (1971) (alienage).

[117] Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting).

people who should be impacted).[118] Under strict scrutiny, the means chosen by the government must also be necessary to achieve the compelling end, and there cannot be less restrictive alternatives.[119] It would be insufficient, for example, for a rational relation to exist between the means and the end, as would be permissible under the second standard of judicial review, rational basis review.[120] Due to these requirements, government action is often struck down under strict scrutiny.[121]

When government action does not infringe upon a fundamental right or involve the use of a suspect classification, the action will be upheld under rational basis review provided that it "bears a rational relation to some legitimate end."[122] Under this standard, legislation will be upheld "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."[123] Consequently, rational basis review is highly deferential to the government and laws are rarely overturned under such an analysis.[124]

The Burger Court formulated a third level of judicial review known as intermediate or mid-tier scrutiny.[125] Intermediate scrutiny is often invoked in gender discrimination cases.[126] Under this level of scrutiny, government conduct will be upheld provided that it is substantially related to an important government interest.[127]

B. A Fundamental Right to Marry?

As the foregoing illustrates, determining whether a right is considered fundamental is critical. The Supreme Court has traditionally

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[118] *See, e.g.*, Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).
[119] *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).
[120] *See, e.g.*, Heller v. Doe, 509 U.S. 312, 320 (1993).
[121] *But see Korematsu*, 323 U.S. 214 (declaring Executive Order 9066, requiring Japanese-Americans in the western part of the United States to be forcibly repatriated to relocation camps during WW II, constitutional, despite applying strict scrutiny).
[122] *E.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996).
[123] *Id.* at 632.
[124] *But see id.* (declaring Colorado's Amendment 2, which prevented any laws banning discrimination against homosexuals, unconstitutional under rational basis review).
[125] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 529 (1997).
[126] *See, e.g.*, *id.*
[127] Craig v. Boren, 429 U.S. 190, 198 (1976).

used two methods to determine whether a right qualifies for heightened judicial protection. First, courts have looked at whether the right is "deeply rooted in th[e] nation's history and tradition."[128] While such evidence is highly persuasive, it is not dispositive.[129] Second, courts have considered a normative argument on what it means to be a free person in a free society. This concept was articulated in *Palko v. Connecticut*, where the Court argued that fundamental rights are those that are "implicit in the concept of ordered liberty."[130]

1. Antecedents: Meyer*,* Skinner*, and* Griswold

The right to marry is an unenumerated right as it appears in neither the Constitution nor the Bill of Rights.[131] Nonetheless, the right has an extensive history in Supreme Court jurisprudence. In 1923, the Court considered the case of a teacher convicted of teaching German to a student in violation of a 1919 Nebraska state statute prohibiting the teaching of foreign languages to pupils before high school.[132] That case,

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[128] *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977); *see also* Griswold v. Connecticut, 381 U.S. 479 (1965) ("The Court stated many years ago that the Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))).

[129] For example, referring to the Virginia anti-miscegenation law that *Loving v. Virginia* struck down, Justice Stevens asserted in his *Bowers v. Hardwick* dissent, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." 478 U.S. 186, 216 (1986) (Stevens, J., dissenting). Similarly, writing for the majority in the case that would overturn *Bowers*, Justice Kennedy explained:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

[130] 302 U.S. 319, 325–26 (1937).

[131] *See, e.g.*, Howard Gillman, *The Future of Unenumerated Rights: Regime Politics, Jurisprudential Regimes, and Unenumerated Rights*, 9 U. PA. J. CONST. L. 107, 118 (2006).

[132] Meyer v. Nebraska, 262 U.S. 390, 396 (1923).

Meyer v. Nebraska, was a benchmark in the creation of substantive due process. Writing for the majority, Justice McReynolds held that liberty, under the Due Process Clause, encompassed the right "to marry, establish a home and bring up children."[133] In 1942, in *Skinner v. Oklahoma*,[134] the Court commented on the essential nature of marriage in society when it declared that marriage is "fundamental to the very existence and survival of the race."[135] In *Skinner*, the Court considered the constitutionality of an Oklahoma law that required the sterilization of "habitual criminals."[136] The Court struck down the law as unconstitutional.

Finally, in the landmark case of *Griswold v. Connecticut*,[137] the Court again referred to the fundamental nature of marriage in invalidating a Connecticut statute that prohibited the use of contraceptives among married couples. In *Griswold*, the Court ruled that the Constitution protected a right to privacy and Justice Douglas's majority opinion placed special emphasis on the burden the Connecticut statute placed on the marital relationship.[138] Justice Douglas concluded his opinion with the following language:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[139]

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[133] *Id.* at 399.
[134] 316 U.S. 535 (1942).
[135] *Id*. at 541.
[136] *Id.* at 536 (defining an "'habitual criminal' as a person who, having been convicted two or more times for crimes 'amounting to felonies involving moral turpitude,' either in an Oklahoma court or in a court of any other State, is thereafter convicted of such a felony in Oklahoma . . . .").
[137] 381 U.S. 479 (1965).
[138] *Id.* at 485 ("The marriage relationship lies within the zone of privacy created by several fundamental constitutional guarantees. [The Connecticut statute], in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship.").
[139] *Id.* at 486.

Although *Meyer*, *Skinner*, and *Griswold* all asserted the fundamental importance of marriage to the traditional family and society, none of these cases dealt with the explicit right to enter into marriage. Rather, each case involved, in the words of one legal scholar, an "interference with marriage," [140] meaning the marital relationship had already been established and the plaintiff alleged that the state had wrongly interfered with a constitutional aspect of the marriage partnership. In contrast, marriage cases considered post-*Griswold* fall into the "failure to recognize" [141] category, meaning the marital relationship had yet to be consummated and the plaintiff alleged that the state had refused to recognize the actual marital relationship.

2. *Regulating the Right to Marry:* Loving

In June 1958, Richard Perry Loving, a white man, and Mildred Delores Jeter, an African-American and Cherokee woman, married in Washington, D.C.[142] Five weeks later, while residing in Caroline County, Virginia, Richard and Mildred were arrested for violating Virginia's anti-miscegenation law.[143] After the Lovings pleaded guilty and received a sentence of a year in jail, the trial judge agreed to suspend the sentence provided the couple leave Virginia and not return for a period of twenty-five years.[144] The Lovings moved to Washington, D.C.; five years after their banishment, they filed a motion asking a Virginia court to vacate their sentence, arguing that the statute was unconstitutional under the Fourteenth Amendment.[145] The state court denied the motion, and the Lovings appealed. The Supreme Court of Appeals of Virginia affirmed the convictions and upheld the anti-miscegenation law as constitutional, a decision ultimately reversed by the U.S. Supreme Court. [146]

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[140] *See* Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 MINN. L. REV. 1184, 1192 (2004); *see also* Lynn D. Wardle, Loving v. Virginia *and the Constitutional Right to Marry, 1790–1990*, 41 HOW. L.J. 289, 302 (1998).
[141] Ball, *supra* note 140, at 1192.
[142] Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of* Loving v. Virginia, 41 HOW. L.J. 229 (1998).
[143] Loving v. Virginia, 388 U.S. 1, 3 (1967).
[144] *Id.*
[145] *Id.*
[146] *Id.*

In a unanimous opinion written by Chief Justice Warren, the Court concluded "that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[147] The Court's opinion could have rested solely on this equal protection analysis, but in the final two paragraphs of the opinion the Court made a substantive due process argument. Chief Justice Warren explained:

> Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.[148]

3. Tensions with the Right to Marry: Zablocki *and* Turner

The marriage cases following *Loving* expose what one scholar has referred to as "the substantial difficulties with the concept of a right to marry."[149] Although *Loving* cemented the fundamental status of the right to marry, in post-*Loving* "failure to recognize" marriage cases the Court has been unwilling to extend the strict scrutiny normally applied to laws infringing upon fundamental rights. *Zablocki v. Redhail*[150] is one such example.

In *Zablocki*, the Court considered the constitutionality of a Wisconsin statute requiring that non-custodial parents ordered to make child support payments receive court counseling and permission prior to being granted a marriage license.[151] The statute specified that such permission would only be forthcoming if two conditions could be met. First, the individual seeking the license had to provide the court with proof that he or she was in current compliance with his or her

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[147] *Id.* at 12.
[148] *Id.* (internal citations omitted).
[149] Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949, 950 (1992).
[150] 434 U.S. 374 (1978).
[151] *Id.* at 375.

obligations.[152] Second, the individual had to demonstrate that the child covered by the support order would not become a public charge.[153]

The facts behind *Zablocki* stem from a high school tryst. In 1972, an acquaintance of Roger Redhail brought a paternity action against the high school senior in Milwaukee County, Wisconsin.[154] Mr. Redhail acknowledged that the baby girl was his, and the county court ordered him to pay $109 per month until she reached the age of eighteen.[155] Mr. Redhail never made a single payment. In September 1974, Mr. Redhail filed an application for a marriage license to a second woman who was also pregnant with his child. The license was denied on the grounds that Mr. Redhail was several thousand dollars in arrears on his support obligations, and his daughter had received benefits under the Aid to Families with Dependent Children program since her birth.[156] Mr. Redhail brought a class-action suit against the country clerk, Thomas Zablocki, and prevailed in the U.S. District Court for the Eastern District of Wisconsin, which concluded that strict scrutiny was the appropriate standard[157] and held the statute unconstitutional.[158] Appellant then appealed directly to the U.S. Supreme Court.

While eight Justices agreed with the Federal District Court that the statute was unconstitutional, the Court could not agree upon a rationale, evidenced by four concurring opinions. Justice Marshall's confusing majority opinion undermines strict scrutiny[159] and at times equates equal protection with a substantive due process analysis.[160]

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[152] *Id.*
[153] *Id.*
[154] *Id.* at 378.
[155] *Id.*
[156] *Id.*
[157] In applying strict scrutiny, the U.S. District Court for the Eastern District of Wisconsin relied upon both a substantive due process argument ("there is a constitutionally protected right to marry which occupies the status of being a fundamental right") and an equal protection argument ("[t]he wealth discrimination inherent in the statute thus provides an additional justification for applying the strict scrutiny test"). Zablocki v. Redhail, 418 F. Supp. 1061, 1069–70 (1976).
[158] *Zablocki*, 434 U.S. at 376.
[159] Justice Marshall consistently expressed concern with the tiered system of judicial review. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

> To begin, I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. The Court apparently seeks to establish today that . . . cases fall into one of two

The Court cited *Loving* as the leading case on the right to marry and quoted it, *Meyer*, *Skinner*, and *Griswold* in asserting "the fundamental character of the right to marry."[161] Nonetheless, rather than automatically apply strict scrutiny, the Court held that the determinative question was not whether government action had impinged upon a fundamental liberty, but whether it "interfered directly and substantially with the right to marry."[162] Taking special pains to explain that traditional strict scrutiny did not apply in the present case, Justice Marshall explained:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.[163]

The selection of the term "rigorous" rather than "strict" is noteworthy. Equally illuminating is the pronouncement that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[164] Here, Justice Marshall jettisons the strict scrutiny "compelling" state interest requirement in favor of an intermediate scrutiny "important" interest element. Justice Marshall was reluctant to apply a traditional

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> neat categories which dictate the appropriate standard of review . . . .
> But this Court's decisions . . . defy such easy categorization.

Id. (internal citations omitted); *see also* Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984) (explaining that "Justice Marshall believes that the multi-tier approach is an oversimplification . . . . He claims that a principled reading of the Court's decisions reveals a spectrum, or 'sliding scale,' of scrutiny that is calibrated by degrees rather than by two or three tiers.").

[160] *See, e.g.*, *Zablocki*, 434 U.S. at 391 (Stewart, J., concurring) ("To hold, as the Court does, that the Wisconsin statute violates the Equal Protection Clause seems to me to misconceive the meaning of that constitutional guarantee. The Equal Protection Clause deals not with substantive rights or freedoms but with invidiously discriminatory classifications.").

[161] *Id.* at 386.

[162] *Id.*

[163] *Id.* at 388.

[164] *Id.*

strict scrutiny analysis to the right to marry, even though his opinion asserts its fundamental character.

The key to understanding this reluctance is found in the concurring opinions. Justice Stewart emphatically disagrees that "there is a 'right to marry' in the constitutional sense."[165] He explains that the "privilege" to marry is "one to be defined and limited by state law."[166] Indeed, the state, he argues, may entirely prohibit it.[167] Herein lies the problem. As one scholar explains:

> [B]road state power to regulate marriage clashes with the idea of marriage as a fundamental right. If a state can define the boundaries of marriage, then it can manage its citizens' access to marriage through those boundaries. But, if marriage is a fundamental constitutional right, such state attempts to restrict access to it should be viewed with great suspicion by the courts.[168]

Nine years after the muddled *Zablocki* holding, the Court again considered the right to marry. While both *Loving* and *Zablocki* were decided primarily on equal protection grounds, the Court based its 1987 decision in *Turner v. Safley*[169] exclusively on a substantive due process analysis, making it, in the words of one scholar, the "most important" failure to recognize marriage case.[170] In *Turner*, prison inmates argued that two regulations implemented by a Missouri correctional institution were unconstitutional and brought a class action suit against prison officials.[171] The first regulation limited correspondence between unrelated inmates housed in different prisons. The second regulation prohibited inmates from marrying except in extenuating circumstances of pregnancy or the birth of a child. The U.S. Court of Appeals for the Eighth Circuit invalidated both regulations. The court applied strict

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[165] *Id.* at 392 (Stewart, J., concurring).
[166] *Id.*
[167] *Id.* While not going as far as Justice Stewart, Justice Powell also expressed concerns with the majority's rationale, noting that it "sweeps too broadly in an area which traditionally has been subject to pervasive state regulation." *Id.* at 396 (Powell, J., concurring).
[168] Joseph A. Pull, *Questioning the Fundamental Right to Marry*, 90 MARQ. L. REV. 21, 34 (2006).
[169] 482 U.S. 78 (1987).
[170] Ball, *supra* note 140, at 1200.
[171] Turner v. Safley, 482 U.S. 78, 82 (1987).

scrutiny, as the regulation implicated two fundamental rights—speech and marriage.[172]

While Justice O'Connor's opinion acknowledged that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,"[173] the Court also noted that "the right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration."[174] Consequently, the Court concluded that rational basis review was the proper standard to evaluate the regulations.[175] By a vote of 5-4, the Court reversed the Eighth Circuit's invalidation of the correspondence regulation, holding that it *reasonably* related to security interests. With regard to the marriage regulation, the four dissenters joined Justice O'Connor's opinion and the Court unanimously affirmed the lower court's decision to strike down the marriage regulation, as it did not "satisfy the reasonable relationship standard."[176] Once again, despite acknowledging the fundamental character of the right to marry, the Court applied a less exacting standard than strict scrutiny.

Turner is an important case in considering the constitutionality of marriage regulations promulgated by the military. The *Turner* Court's use of rational basis review, rather than strict scrutiny, can be analogized to cases involving marriage rights of Soldiers. Soldiers, like prison inmates, belong to a "specialized community,"[177] and any regulation that infringes upon the fundamental rights of individuals belonging to either of these groups should undergo a similar standard of review.

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[172] Safley v. Turner, 777 F.2d 1307, 1313 (8th Cir. 1985).
[173] *Turner*, 482 U.S. at 84.
[174] *Id.* at 95.
[175] *Id.* at 89.

> [W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations."

Id. (internal citations omitted).
[176] The Court concluded that the marriage regulation was neither reasonably related to the penological interest of security nor to the goal of rehabilitation. *Id.* at 97–98.
[177] *See infra* note 179 and accompanying text.

A. The Military as a "Specialized Community"

While the Supreme Court has acknowledged that Soldiers are entitled to the same rights as all U.S. citizens,[178] it has consistently held that "the military constitutes a specialized community governed by a separate discipline from that of the civilian",[179] and the need for discipline and obedience "may render permissible within the military that which would be constitutionally impermissible outside it."[180] Such a presumption is as old as the Constitution. In the Fifth Amendment, for example, the framers distinguished cases arising in the military services from those arising in civilian life.[181]

Hand in hand with the supposition that military members' individual rights must often be curtailed to accomplish the military mission has been a judicial deference to military matters.[182] Indeed, as Justice Jackson famously noted in *Orloff v. Willoughby*, "judges are not given the task of running the Army."[183] At times, however, such judicial deference runs the risk of amounting to judicial abdication. In the most shameful example of the judiciary deferring to the military—*Korematsu v. United States*—the Court upheld Executive Order 9066, requiring Japanese-Americans in the western United States to be forcibly repatriated to internment camps during World War II.[184]

Justice Jackson first penned the widely quoted aphorism "specialized community" in the 1953 case of *Orloff v. Willoughby*.[185] In what the Court described as "a novel case," Orloff was inducted into the Army but

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[178] Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962) ("[O]ur citizens in uniform may not be stripped of basic rights simply because they doffed their civilian clothes.").
[179] Orloff v. Willoughby, 345 U.S. 83, 94 (1953).
[180] Parker v. Levy, 417 U.S. 733, 758 (1974).
[181] *See* U.S. CONST. amend. V (providing in part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of Grand Jury, *except in cases arising in the land or naval forces*, or in the Militia, when in actual service in time of War or public danger" (emphasis added)).
[182] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (holding that "our review of military regulations . . . is far more deferential than constitutional review of similar laws or regulations designed for civilian society"); *see also* Rostker v. Goldberg, 453 U.S. 57, 64 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.").
[183] *Orloff*, 345 U.S. at 93.
[184] 323 U.S. 214, 216 (1944).
[185] *Orloff*, 345 U.S. at 94.

denied a commission due to his refusal to state whether he had been a member of the Communist Party.[186] Orloff then sought a writ of habeas corpus to discharge him from the Army.[187] The district court denied the writ and the U.S. Court of Appeals for the Ninth Circuit affirmed.[188] In affirming the Ninth Circuit's judgment, the Court held that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."[189]

The effect of judicial deference to the military's "specialized community" has been the consistent application by courts of less stringent standards than strict scrutiny to constitutional challenges of military regulations and rules implicating fundamental rights and suspect classifications. As the case law demonstrates, even when military regulations and rules implicate fundamental rights, such as speech[190] or the Free Exercise Clause,[191] or suspect classifications such as gender,[192] courts apply rational basis review rather than strict scrutiny, and uphold the military regulation or rule provided that it is reasonable.

V. The Devil is in the Details: USFK Regulation 600-240

A. Purposes

In an e-mail to commanders and senior USFK leaders on 1 March 2007, the USFK Commander specifically cited USFK Regulation 600-240's purpose as "eliminat[ing] the problem of [servicemembers] leaving

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[186] *Id.* at 84.
[187] *Id.* at 85.
[188] *Id.* at 87.
[189] *Id.* at 94.
[190] *See, e.g.*, Parker v. Levy, 417 U.S. 733, 737 (1974) (denying an Army physician's habeas corpus review of his general court-martial conviction). Captain Levy had referred to special forces personnel as "liars, thieves, killers of peasants, and murderers of women and children" and had urged African-American enlisted men not to go to Vietnam. *Id.*
[191] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that an Air Force regulation prohibiting the wearing of a yarmulke did not violate the First Amendment free exercise rights of a Jewish Air Force captain).
[192] *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (holding that the Military Selective Service Act did not violate the Fifth Amendment in authorizing the President to require a male-only registration for the draft.).

spouses behind when they [transfer] out of Korea."[193] The emphasis of invigorating the U.S.-ROK strategic relationship by confronting the issue of abandoned and waiting spouses is further reflected in the regulation's *Commander's Intent*. Of the two articulated interests, the first explains that the regulation fills a necessary information gap and that "[m]arriages entered into in the absence of this information may result in spouses and children who are left behind in Korea when the servicemember leaves, creating undue hardship."[194]

United States Forces Korea Regulation 600-240 is a short document of thirteen pages with an additional eighteen pages in appendixes and copies of required forms. The regulation is structurally confusing and often difficult to follow, particularly for Soldiers. The crux of the regulation is meant to be paragraph 4 (responsibilities), delineating the myriad tasks both the Soldier and members of the chain of command must complete. Nevertheless, this paragraph fails to lay out comprehensively all required steps. Very confusingly, that paragraph is supplemented by paragraph 6 (pre-marital procedures); paragraph 7 (marriage in the ROK); and paragraph 8 (immigration procedures), all of which contain their own laundry list of requisite steps.

The 2ID Office of the Staff Judge Advocate (OSJA) further promulgated both a *Commander's Guide to USFK Regulation 600-240* and a *Soldier's Guide to International Marriages in Korea*. Both documents include a user-friendly flow chart laying out all required steps in a single PowerPoint slide.[195] Because commanders often were as confused as their Soldiers, particularly with regard to the information they needed to convey in two separate counseling sessions, the *Commander's Guide* is also supplemented by model templates of the Department of the Army Form 4856, Developmental Counseling.[196] The

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[193] E-mail from General Burwell B. Bell, UNC/CFC/CDR, to Lieutenant General James P. Valcourt, USFK Chief of Staff et al. (1 Mar. 2007, 17:74:12 KST (UTC + 9)) (on file with author). Eight days after sending the email to senior USFK leaders, General Bell followed up with an article to all USFK Soldiers. *See* General B.B. Bell, *International Marriages in South Korea*, WOLF PACK WARRIOR, Mar. 9, 2007, at 2, *available at* http://www.kunsan.af.mil/shared/media/document/AFD-070314-054.pdf.

[194] USFK REG. 600-240, *supra* note 3, para. 3a(1).

[195] Second Infantry Div. Chief, Admin. Law, Marriages in the Republic of Korea Briefing (Apr. 3, 2007) (unpublished PowerPoint Presentation, on file with author).

[196] U.S. Dep't of Def., DD Form 4856, Developmental Counseling Form (Pre-Marital Counseling with Couple) (May 2006); U.S. Dep't of Def., DD Form 4856, Developmental Counseling Form (Pre-Marital Counseling with Soldier) (May 2006); U.S. Dep't of Def., DD Form 4856, Developmental Counseling Form (Final Checklist

Soldier's Guide places special emphasis on those steps required to marry in Korea once the procedural requirements of USFK Regulation 600-240 have been met.[197]

B. Procedures

The process begins with a Soldier informing his chain of command that he wishes to marry a non-U.S. citizen in the ROK.[198] Immediately thereafter, the Soldier is responsible for scheduling the first of two counseling interviews with his battalion commander.[199] During the initial counseling the battalion commander is expected to advise the prospective couple on "understanding and accepting cultural differences."[200] It is peculiar that this is a required topic, as most commanders are not counselors and cross-cultural sensitivity is a topic covered in the mandatory counseling with the chaplain. Even more bizarre, the commander is required to counsel the Soldier on "what constitutes visa fraud and the penalties for marriage with a foreign national solely to circumvent U.S. immigration law"[201]—a topic most battalion commanders are unqualified to discuss with, much less counsel, a young Soldier.

At least forty-eight hours after the initial counseling session, the Soldier, without his fiancée, is required to meet with his battalion commander for a second counseling interview. The minimum forty-eight hour period is meant to let the Soldier "reflect on the subjects discussed" and cannot be waived.[202] During this second counseling, the commander

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Prior to Forwarding to Verification Authority) (May 2006) (on file with author).

[197] *See, e.g.*, Camp Casey Legal Office, *Soldier's Guide to International Marriages in Korea* 5–7, Mar. 2007, *available at* http://www.2id.korea.army.mil/documents/soldiers_guide_usfk_marriage_reg20070319.pdf [hereinafter *Soldier's Guide to International Marriages in Korea*].

[198] USFK REG. 600-240, *supra* note 3, para. 6a.

[199] When the 2ID OSJA learned that some Soldiers were waiting up to two months to get on the battalion commander's calendar, it drafted a memorandum for record signed by the 2ID Chief of Staff directing all commanders to "make reasonable efforts to meet with [their] Soldiers within 14 days of the Soldier notifying the chain of command." Memorandum from Colonel Robert P. Pricone, Second Infantry Div. Chief of Staff, to Second Infantry Div. Commanders, subject: Implementation Guidance for USFK Reg. 600-240 (International Marriages in Korea) (1 Apr. 2007) (on file with author).

[200] USFK REG. 600-240, *supra* note 3, app. I(2).

[201] *Id.* para. 6b.

[202] *Id.*

will inform the Soldier that he may be involuntarily extended in Korea to complete the regulation's requirements.[203] The Soldier will also swear to and sign USFK Form 166, an affidavit of acknowledgement that he has been counseled on visa fraud.[204]

The Soldier must next notify his security (intelligence) manager of his decision to marry a foreign national.[205] Such vigilance is well-founded, as many of the women our Soldiers are marrying could present a significant intelligence threat. One Russian woman confided to the author that she and other "juicy girls" could earn extra money by acquiring operational information from Soldiers and selling it to Russian mafia handlers who would offer it to the Russian government.[206]

The security manager will caution Soldiers with security clearances that marriage to certain foreign nationals may result in reduction or loss of the clearance as well as possible ineligibility to continue a career in the intelligence field.[207] Per paragraph 4e(7)(d) of the regulation, prospective spouses of Soldiers with access to Sensitive Compartmented Information may be required to undergo a National Agency Check equivalent.[208] In fact, in the ROK, *all* prospective spouses, whether Korean, Filipina, Russian, or another nationality, must provide the Korean ward office (town hall) with background checks prior to marriage.[209] If the Soldier's fiancée is Korean, she must receive a Korean National Police Certificate (KNPC) by providing a local Korean police station with her Korean identity card.[210] The KNPC will indicate whether the subject has committed a felony in the ROK.[211] Processing the KNPC costs roughly 10,000 won (about ten U.S. dollars) and takes fewer than twenty-four hours.[212] If the Soldier's fiancée is a nationality other than Korean, but she has lived in the ROK for more than six months after her sixteenth birthday, she must provide the local ward office with both a police certificate from her country of nationality and a

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[203] *Id.* para. 6c.
[204] *See id.* app. E.
[205] *Id.* para. 6(d).
[206] Interview with Natasha Ivanova, Mojo's American Bar, in Dongducheon, S. Korea (Nov. 24, 2007).
[207] USFK REG. 600-240, *supra* note 3, para. 4e(7).
[208] *Id.* para. 4e(7)(d).
[209] Interview with Sung Lee, Uijongbu Immigration Office, in Uijongbu, S. Korea (Dec. 21, 2007).
[210] *Id.*
[211] *Id.*
[212] *Id.*

KNPC, which will be processed upon presentation of her Korean alien registration card or passport.[213] If the Soldier's fiancée is a nationality other than Korean, but she has lived in the ROK for less than six months, she need only provide the ward office with a certificate from her country of nationality indicating that she has no criminal record.[214]

The Soldier and his fiancée must next schedule a counseling session with a military chaplain. The chaplain will provide the couple with pre-marital and cross-cultural marriage counseling. The counseling will not be religious in nature unless requested by the Soldier.[215] The issue of mandatory counseling by a chaplain was briefly raised in *United States v. Wheeler* with the defendant claiming the counseling constituted "an intrusion into religious practices."[216] The Court of Military Appeals squashed this argument, asserting that "[h]owever high or thick the wall of separation between church and state, the interview provision does not breach that wall. It does not force, influence, or encourage the applicant to profess any religious belief or disbelief."[217]

The couple must next attend a legal counseling session. The legal officer will provide the couple with an overview of the Immigration and Nationality Act and the prospective spouse's status under immigration laws of the United States.[218] This counseling does not create a confidential attorney-client privilege.[219] At the termination of this session, the Soldier is required to sign USFK Form 41, Immigration Counseling Certificate.[220]

Both the Soldier and his intended spouse must next obtain a medical examination. The Soldier may have his medical examination conducted at a military medical facility at no charge. The Soldier's examination consists of serology testing for HIV, syphilis, and hepatitis B, as well as a tuberculin skin test.[221] The intended spouse's medical examination serves as both the pre-marital examination as well as the visa medical examination. The couple is responsible for scheduling the examination

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[213] *Id.*
[214] *Id.*
[215] USFK REG. 600-240, *supra* note 3, para. 4d(4).
[216] United States v. Wheeler, 30 C.M.R. 389 (C.M.A. 1961).
[217] *Id.*
[218] USFK REG. 600-240, *supra* note 3, para. 4g(2).
[219] *Id.* para. 4g(1).
[220] *See id*. app. B.
[221] *See id*. app. F(a).

at an approved medical facility sanctioned by the U.S. Embassy.[222] The fee for the medical exam at all approved facilities is $150.[223]

Provided that the Soldier and his intended spouse have complied with the requirements above, they may submit their application to marry to the battalion commander.[224] A completed application will contain a number of USFK forms[225] as well as paperwork, to include: the Soldier's and intended spouse's birth certificates;[226] birth certificates of any additional dependents to be acquired by marriage;[227] evidence of termination of any previous marriages by either party;[228] parental consent if either party is under twenty years of age (the legal age to marry in the ROK);[229] the Soldier's medical examination report signed by a U.S. forces medical officer;[230] the medical examination of the intended spouse signed by a U.S. forces medical officer;[231] and all required background checks for the intended spouse. This paperwork is required for the spouse to receive a U.S. visa, and gathering the documents at this stage will facilitate that process.

Once the battalion commander has ensured that all the necessary documents are included, and has verified that the Soldier is single by consulting the Soldier's Official Military Personnel File (OMPF), he will sign USFK form Section V.[232] At this time the complete application will be forwarded to the supporting legal office for sufficiency review.[233] Once the legal officer has determined that the application is legally

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[222] Currently, the U.S. Embassy has approved five Korean medical facilities, with three located in Seoul, one in Suwon, and one in the port-city of Pusan. *See* Embassy of the United States, Seoul, Korea, Immigration Visa Medical Examination, *available at* http://seoul.usembassy.gov/uploads/images/aeBE4_eiK8ao951ClV9EMQ/ME_dec08.pdf (last visited July 1, 2009).

[223] Interview with Ang-Suk Kim, Saint Mary's Hospital, in Seoul, S. Korea (Jan. 2, 2008).

[224] USFK REG. 600-240, *supra* note 3, para.6h.

[225] These forms include: U.S. Forces Korea, USFK Form 41, Immigration Counseling Certificate (2 Mar. 2007); U.S. Forces Korea, USFK Form 163, Pre-Marital Certification Application (2 Mar. 2007); and U.S. Forces Korea, USFK Form 166, Affidavit of Acknowledgement (Visa Fraud) (2 Mar. 2007).

[226] USFK REG. 600-240, *supra* note 3, para. 6h(3).

[227] *Id.* para. 6h(4).

[228] *Id.* para. 6h(6).

[229] *Id.* para. 6h(5).

[230] *Id.* para. 6h(8).

[231] *Id.* para. 6h(9).

[232] *Id.* para. 6l.

[233] *Id.* para. 4c(2).

sufficient, the Soldier's chain of command will forward it to the verification authority.[234] The verification authority will ultimately determine whether the Soldier has properly complied with the regulation.[235]

United States Forces Korea Regulation 600-240 outlines five verification authorities.[236] Additionally, the regulation permits the verification authority to "be delegated in writing to the brigade, area, or wing, or appropriate O-6 level commander."[237] Second Infantry Division promptly delegated verification authority for acknowledging Soldier compliance with USFK Regulation 600-240 to the three brigade commanders.[238] Once the verification authority has verified that the Soldier has satisfied all the pre-marital requirements, he will sign USFK Form 163, Section VIII. While this act concludes the regulation's procedural requirements, the couple still must comply with Korean marriage laws.[239] After marriage, the Soldier can immediately begin filing for the spouse's immigration visa.[240] The Soldier will keep his battalion commander informed of the date the immigrant petition is filed, the date the petition is approved, and the date the immigration visa is approved.[241]

C. Policy

The regulation's paragraph 5 (Policy) holds that verification of a Soldier's application to marry will be granted in all cases where the Soldier has met the regulation's procedural provisions, *provided that* the verification authority determines the following four circumstances exist:

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[234] *Id.* para 5(b).
[235] *Id.* para. 4c(1).
[236] The verification authorities include Commander, 8th U.S. Army; Commander, 7th Air Force; Commander, U.S. Naval Forces Korea; Commander, U.S. Marine Corps Forces, Korea, and Commander Special Operations Command Korea. *See id.* para. 4b(1)–(5).
[237] *Id.* para. 4b(6).
[238] *See* Memorandum from Brigadier General John D. Johnson, Second Infantry Div. Assistant Div. Commander, to Second Infantry Div. Commanders, subject: Delegation of Verification Authority for Acknowledging Soldier Compliance with USFK Regulation 600-240, International Marriages in Korea (15 Mar. 2007).
[239] *See Soldier's Guide to International Marriages in Korea, supra* note 197, at 4–5.
[240] USFK REG. 600-240, *supra* note 3, para. 8.
[241] *Id.*

> (1) There is no evidence that the servicemember and intended spouse are currently married; (2) There are no indications that the intended spouse would be barred entry to the U.S. through inability to meet required physical, mental, or character standards; (3) The servicemember has shown financial ability, not limited to any particular form of financial security, to prevent the intended non-U.S. citizen spouse from becoming a public charge; (4) The marriage is not solely for securing a visa for the intended spouse with no intention of living together as husband and wife.[242]

If the verification authority makes a determination contrary to any of these circumstances, the Soldier's application will be denied.[243] While the first requirement is understandable—although unnecessary, as the battalion commander has already verified this—the second, third, and fourth requirements permit a subjective, rather than objective, determination. All three of these requirements are tied to a federal statute[244] and should be made by an immigration official. Nonetheless, the regulation empowers military officers with little to no familiarity with the law to apply it without consulting a subject-matter expert. This decision can have far-reaching consequences for the Soldier, as USFK Regulation 600-240 does not provide for an appeal from such a judgment.

The possible denial of permission to marry at the discretion of the verification authority based upon the absence of one of the four circumstances above also raises a second concern. It is directly contradicted by the Supreme Court's holding in *Zablocki v. Redhail,* the 1978 case concerning the Wisconsin statute that prevented residents from marrying if they were behind in their child support obligations.[245] In his majority opinion, Justice Marshall considered the legislative history of the Wisconsin statute. He explained:

> There is evidence that the challenged statute, as originally introduced in the Wisconsin Legislature, was intended merely to establish a mechanism whereby

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[242] *Soldier's Guide to International Marriages in Korea, supra* note 197, at 4–5.
[243] USFK REG. 600-240, *supra* note 3, para. 5a.
[244] *See* 8 U.S.C. § 1182 (2006).
[245] Zablocki v. Redhail, 434 U.S. 374 (1978).

> persons with support obligations to children from prior marriages could be counseled before they entered into new marital relationships and incurred further support obligations. Court permission to marry was to be required, but apparently permission was automatically to be granted after counseling was completed. The statute actually enacted, however, does not expressly require or provide for any counseling whatsoever, nor for any automatic granting of permission to marry by the court and thus it can hardly be justified as a means for ensuring counseling of the persons within its coverage. Even assuming that counseling does take place . . . this interest obviously cannot support the withholding of court permission to marry once counseling is completed.[246]

According to Justice Marshall, had the Wisconsin legislature passed the original statute, setting as its goal counseling and providing for automatic approval, it would have been upheld. Instead, the legislature impermissibly broadened the purpose of the regulation and implemented a scheme by which members of a certain class would automatically be denied a marriage license. In this aspect, the unconstitutional Wisconsin statute is remarkably similar to USFK Regulation 600-240. Like the original Wisconsin statute, USFK Regulation 600-240's paramount purpose is counseling.[247] Moreover, since the regulation's promulgation, in not a single instance has the verification authority denied permission to marry based upon one of the four articulated circumstances in paragraph 5a of the regulation. As such, allowing verification authorities to deny a request to marry based upon the second, third, or fourth requirement above is entirely unnecessary to achieving USFK's goals.

D. Applicability

USFK issued *International Marriages in Korea* on 2 March 2007 with compliance set to begin on 16 March 2007. Problems of

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[246] *Id.* at 388–89.

[247] *See, e.g.*, USFK REG. 600-240, *supra* note 3, para. 1a ("The provisions of this regulation are intended to– a. Ensure that servicemembers have the necessary information to make an informed decision before entering into an international marriage."); *see also id*. para. 1c ("Ensure that servicemembers and intended spouses are aware of applicable U.S. immigration laws.").

interpretation arose immediately. On 3 March 2007, the OSJA received a phone call from a Soldier who had plans to travel to the Philippines to marry his fiancée at the end of the month. The Soldier asked whether the new regulation would apply to him. The author replied that this depended upon what the meaning of the word "in" is. An expansive view would hold that "*in Korea*" refers to any Soldier assigned to USFK, regardless of whether he was physically in the ROK when he wished to marry. A narrow view would only apply the regulation to USFK Soldiers physically in Korea at the time of the intended marriage.[248]

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[248] The 2ID Staff Judge Advocate (SJA) believed that the narrow interpretation was correct. This view was subsequently endorsed by the SJA for USFK. Nevertheless, not all decision-makers agreed with this analysis. In particular, one of the three brigade commanders, dual-hatted as a 2ID verification authority, believed the expansive interpretation was proper. As such, he stated that he would deny leave for any of the several thousand Soldiers under his command who intended to marry outside the ROK without complying with the regulation. Similarly, if one of his Soldiers managed to travel overseas by not declaring his motive for doing so, and married without compliance, the Soldier would be subject to disciplinary action.

The OSJA argued that while leave was always subject to the commander's discretion, approval "could not be used to impermissibly broaden the scope of the regulation." *See* Memorandum from Captain Dana M. Hollywood, Second Infantry Div. Chief, Admin. Law, to Colonel Robert P. Pricone, Second Infantry Div. Chief of Staff, subject: Travel to Philippines (3 Apr. 2007) (on file with author). Similarly, the OSJA argued that making a Soldier comply with the regulation when his intended spouse was in another country was procedurally unfair, as it would require the spouse to travel to the ROK. As of this writing, no 2ID Soldier has ever received disciplinary action as a result of marrying a third country national outside the ROK. The author is aware, however, of a handful of Soldiers denied leave because they intended to marry while on leave.

In time, the 2ID Commander himself came to favor the expansive applicability interpretation. In a memorandum to the USFK Commander, the 2ID Commander requested an unambiguous revision of the applicability paragraph supporting the expansive interpretation. A section of the memo submitted by the 2ID Commander to the USFK Commander reads:

> Several servicemembers have attempted to bypass the requirements of this regulation by traveling to countries outside of Korea to marry non-US citizens. This makes it impossible for the purposes of the regulation to be met. Additionally, often after marriages outside of Korea, servicemembers bring their new spouse to Korea, some of whom may not be qualified to travel with the servicemember to the US upon PCS. This runs counter to the intent of the regulation.

See Memorandum from Major General James A. Coggin, Second Infantry Div. Commander, to Mr. Peter Mann, USFK J1, subject: USFK Regulation 600-240 (5 Sept. 2007) (on file with author).

Of the two scenarios raised by the 2ID Commander above, there is little evidence to support either. The first scenario predicts that young Soldiers and their "juicy girl"

The regulation's applicability paragraph provides little assistance to this quandary. It nebulously declares that "[t]his regulation applies to all United States (U.S.) military personnel assigned in the Republic of Korea (ROK) [and] does not apply to marriages between U.S. citizens," without further clarification.[249] Nevertheless, the spirit of the regulation—eliminating the problem of abandoned/waiting spouses—clearly supports the narrow interpretation. After all, the expansive view would mean that a Soldier who goes on leave from Korea to his home in Texas and chooses to marry his Mexican girlfriend while there would have to comply with the regulation, requiring his fiancée to travel to Korea for several months. Yet, making the couple comply with the regulation would not further its purpose as the intended spouse would never become an abandoned or waiting spouse in the ROK.

This issue has not yet been resolved. If the command adopts the expansive view, it would raise further constitutional concerns. In *Turner v. Safley*, the Court applied a rational basis review to the regulation and *still* found it invalid.[250] Justice O'Connor explained:

> It is undisputed that Missouri prison officials may regulate the time and circumstances under which the marriage ceremony itself takes place. . . . On this record, however, the almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives. We conclude, therefore, that the Missouri marriage regulation is facially invalid.[251]

Turner therefore stands for the legal proposition that when a regulation results in a complete prohibition to marriage, a court will find the regulation unconstitutional. Viewed in this light, USFK's current policy of regulating the "time and circumstances" under which Soldiers may marry is likely valid (barring the broad discretion granted to verification authorities). Nonetheless, if USFK were to broaden the scope of the regulation to apply to marriages outside the ROK, it would wrongfully be foreclosing marriage to a class of Soldiers. In light of

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fiancées will abscond from the ROK so as to not have to "comply" with the regulation. This is unlikely to occur. The majority of "juicy girls" are in Korea on expired work visas and would not risk leaving, as they would not be allowed to return. With regard to the second scenario, there is simply no data to support this scenario.

[249] *See, e.g.*, USFK REG. 600-240, *supra* note 3, para. 2.

[250] *See supra* notes 172–78 and accompanying text.

[251] Turner v. Safley, 482 U.S. 78, 100 (1987).

Turner, USFK cannot deny a Soldier permission to marry his fiancée in the Philippines while at the same time declaring that an intended spouse living in the Philippines is unable to comply with the regulation's myriad regulatory procedures. While a Soldier in such a position could apply for a K-1 fiancée visa,[252] this contingency does not diminish the "complete ban" on the decision to marry that the proposed revision would create.

VI. Conclusions & Recommendations

USFK Regulation 600-240 is far more than a directive counseling young Soldiers against impetuous marriages. The likelihood of an ever-growing number of abandoned or waiting spouses further imperiled the already attenuated U.S.-ROK alliance. It is for this reason that USFK implemented the regulation. A little more than two years after the regulation's promulgation, even the most ardent critics of military regulation of Soldiers' personal affairs would be hard-pressed to controvert the evidence that USFK Regulation 600-240 has proven a success. While precise data on abandoned or waiting spouses was always indeterminate, there is no denying that the regulation has significantly curbed further swelling of this lamentable population. Command involvement now ensures that Soldiers act responsibly in assisting their dependents in seeking immigration to the United States. In fact, many commanders involuntarily extend their Soldiers and prevent them from leaving Korea until the spouse's immigration visa has been submitted and received.

The regulation does, however, raise constitutional concerns. A constitutional challenge to USFK Regulation 600-240 would be reviewed under the deferential standard of a rational basis review. While it is true that courts pay lip-service to the axiom that marriage is a fundamental right, they simultaneously acknowledge the reality that extensive state powers regulating marriage conflict with this assertion.[253] This has led courts to uphold substantial restrictions to marriage provided they are *reasonably* related to a legitimate end. Moreover, the presumption that the military is a "specialized community" has ensured judicial deference on a wide range of military matters. A constitutional challenge to USFK Regulation 600-240 will therefore focus on whether the ends are legitimate and the means are reasonably related to those ends. On both

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[252] *See, e.g.*, 8 U.S.C. § 1184 (2006).
[253] *See supra* notes 167–68 and accompanying text.

these points USFK would prevail. Nevertheless, particular aspects of the regulation could still render it unlawful.

Taken together, *U.S. v. Nation* and *U.S. v. Wheeler*, the two cases to reach COMA on the question of military regulation of overseas marriages, stand for the proposition that regulation is reasonable and lawful provided that it is not arbitrary. Regulation 600-240's allowance that verification authorities can deny a Soldier's marriage on nothing more than a subjective analysis is an arbitrary grant of discretion. Not only does this provision jeopardize the legality of the regulation, but it is also wholly unnecessary to achieving USFK's goals. For that reason, the regulation should be revised so that approval to marry in the ROK is automatic once a Soldier has complied with all the requisite procedures. USFK Regulation 600-240's applicability provision should also be revised to unambiguously clarify that the regulation applies to USFK Soldiers physically in the ROK at the time of the intended marriage—thereby codifying the narrow interpretation of the regulation's applicability. Were USFK to implement these two recommendations, the U.S. and ROK would, at long last, have a partnership truly worthy of both our Soldiers and the South Korean people.

THE THIRTY-SEVENTH KENNETH J. HODSON LECTURE ON CRIMINAL LAW*

DANIEL J. DELL'ORTO[1]

Thank you, Colonel Brookhart, for that introduction and for allowing me to join you today for this lecture. I, too, would like to recognize

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* This is an edited transcript of a lecture delivered on 25 March 2009 by Mr. Daniel J. Dell'Orto, Senior Vice President, General Counsel, and Secretary of AM General LLC, to members of the staff and faculty, distinguished guests, and officers attending the 57th Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. Established at The Judge Advocate General's School on 24 June 1971, the Kenneth J. Hodson Chair of Criminal Law was named after Major General Hodson who served as The Judge Advocate General, U.S. Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and he was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

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Military awards include the Defense Distinguished Service Medal, the Legion of Merit (two awards), the Meritorious Service Medal (four awards), the Joint Service Commendation Medal, the Army Commendation Medal, and the Army Achievement Medal. In 1985, the American Bar Association honored him as the Outstanding Young Military Lawyer of the Army. Civilian awards include the Department of Defense Medal for Distinguished Public Service (two awards), the Secretary of Defense Medal for Exceptional Public Service, and the Department of the Air Force Decoration for Exceptional Civilian Service.

Mr. Dell'Orto is a member of the Bar of the State of New York and has been admitted to practice before the Supreme Court of the United States, the United States Tax Court, the United States Court of Appeals for the Armed Forces, and the United States Army Court of Criminal Appeals.

many distinguished guests in this audience but also friends in this audience, people I've served with over the years, both on active duty and since I retired from active duty to become a civilian employee of the Department of Defense.

. . . .

Major General Hodson participated in the ROTC Program and was commissioned initially as a coastal artillery officer during World War II, or shortly before World War II. He was called to active duty in May of 1941, and he served as a Judge Advocate in the European Theater in World War II; and as you've heard, he was The Judge Advocate General of the Army from 1967 to 1971, and he served as the first Chief Judge of what was then called the Army Court of Military Review, more recently the Army Court of Criminal Appeals. He was not only someone who had an outstanding career as a Judge Advocate, he was one of the principal architects of the United States military justice system and his leadership molded the United States Army Judge Advocate General's Corps into the institution it is today through some very critical and momentous years in the '50s and '60s. It is an honor to present this lecture because I, like some of you, attended the Hodson Lecture while a student in the Grad Course, in particular as a member of the 31st Graduate Course, more infamously known as "the wurst of the 31st," that's w-u-r-s-t, because the year that we graduated a significant bulk of us went on to Europe, ergo "the wurst."

Now most often the person who presents this lecture is a distinguished professor or jurist. In honor of General Hodson's contributions in the field of military justice, that person will present an academic argument on an interesting, developing criminal law topic, but one should not infer from such a presentation that Major General Hodson's accomplishments were limited to jurisprudence. Rather it is important to acknowledge how he shaped the role Judge Advocates play in the Armed Forces. For example, when Major General Nardotti gave this lecture in 1995, which I believe was the year of General Hodson's death, he told the story about General Hodson serving as a major in the 52d Medium Port Facility in New York City for a few months before deploying to the European Theatre in World War II. As General Nardotti indicated, at the 52d Medium Port, however, not all aspects of the operation were running smoothly. When the command examined the situation, they discovered that they did not have a standing operating procedure, an SOP. General Hodson, at this time a major, decided to do

something about the problem and he wrote an SOP, which was contrary to the contemporary thinking that people in the JAG Corps should not be involved in fixing a problem unless it was 100% legal. He saw it differently. There was a need and a Judge Advocate had the ability to solve the problem. It did not matter that it was a nonlegal problem. This is an interesting philosophy that reinforces what we as a Corps have said over the years, as General Nardotti concluded.

It is evident that General Hodson stuck to this philosophy throughout his career. If you read General Nardotti's account of General Hodson's career, you can see it when General Hodson worked with Congress on the Military Justice Act of 1968 and when he advised the Secretary of the Army on the My Lai Massacre. General Hodson's leadership and advice shaped the role Judge Advocates now play in the Army, and it is indeed in honor of those contributions that I offer these remarks today.

Today, I'd like to offer a few reflections on my experience and some thoughts on the duties of the government lawyer advising policymakers. I've just completed a thirty-seven-plus year career in government, with thirty years as a government lawyer in the Executive Branch. For the past nine, I've served as the Principal Deputy General Counsel of the Department of Defense with two stints as the Acting General Counsel, totaling almost one and a half years. It is a little difficult to explain to a layperson what exactly the General Counsel of the Department of Defense is or what the General Counsel's deputies do. A layperson's experience with lawyers is usually limited to watching lawyers on television, and that's if they're lucky. *Perry Mason*, *L.A. Law*, *Boston Legal*, *Law and Order*, *The Practice*, *Judge Judy*—these shows feature prosecutors, defense counsel, generally civil litigators, and judges, and on occasion, Judge Advocates. Fortunately or unfortunately, they haven't yet made a show about DoD lawyers, both uniformed and civilian, advising policymakers except insofar as the *E Ring* had a character in my former role during its brief run, who happened to be a female, who was far more attractive than I. Now if they did, you could call it *OGC*, and that has a nice ring to it, and I think it sounds at least as interesting as *CSI*, but it is not obvious what OGC does. I can tell you when I went up to interview to be the military assistant in my last active duty assignment, I had virtually no idea what went on in that office. The office has not been around all that long in our nation's history. It's not generally a public place that people come and visit, and it's not dramatized on TV. I have often thought, however, particularly recently, that were it not for the classification level and sensitivity of what is

accomplished each and every day by the attorneys in the Office of the DoD General Counsel, a filming of what occurs in that office on any given workday would be of extreme interest to any lawyer.

Now the role of the Office of General Counsel is to give advice, and it is somewhere in between advocating and judging and not dissimilar to what takes place in the Staff Judge Advocate's Office. On the one hand, there are situations in which the advisor advocates. In negotiations with other departments and agencies, in negotiations with counterparts from other countries, the DoD lawyer has to muster the best arguments supporting the department's and the administration's policies and ensure that the interests of the department and the millions who serve in it are represented. As one British diplomat put it, describing his efforts during World War I, the Navy acted and the Foreign Office had to find the argument to support the action. It was anxious work. On the other hand, there are situations where the advisor judges, like an umpire calling balls and strikes. Policymakers circulate potential policies for clearance and coordination. When a potential course of action would contravene a law, it is the job of the lawyer to nonconcur, or as they say in another variant of bureaucratese, pose a legal objection. Department of Defense lawyers practice on the spectrum in between these models, and most cases, I believe, do not fit neatly in one mold or the other. A good counselor is neither Mr. Yes nor Dr. No; in fact, to fulfill his duties properly I believe that he must do much more than simply say yes or no. A good lawyer should get involved in the process and advise the client on how best to get to yes early in the client's decision-making process. In most situations, there is some way, some lawful way, for the client to achieve his objective. It may require additional authorization higher up the chain of command; for instance, an exception to policy in the case of constraints in the DoD directive. However, there is rarely a reasonable objective that is unlawful and in such an instance legislation generally would be needed.

The position of the lawyer as an active participant in the process, helping the client get to yes, comes with a requirement for precision; namely, the lawyer must be clear about the nature of his advice. The lawyer has to say what the law requires. He must distinguish his prudential and his legal advice. If the client does not know which advice is given merely as a good idea and which is given as a legal requirement, the client will not know the extent of his freedom of action. In my past life, which ended but two short days ago, I regularly addressed CAPSTONE, otherwise referred to as "The Charm School," the course

that newly appointed general and flag officers attend.[2] Generally, I speak for only a brief portion of the forty-five minutes that I spend with these senior military officers from all of the services and select senior civilian officials. Mostly I entertain their questions on all manner of subjects, much as we will do shortly in this setting, and they have many questions as do the three-stars I address as I participate in the Pinnacle Course that the Commander, JFCOM[3] hosts twice a year in Norfolk, Virginia, for those newly appointed three-stars. But there is one thing I take great care in explaining to them and that is what they have a right to expect from their lawyers. During the past three decades, all of the JAG Corps, the Corps of all the services, have done a great job in promoting the notion that lawyers bring value to the table in many ways. I know that throughout my time as an Army JAG, successive TJAGs[4] emphasized our dual roles as lawyers and Soldiers, never advocating that we compromise the former but always challenging us to embrace the latter. And successive generations of Judge Advocates have followed that lead to the point that all of you from all of the services have become virtually indispensable to commanders at all levels of command. And therein lies my concern for all of us who practice law at any level within DoD, and it is this concern that I have expressed not only to your general and flag officer clients but to the senior officials I have advised and to the legal community, whether it be the senior lawyers I have supervised within DoD, including Defense Agency lawyers, or The Judge Advocates General of the Military Departments and the Staff Judge Advocate to the Commandant and the General Counsels of the Military Departments and the Counsel to the Commandant.

As a starting point for a discussion that I hope we can pick up during the question-and-answer session, please ask yourself: Who within any of your organizations, or our organizations, has the broad view of the organization, its problems, and its challenges? Certainly the commander does, and in my recent case, the Secretary of Defense. In many large organizations, but not all, the deputy commander or deputy executive or executive officer does. If your organization has a public affairs official, he or she probably has such a perspective as would the head of the organization's legislative affairs shop, if you have one. Now consider

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[2] *See generally* Welcome to CAPSTONE, http://www.ndu.edu/CAPSTONE/ (last visited May 6, 2009) (explaining the purpose, history, and curriculum of the course).
[3] Joint Forces Command.
[4] The Judge Advocate General of each branch of the U.S. Armed Forces.

the remainder of the staff, whether the S1, G1, J1,[5] or in OSD's case, the Undersecretary for Personnel and Readiness or that official's military department's equivalent on the Secretary's or the Chief's staff or any of the functional heads of the intel[ligence], operations, or logistics staff. All of them focus almost exclusively on their functional areas of responsibility and therefore only a slice, however important that slice might be, of the overall total organization.

But not the attorneys. At all levels and in all organizations you either have a finger in every functional slice of the pie or you are observing it pretty closely. Indeed, as with the organizational leader, you have what a former boss of mine called a 360-degree view of the organization. Thus you have a great perch from which to observe and formulate the advice you will provide your client. That client knows this, and unless your personalities are clashing or he or she is generally unfriendly to lawyers, that client will seek you out for the full range of your advice, both legal and nonlegal, or otherwise called policy. And we've encouraged that.

So what do I mean by that? Well those of you who have been prosecutors, defense counsel, or trial judges, or appellate counsel or appellate judges, can recall instances usually involving defense counsel arguments in which counsel makes a very cogent, rational argument for why a particular result should obtain and yet the judge, perhaps after the prosecutor's objection, will respond to counsel's argument words to the effect of, "Well, Captain Joe Bag of Doughnuts, that is an excellent argument, but it is your idea of what the policy should be, not what the law is." It is this tendency I see too often in lawyers in government and DoD practice today when a client seeks legal advice on a proposed course of action and the lawyer responds with, "You shouldn't do that." What the client has heard is, "I can't do that," whatever "that" is. Thereafter, the client goes to his boss and says, "My lawyer told me I can't do that." Now at that point the boss may pick up the phone and call his or her lawyer, who in our system often is the technical supervisor of the lawyer who gave the advice, and ask that superior lawyer for his view on the issue; and at that point the more senior attorney may respond with, "Well I don't believe that there is a legal prohibition against doing what your subordinate proposes, but I do believe it would not be a wise thing to do for the following reason." Now pick one or more. If a media outlet

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[5] The S1, G1, and J1 staff handle personnel issues. *See* U.S. DEP'T OF ARMY, FIELD MANUAL (FM) 101-5, STAFF ORGANIZATION AND OPERATIONS (31 May 1997).

learns of this decision, you'll see it in tomorrow's paper cast in a very unflattering light, on tonight's news, or on a Web site by the time you sit back down. Your boss won't like it. It would not be in line with the administration's view on this. Congressman So-and-So will complain and so on and so forth.

And therein is the rub. I have no problem with a commander asking a lawyer what he thinks about an issue, but you as a lawyer have to be careful enough, you have to be diligent enough, and you have to be precise enough to answer the question in two parts. The first part should be your express view of whether the law permits or prohibits what the commander proposes to do, and the second part should be your opinion about all of the policy and other implications of what is proposed if the commander is indeed seeking that opinion from you, as well he might. In my view your first responsibility is to draw the box that reflects your interpretation of what the law permits. If the commander operates inside that box, he is operating within the bounds of the law; outside the box and we are in a legally prohibited area based upon your interpretation of the law. In some instances the box will be quite large, offering the commander great latitude; and in others, it will be rather small and constrain him to a significant degree. In still others, the lines that define the boundaries of that box may be fuzzy, and that is okay, too. As long as you draw that box based on what you believe the Constitution, our statutes, our executive orders, our regulations, et cetera, say, then you are doing your job; but when you fail to make the distinction between the legal and nonlegal analysis, you are failing your client and usurping your client's authority. Remember, whether your boss or your client is a presidentially appointed, Senate-confirmed, senior DoD official or a military officer appointed to command by proper authority, he or she is the one entrusted with the responsibility to command or to make decisions based upon his statutory or delegated authority. You or I as a lawyer were not provided with that authority.

Now all of what I have said is in the abstract, so let's apply it in practice to what I believe are some of the most consequential decisions of the last nine years. On 11 September 2001, I started the day thinking about antitrust law. General Dynamics and Northrup Grumman were bidding for Newport News Shipbuilding, the nation's only nuclear aircraft career builder. I was preparing for a meeting with lawyers and corporate executives to discuss the antitrust issues raised by a potential merger, and I was preparing for that meeting when the news broke about a small plane crashing into the World Trade Center. I was curious. I

grew up in New York. I remember seeing the foundations laid for the Twin Towers. When I saw the footage of the smoking tower, I remember being puzzled that a small plane could cause so much smoke and so large a hole in the building. Then I saw the live footage of the second airplane hitting the second tower. At first I thought that was the news station playing back video of the first plane's impact. When I realized it was a second plane, I knew immediately that this could not be an accident. I knew our country was at war. I canceled my meeting, and I was walking back to my office when the plane hit the Pentagon. I may have been the only person in the Pentagon who did not feel it or hear it. I got back to my office and found out that the Pentagon had been hit. I went into the command center to support Secretary Rumsfeld and General Myers, who was then the Vice Chairman of the Joint Chiefs; General Shelton, the Chairman, was out of the country at the time. The halls were filling with smoke. Smoke also started to fill the National Military Command Center and we were uncertain about whether we could stay and work at the Pentagon, both because the building was on fire and because we didn't know if more attacks were coming.

Secretary Rumsfeld decided that some of us would go to an alternate command site, and I was to go with Deputy Secretary Wolfowitz and others. As we got into our helicopter, lifted off, and flew from the Pentagon over downtown Washington, I remember noticing that it was a beautiful day, perfect early fall weather, and much to my pleasant surprise, contrary to other reports of bombings in Washington, including at the State Department, there was no other smoke rising from the city. At the other command site, we monitored news reports, participated in video teleconferences, and braced for more attacks, which thankfully did not come. We flew back around nine o'clock that night. There were six fires still burning at the Pentagon as we circled the building and landed close to the crash site. I left at two in the morning, went home, and that was my day on 11 September 2001.

September 11th has been called a black swan: an unexpected event with a high impact that fundamentally changes how people think. Pundits chide their opponents with talk of a pre-11 September mindset. September 11th was a fulcrum upon which our nation's thoughts and actions turned. It was the day our country realized that we were at war. Attorney General Holder put it this way in his recent confirmation hearing more than seven years after the events of that day, and I quote, I don't think there's any question but that we are at war, and I think to be honest, I think our nation didn't realize that we were at war when, in fact,

we were. When I look back at the '90s and the embassy bombings, the bombing of the *Cole*, I think we as a nation should have realized that at that point we were at war. We should not have waited until 11 September of 2001 to make that determination, end of quote. Now what is the role of the government lawyer advising on this decision? My first point is that the decision to wage war against al Qaeda was well precedented in state practice in the law of war; and although certainly there are aspects of the war against al Qaeda that are novel, many aspects of this current struggle have precedent in state practice and international law. Take, for example, the core concept war against non-state actors. The United States has a history of using military force against non-state actors. During the Civil War, the Union did not recognize the Confederacy as a state. The Confederate Army was considered a non-state actor and we waged war against it. The U.S. Army fought against bands of Native Americans, which also were not considered sovereign nations. President Wilson ordered thousands of U.S. troops against Poncho Villa after his raid on Columbus, New Mexico, in 1916. More recently, harking back to the Attorney General's remarks, President Clinton ordered cruise missile strikes against al Qaeda facilities in the Sudan and Afghanistan in 1998, after the attacks against our embassies in Kenya and Tanzania.

Another idea which has long been contemplated in state practice in the law of armed conflict is the problem of an enemy who does not wear uniforms and attempts to disguise himself as a civilian. Traditionally, these sorts of persons have been known as unprivileged belligerents and their situation has been considered since the very foundation of the modern law of war. Francis Lieber is regarded as the founder of the law of war because of his efforts during the Civil War in drafting General Order Number 1, later known as the Lieber Code. However, before he was asked to do this, Lieber was asked by Major General Halleck to opine on the matter of guerrilla warfare. General Halleck presented the following question: "The rebel authorities claim the right to send men, in the garb of peaceful civilians, to waylay and attack our troops, to burn bridges and houses, and to destroy property and persons within our lines. They demand that such persons be treated as ordinary belligerents and that when captured they have extended to them the same rights as other prisoners of war." Lieber discussed the many colorful names by which this type of fighter was known at the time: the freebooter, the marauder, the brigand, the partisan, the free corps, the spy, the rebel, the conspirator, the robber, the armed prowler, and the so-called bushwhacker. They used colorful language back then. The law of war

has progressed greatly since Lieber's Code; however, the idea that those who follow the rules of war and attempt to distinguish themselves from noncombatants should receive privileges if captured and those who do not should not has been a fundamental principle of the law of war. This issue later arose in the United States' objection to the ratification of Additional Protocol I to the 1949 Geneva Conventions. President Reagan opposed ratification of Protocol I on the grounds that it improperly conferred privileges and lawful combatant status upon terrorist groups.

Interestingly, both the *New York Times* and the *Washington Post* published editorials at the time supporting the President's rationale that we must not and need not give recognition and protection to terrorist groups as a price for progress in humanitarian law. In an editorial titled, "Denied: A Shield for Terrorists," the *New York Times* praised President Reagan's decision not to submit Protocol I to the Senate because it would legitimize terrorism. The *Washington Post* also supported President Reagan's decision in an editorial titled, "Hijacking the Geneva Conventions," and it stated worst of all was the impact of the new rules on the traditional purpose of humanitarian law, which is to offer protection to noncombatants by isolating them from the perils of combat operations. The changes granted status as combatants and, when captured, as prisoners of war to irregular fighters who do not wear uniforms and who otherwise fail to distinguish themselves from combatants; in brief, to those whom the world knows as terrorists.

Another aspect of the armed conflict with al Qaeda that has precedent in international law is the issue of the use of force against non-state actors in the territory of another state. This is precisely the case of the destruction of the *Caroline* in 1837. International law scholars have considered Daniel Webster's exchange of letters with Lord Ashburton regarding the *Caroline* as the quintessential formulation for the use of force in anticipatory self-defense. Less remembered is the fact that the *Caroline* involved the use of force by a state against non-state actors based in another state. Insurgents from a revolution in Canada had sought refuge across the border in the United States. The British crossed the border and destroyed the *Caroline*, a steamship that had been used by the insurgents. The United States protested the violation of its sovereignty and territory and the British claimed that they had acted in lawful self-defense. As states go to war against non-state actors, those non-state actors may seek refuge in the territory of other states. How

states must balance rights of self-defense against rights of territorial inviolability in such cases has long been an issue in international law.

My second point is that going to war against al Qaeda had many legal consequences. Armed conflict is a far more permissive legal framework than peacetime law. Armed conflict allows for targeting with deadly force. It allows for the detention of captured fighters for the duration of hostilities. It allows for interrogation without defense counsel. It allows for spying without warrant. It allows for trial by military commission. These are potent authorities and they should not be used lightly.

My third point is that the legal judgment recognizing that one is in a state of armed conflict with al Qaeda is different from the policy decision to fight that armed conflict. The decision to go to war against al Qaeda was not a legal decision made by Executive Branch lawyers. A legal opinion does not spend blood and treasure. The decision to go to war was a policy decision made by Congress when it recognized in a joint resolution on September 18, 2001 that the United States had suffered an attack and authorized the use of military force, and this policy decision was made by the President as well when he exercised the use of force pursuant to that authorization. The important thing to remember is that just because our nation *may* exercise authorities pursuant to an armed conflict does not mean that we *must* exercise those authorities. This is a separate decision requiring a separate analysis, and most importantly, a matter to be decided by those entrusted and charged with that responsibility under our law.

As I stated only a few days ago during my retirement ceremony at the Pentagon, in the days, months, and years since 9/11 I have thought often about the events of that tragic day. In the immediate aftermath of the attack, I felt a considerable amount of guilt over the fact that the attack had occurred. After all, for almost five full years prior to the attack I had served in either the Office of the DoD General Counsel or the Office of the Air Force General Counsel. I had had the opportunity to read much of the world's daily intelligence reporting in all of my positions in those offices. I was there shortly after the bombing of OPM-SANG[6] and Khobar Towers in Saudi Arabia. I was there for the East Africa bombings and the attack on the U.S.S. *Cole*. I had a sense for the size of the World Trade Center for I had observed, as I said earlier, its

[6] Office of the Program Manager, Saudi Arabian National Guard.

construction in the early 1970s and had noted how deep its foundation extended into the ground. I knew that at 100-plus stories it was close to the height at which many of us have parachuted from military aircraft in airborne training and exercises, and in the days after the attack, I read many of the accounts from survivors of the Twin Towers and watched the videos of the attack, noting that an undetermined number of people in those buildings were faced with a choice, if one can call it a choice, of staying put with fire raging around them or jumping from the seventy-fifth or the eighty-ninth or the hundredth story of those buildings; how some of the bodies of those who made that fateful decision to jump were sliced in two as their fall caused them to impact with street signs; and for several summers thereafter as I participated in an annual, 100-mile, two-day bike ride along the south shore of Long Island with guys I have known for much of my life and stopped in the local eating and drinking establishments we frequent during this very social event, I noticed pictures of people in uniform, and as I looked more closely, I further noticed that they were not pictures of servicemembers but rather pictures of firemen and policemen who died that day attempting to rescue the civilians who were the victims of that attack, and I will not ever forget that.

Much has transpired in the seven-plus years since 9/11, and I commend all of you for the work you have done in helping sort through the tough legal issues with which we wrestle every day in support of those making the decisions about how we will conduct the war against those who planned and perpetrated that attack and those providing substantial support to those who planned and perpetrated that attack or who may be planning yet another attack. That we have not suffered a subsequent attack is in no small measure a result of our engaging this enemy on ground far away from our home soil and in a way that keeps him on his heels countering our offensive action and capabilities. Again, it is your dedication to getting to the right legal answer at all levels of our department that has aided your client in taking that fight to the enemy.

Please allow me one last anecdote before I conclude this lecture and take your questions. My first assignment as a Judge Advocate was at Fort Benning, Georgia. During that assignment and several years later during his second assignment to Fort Benning, Colonel (now retired) Earle Lasseter was the Staff Judge Advocate. Only a small number of those who served under Colonel Lasseter ultimately continued our JAG service until retirement, those including Fred Borch, who's in our audience today. Most of our colleagues in the Fort Benning JAG Office,

which recently burned to the ground, elected to move on to the civilian practice of law in firms, corporations, or state and local governments. This past November, principally through the efforts of those who had returned to civilian pursuits, a significant number of us returned to Fort Benning for a weekend reunion, and as you might expect, we had a great time; but the one thing that stood out for me about that weekend is how to a person, man and woman, those once young and novice lawyers, now middle-aged and fairly accomplished, described their Fort Benning JAG experience as the most enjoyable and rewarding part of their legal careers. My concluding point is my wish that for all of you JAGs in the audience today, with all you have done, all the places you have been, and all that you have experienced in your careers, when all is said and done you are able to say that your JAG experience was the most enjoyable and rewarding part of your legal career—wherever that career may take you.

CHIEFS OF STAFF: THE PRINCIPAL OFFICERS BEHIND HISTORY'S GREAT COMMANDERS[1]

REVIEWED BY FRED L. BORCH III[2]

Military libraries are filled with books about commanders—understandably so, given the importance of command in military operations.[3] But, while Judge Advocates have served as commanders in both war and peace,[4] Army lawyers spend most of their military careers as staff officers advising commanders and their staffs. It follows that Judge Advocates should look for ways to enhance their abilities as staff officers—and reading this new, unique, and groundbreaking study of chiefs of staff in modern history is a great start.

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[1] 1 DAVID ZABECKI, CHIEFS OF STAFF: THE PRINCIPAL OFFICERS BEHIND HISTORY'S GREAT COMMANDERS (Napoleonic Wars to World War I) (Naval Inst. Press 2008), 2 DAVID ZABECKI, CHIEFS OF STAFF: THE PRINCIPAL OFFICERS BEHIND HISTORY'S GREAT COMMANDERS (World War II to Korea and Vietnam) (Naval Inst. Press 2008).

[2] Regimental Historian and Archivist for the U.S. Army Judge Advocate General's Corps. Davidson College (A.B., 1976); University of North Carolina (J.D., 1979); University of Brussels, Belg. (LL.M., *magna cum laude*, International and Comparative Law, 1980); The Judge Advocate General's School (LL.M., 1988); Naval War College (M.A., *highest distinction*, National Security Studies, 2001); University of Virginia (M.A., History, 2007). Mr. Borch is the author of a number of books and articles on legal and non-legal topics, including JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001) and JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA (2004). His latest book, SEA SERVICE MEDALS: MILITARY AWARDS AND DECORATIONS OF THE NAVY, MARINE CORPS, AND COAST GUARD (co-authored with Charles P. McDowell) was published by Naval Institute Press in 2009.

[3] Classics on command include CHARLES B. MACDONALD, COMPANY COMMANDER (1984); JAMES R. MCDONOUGH, PLATOON LEADER: A MEMOIR OF COMMAND IN COMBAT (1986); and MARTIN VAN CREVELD, COMMAND IN WAR (1987). More recent publications on the subject include ROGER H. NYE, CHALLENGE OF COMMAND (1986) and THE ART OF COMMAND: LEADERSHIP FROM GEORGE WASHINGTON TO COLIN POWELL (Harry S. Laver & Jeffrey J. Matthews eds., 2008).

[4] Two examples of Judge Advocates (JAs) who commanded in wartime are Colonel (later Major General) Blanton Winship and Major (later Brigadier General) Bruce C. Babbitt. Winship was serving as a JA in France in 1918 when, at the request of General John J. Pershing, he took command of two infantry regiments and led them in combat. Babbitt was serving as a JA in the 7th Infantry Division in Korea in 1950 when he took command of a provisional rifle battalion during the defense of the Pusan Perimeter. An example of a JA who commanded in peacetime is COL (Ret.) Earle F. Lasseter, who served as Staff Judge Advocate at the U.S. Army Infantry Center and Fort Benning in the late 1980s. Since Lasseter was the senior ranking field grade officer on the installation, he took command of Fort Benning in the absence of the commanding general.

The theme of *Chiefs of Staff: The Principal Officers Behind History's Great Commanders* is that while the commander is critical to victory in war, that commander cannot succeed without a chief of staff—the "key staff officer responsible for translating the ideas of the commander into practical plans for soldiers to execute on the battlefield."[5] The chief of staff must not only understand the commander's intent, but also translate that intent into clear and succinct guidance for subordinate staff principals. Additionally, the chief of staff must manage and run the staff, and coordinate with subordinate, higher, and lateral commanders. This takes not only intelligence and knowledge, but tact and diplomatic skill as well. Finally, the chief of staff must have the ability to envisage new (and perhaps unexpected) ways for the staff to enhance mission success. The ultimate message of *Chiefs of Staff* is that commanders get the credit for great victories and are blamed for battlefield disasters. Their chiefs of staff, however, are overlooked, if not forgotten. Yet the importance of the chief of staff in military operations makes it imperative to study them.

What makes a chief of staff successful? *Chiefs of Staff* answers this question by examining more than twenty operational-level chiefs of staff from the Napoleonic Wars through World War I (Volume I) and World War II through Vietnam (Volume II). More than twenty distinguished military historians, including David T. Zabecki, who served both as an author and editor, provide biographical sketches of more than thirty German, British, French, Soviet, and U.S. officers who served as chiefs of staff over a nearly 200 year period.[6]

Each profile begins with a chronology of the subject's military career, followed by an eight to twenty page discussion of the chief of staff's relationship with his commander and his strengths and weaknesses as an organizer and manager. Each sketch naturally

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[5] 1 ZABECKI, *supra* note 1, at 1.

[6] Well-known historians contributing biographical essays include: James J. Cooke, Professor Emeritus of History at the University of Mississippi, author of five books on World War I, and recipient of France's *Ordre des Palmes Académiques* (Chevalier) for scholarship; Russell Hart, Professor of History at Hawaii Pacific University and author of the award-winning CLASH OF ARMS: HOW THE ALLIES WON IN NORMANDY (2001); Geoffrey P. Megargee, a scholar at the U.S. Holocaust Memorial Museum and author of the prize-winning INSIDE HITLER'S HIGH COMMAND (2000); and Spencer C. Tucker, Professor Emeritus of History at the Virginia Military Institute and author or editor of twenty-seven books and encyclopedias on military and naval history, including the prize-winning ENCYCLOPEDIA OF WORLD WAR I (Spencer C. Tucker & Priscilla Mary Roberts eds., 5 vols. 2005).

concentrates on a particular warfighting event that highlights the chief of staff's contribution to the commander's success—or failure—on the battlefield.

Zabecki, who penned two of the profiles contained in these volumes, is well-qualified to write about military history generally and chiefs of staff in particular. He served as an infantry rifleman in Vietnam and, after earning a commission, commanded at the company, battalion, brigade, and division level.[7] Before he retired as an Army major general, Zabecki had served as the senior U.S. Army commander south of the Alps and had been the chief of staff at the 7th Army Command in Heidelberg, Germany.[8] He also is a professionally trained historian, with a Ph.D. in military history.[9]

Chiefs of Staff begins with a quick historical examination of the evolution of the staff at the operational level of warfare.[10] Although King Gustavus Adolphus of Sweden was the first to develop a regimental staff in the early 1600s, most military historians view the era of the French Revolution and Napoleon as triggering the need for a warfighting-level staff. The emergence of large national armies in the early 1800s meant a commander could no longer control his troops directly. The mass warfare carried out by corps-sized organizations in an even larger army also required detailed planning to move and supply thousands and thousands of troops, and the commander simply did not have the time to do this complex and time-consuming staff work.[11]

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[7] As a captain, Zabecki commanded B Co., 2-123 Field Artillery, Illinois Army National Guard (1979–1982); Lieutenant Colonel Zabecki commanded 303rd Rear Operations Center, 3rd Infantry Division (1991–1994); and as a colonel, Zabecki commanded 313th Rear Tactical Operations Center, 21st Theater Army Area Command (1994–1996). Major General Zabecki served as Commanding General, Southern European Task Force-Rear (2005–2006).

[8] Colonel Zabecki served as Chief of Staff, 7th Army Command (1998–2000). As a major general, Zabecki also served as Senior Security Advisor to the U.S. Coordinating and Monitoring Mission, Israel (2003–2004), where he was responsible for the Roadmap to Peace in the Middle East. Zabecki retired in 2007 after more than forty years enlisted and officer service in the Regular Army, National Guard, and Army Reserve.

[9] Zabecki earned his B.A. (1972) and M.A. (1973) from Xavier University. He holds an M.S. (1976) from the Florida Institute of Technology. His Ph.D. is from the Royal Military College of Science (United Kingdom) (2004).

[10] 1 ZABECKI, *supra* note 1, at 1–21.

[11] *Id*. at 3.

While Napoleon's Grand Army—more than 500,000 men by 1812—had an improvised staff of officers doing administrative work and war planning, and a chief of staff who acted as a "facilitator" and coordinator, it was the Prussians who first developed the framework for the modern general staff.[12] Operations and training, logistics and movements, intelligence, and ammunition resupply were the chief business of the staff, although administrative, personnel, legal, and medical also were part of the Prussian warfighting staff structure.[13]

Chiefs of Staff explores the German contribution to the development of the General Staff, and explains why German battlefield success in the Austro-Prussian War (1866) and Franco-Prussian War (1870) convinced early twentieth century military observers from the United States to Japan that the German staff structure was the model to emulate.[14] Perhaps more important than staff structure, however, was the German development of tactical doctrine or *Auftragstaktik*, which not only guided subordinate commanders in executing military operations, but guided warfighting staffs in their work. Zabecki's profile of German General Friedrich-Wilhelm von Mellenthin (who served as a chief of staff in North Africa and on the Eastern Front in World War II) is particularly instructive because it shows how this *Auftragstaktik* or "mission orders" concept, combined with the principle of "commander's intent," made German operational-level staff work so successful.[15] As von Mellenthin explained:

> To follow a command or an order requires that it is thought through on the level from which the order was given. The following through of an order requires that the person to whom it was given thinks at least one level above the one at which the order was given. The mission requires one to be able to think, or to penetrate by thought, the functions of the higher commander.[16]

This "mission orders" doctrine, along with "commander's intent," remain fundamental building blocks in current U.S. Army doctrine—and

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[12] *Id*. at 4.
[13] *Id*. at 9.
[14] *Id*. at 5, 15.
[15] 2 ZABECKI, *supra* note 1, at 62–73.
[16] *Id*. at 73.

consequently the foundation of staff work at the warfighting level today.[17]

While Judge Advocates will find something of interest in every profile in *Chiefs of Staff*, the Americans examined in the two volumes merit the closest look, if for no other reason than these profiles show the evolution of the Army's staff structure in the twentieth century, and very different challenges faced by Army operational level chiefs of staff in World War I, World War II, Korea, and Vietnam.[18]

It was during World War I that General John J. Pershing, then commanding the American Expeditionary Force, adopted the staff model familiar to U.S. Soldiers today. While the Army had a staff system before Pershing arrived in France, it was cumbersome (consisting of more than ten sections) and "very much a work in progress."[19] Pershing's experience pursuing Pancho Villa in Mexico in 1916 and 1917, however, had convinced him "of the absolute necessity of an efficient staff to support and advise the commander,"[20] and the Punitive Expedition had used a three-section staff system of combat (operations), administration, and intelligence.[21] While this staff system had worked well enough with a 5000-man force, it was quickly apparent that a different staff model was needed in what would become a two-million strong American force in France.[22]

Pershing studied both the British and French staff systems, but he liked the French model more because it was simple: personnel, intelligence, operations, and logistics. Pershing's lasting contribution

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[17] U.S. DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS 5-9, 5-26 (1997) (Military Decision-Making Making Process); U.S. DEP'T OF ARMY, FIELD MANUAL 7-98, OPERATIONS IN A LOW INTENSITY CONFLICT 6-1 (1992) (Command, Control, Communications, and Intelligence).

[18] American operational level chiefs of staff examined are Randolph B. Marcy, 1 ZABECKI, *supra* note 1, at 60–73; John A. Rawlins, *id*. at 75–86; James G. Harbord, *id*. at 209–19; Walter B. Smith, 2 ZABECKI, *supra* note 1, at 117–26; Hobart R. Gay & Hugh J. Gaffey, *id.* at 127–40; Eugene M. Landrum, *id*. at 169–87; Edward M. Almond, *id*. at 188–202; and Walter T. Kerwin, Jr., *id*. at 203–23.

[19] 1 ZABECKI, *supra* note 1, at 21.

[20] *Id*. at 209.

[21] *Id*. at 211.

[22] When Congress declared war in August 1917, the Army consisted of 128,000 Regulars and 67,000 National Guardsmen. By November 1918, when the war ended, there were 3.7 million Soldiers on active duty, of which two million were in Europe with Pershing. 3 REFERENCE GUIDE TO UNITED STATES MILITARY HISTORY 1865–1919, at 122–29 (Charles R. Schrader ed., 1993).

was to add a letter to the front of the staff section to reflect the level of the staff. The S-1 or S-2 was the personnel or intelligence officer at a regiment while the G-3 or G-4 was the operations or logistics staff officer at a division.[23]

The explosion in the size of the Army in World War II—there were eight million men and women in Army uniforms before Germany, Italy, and Japan were defeated in 1945—required operational-level staff work as never before.[24] Perhaps more importantly, this staff work required a chief of staff who could facilitate and coordinate a variety of diverse efforts. *Chiefs of Staff* makes clear that Lieutenant General Walter Bedell "Beetle" Smith, who served as General Dwight D. Eisenhower's chief of staff from 1942 to 1945, was probably the top American operational-level chief of staff in World War II, or at least first among equals. After all, it was Smith who oversaw the planning and execution of operations in North Africa, the Mediterranean, and Europe, including the Normandy landings in June 1944.[25]

Judge Advocates who have served in Korea will be particularly interested in Donald W. Boose Jr.'s profile of Colonel Eugene M. Landrum, who turned in a virtuoso performance as chief of staff for General Walton H. Walker's Eighth U.S. Army in the summer of 1950.[26] While Walker oversaw the execution of the successful defense of the Pusan Perimeter, it was Landrum who coordinated the planning.[27] As Boose shows, his most significant contribution was to come up with the ad hoc mobile reserve forces that Walker used as fire brigades up and down the line of the Naktong River. In the absence of Landrum, it is doubtful whether the Pusan Perimeter battle—and the entire Korean War—would have been an American success.[28]

Finally, students of the Vietnam War will want to read James Jay Carafano's profile of Major General Walter "Dutch" Kerwin, who served as chief of staff at Military Assistance Command, Vietnam, under both Generals William C. Westmoreland and Creighton Abrams.[29] Kerwin

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[23] 1 ZABECKI, *supra* note 1, at 21.
[24] THE OXFORD COMPANION TO THE SECOND WORLD WAR 1192 (I.C.B. Dear & M.R.D. Foot eds., 1995).
[25] 2 ZABECKI, *supra* note 1, at 122–23.
[26] *Id*. at 175–79.
[27] *Id.* at 176.
[28] *Id*. at 180, 186 n.43.
[29] *Id*. at 205.

faced a number of difficult challenges, starting with a theater rotation policy that "moved officers through the MACV staff in less than a year."[30] Officers served one year in Vietnam, and since most wanted to command as well, this meant in practice that few served even one year under Kerwin.[31] Yet this staff had to coordinate large-scale conventional combat operations (being carried out principally by units at U.S. Army, Vietnam), counter-guerilla, pacification, and civil-military operations.[32] The greatest test for Kerwin and his staff came on 30 January 1968, when the Viet Cong launched a series of coordinated attacks that became known as the Tet Offensive.[33] During this challenging time, Kerwin proved to be a chief of staff who could act as the commander's advisor and counselor, yet simultaneously "manage the blitzkrieg of coordination and logistical tasks" that ultimately defeated the Viet Cong—at least militarily.[34]

Chiefs of Staff shows that being an effective and efficient chief of staff—or staff officer—is an art and not a science. This is principally because every commander has a different style or technique of command, and consequently the chief of staff or staff officer must shape his or her efforts to complement that commander. For example, some commanders prize personal loyalty, but do so for different reasons. Pershing wanted this quality in his top staff officer because he wanted to share his most intimate thoughts and wanted them kept confidential.[35] General Douglas MacArthur, on the other hand, prized personal loyalty because his ego required it.[36]

Other commanders look for diplomatic qualities, as did Dwight D. Eisenhower in World War II. Lieutenant General "Beetle" Smith, who served as his chief from 1942 to 1945, had been assigned in Washington, D.C., and these tours "taught him tact, diplomacy, and the art of evasive conversation."[37] All were critical to Smith's success in handling the rivalry between General George S. Patton and Field Marshal Bernard

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[30] *Id*. at 211.
[31] *Id*.
[32] *Id*. at 213.
[33] *Id*. at 217.
[34] *Id*. at 219.
[35] 1 ZABECKI, *supra* note 1, at 209.
[36] 2 ZABECKI, *supra* note 1, at 193.
[37] *Id*. at 121.

Montgomery, as well as the rivalry between Allied air commander General Carl A. Spaatz and Sir Arthur Tedder.[38]

Finally, some commanders look primarily for a chief of staff who can anticipate their requirements and decisions, and even act as an assistant commander. *Chiefs of Staff* shows that George S. Patton, for example, wanted a chief of staff who was a "chief doer."[39] But Patton also expected his chief to fill his shoes as an assistant commander. Brigadier General Hugh Gaffey, who served as Patton's chief of staff at Third Army, was often away from headquarters visiting units at the front in August 1944. Gaffey served "primarily as another set of eyes and ears to help direct units of the Third Army" and ensure that Patton's orders were followed.[40] That same month, Patton placed Gaffey in command of a provisional corps.[41] Gaffey had successfully commanded the 2d Armored Division in Sicily, and this certainly explains why Patton trusted Gaffey to take command on very short notice.[42] The import of Patton's selection of Gaffey, however, is that it illustrates that Patton wanted a chief of staff who also could act as a deputy commander.[43] It also demonstrates that what a chief of staff does, and how and where he does it, very much depends on the commander's requirements.

Like all books, there are some things about *Chiefs of Staff* that could be better. First, it would have been better as one single volume rather than two separate books. While there is a natural division between World War I and World War II—the break point in the two volumes—and some readers might only be interested in reading either the first or second volume, *Chiefs of Staff* would work better as a single book. For example, one volume would have meant a comprehensive introduction (rather than two separate introductions) and a comprehensive bibliography (rather than two separate lists of articles and books). On the other hand, two volumes means that Richard Holmes and Dennis Showalter, two of the most respected military historians alive today, each wrote a foreword. But a single volume would have given the reader and researcher a more complete picture of the development and evolution of chiefs of staff over 200 years. Since each book may be purchased separately from the

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[38] *Id*. at 122.
[39] *Id*. at 131.
[40] *Id.* at 134.
[41] *Id*.
[42] *Id*. at 133.
[43] *Id*. at 131.

publisher, there is nothing to ensure that a reader will understand that the books, in fact, belong together. This is bad.

Second, more than twenty different contributors means a wide variety of approaches in examining an individual chief. These individual variations are also reflected in content. For example, Andy Simpson covers two World War I British chiefs of staff in less than eight pages plus one page of endnotes.[44] On the other hand, John Jay Carafano's piece on Walter T. Kerwin is almost seventeen pages plus three pages of endnotes.[45] This uneven content means that some profiles are more complete—and more helpful—than others. While Zabecki has done a masterful job as the editor in melding the various profiles into one coherent product—and getting absolute uniformity among so many different scholars is a mission impossible—the fact is that some of the essays are simply better than others.

But these are otherwise minor criticisms of a unique and groundbreaking study that deserves the widest possible audience. Nothing like *Chiefs of Staff* has previously been published in book form, and the examination of planning and thinking at the operational level is thought-provoking. Since the career goal of most Judge Advocates is to serve as a legal advisor at the division, corps, and combatant command level, this two volume set provides invaluable insights for Army lawyers into how staff structures and procedures, when combined with personalities and abilities, determine the outcome of military operations.

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[44] 1 ZABECKI, *supra* note 1, at 199–206.
[45] 2 ZABECKI, *supra* note 1, at 205–23.

CULTURE AND CONFLICT IN THE MIDDLE EAST[1]

REVIEWED BY MAJOR J NELSON[2]

I against my brother; I and my brothers against my cousins; I and my brothers and my cousins against the world.[3]

The primary objective of any COIN operation is to foster development of effective governance by a legitimate government.[4]

I. Introduction

In *Culture and Conflict in the Middle East,* Carl Salzman effectively argues that his theory of "balanced opposition" undergirds social order in the Arab Middle East.[5] Drawing from various anthropologists who have studied nomadic tribes in the Middle East,[6] as well as from his own ethnography of the Yrahmadzai tribe in Iran,[7] Salzman's theory is intriguing on two fronts. First, to the casual reader the theory of balanced opposition offers a persuasive, predictable reason as to why and how, either individually or collectively, Middle Eastern Arabs will react when an outside source encroaches on their security or their socio-economic interests. Second, for the reader serving in the military, Salzman's theory fundamentally challenges the principle tenet of current Army and Marine Corps Counterinsurgency (COIN) doctrine.[8] Although the author does not confront this doctrine in his book, after reading *Culture and Conflict* the military reader is left with the nagging, yet profound question, "can our current COIN doctrine 'work' in Iraq and Afghanistan?" Because Salzman argues that balanced opposition

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[1] PHILIP CARL SALZMAN, CULTURE AND CONFLICT IN THE MIDDLE EAST (2008).
[2] U.S. Army. Currently assigned as Chief, Contract & Fiscal Law, Office of the Staff Judge Advocate, Multi-National Security Transition Command–Iraq (MNSTC–I), Baghdad, Iraq. This book review was submitted in partial satisfaction of the Master of Laws requirements of the 57th Judge Advocate Officer Graduate Course.
[3] SALZMAN, *supra* note 1, at 211.
[4] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006) [hereinafter FM 3-24].
[5] SALZMAN, *supra* note 1, at 11.
[6] *Id.* at 55–65.
[7] *Id.* at 69–93.
[8] *See* FM 3-24, *supra* note 4.

precludes the rule of law and constitutionalism[9]—factors under COIN doctrine that are essential for achieving legitimacy of the host-nation government[10]—*Culture and Conflict* does not leave the military reader overly optimistic about future operations in those countries.

II. Analysis

A. General Thoughts

Salzman uses nearly 200 pages of *Culture and Conflict* to define and argue for his theory of balanced opposition. Through historical examples,[11] research conducted by other anthropologists,[12] and his ethnographies,[13] his analysis is systematic and persuasive. Nevertheless, the reader may find the book tedious because it reads like it was primarily written for students and scholars of Arab culture. Although Salzman adequately defines terms presumably understood by anthropologists and academics,[14] and not intuitively understood by the military or casual reader, his substantively dense, academic writing style could potentially lose the reader's interest. Additionally, Salzman does not apply his theory of balanced opposition to the social and political future of Arab Middle Eastern countries until the last chapter of the book.[15] Unfortunately, these two criticisms taken in tandem may cause the reader to overlook his theory's contemporary relevance to the current prosecution of overseas contingency operations.

B. Balanced Opposition Described

Salzman argues that balanced opposition is a system of social control based on tribal affiliation.[16] As opposed to state authority, where the governed abdicate some of their individual rights to the polity, under the theory of balanced opposition, one is loyal to his tribe or kin group for

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[9] SALZMAN, *supra* note 1, at 211.
[10] FM 3-24, *supra* note 4, at 1-22.
[11] SALZMAN, *supra* note 1, at 152–59.
[12] *Id.* at 55–65.
[13] *Id.* at 69–93.
[14] *Id.* at 50.
[15] *Id.* at 197–212.
[16] *Id.* at 13.

two reasons.[17] First, Salzman argues that pragmatically one believes strongly that he can only rely on those of his kin group to come to his aid, even at their risk of substantial material loss or loss of life.[18] Second, because honor is a central theme in Arab culture,[19] one will strive to live up to his commitment to his kin group even at the expense of his short-term interests.[20] If one fails in this respect, one has lost his honor and respect within his group and, consequently, members of his group will not partner with him in future endeavors.[21]

Salzman also argues that the application of balanced opposition is an "ingenious" way to organize security.[22] Because everyone is born into a specific kin group, and one's loyalty is to his group, everyone, in principle, is equal.[23] Furthermore, the act of one group member can be attributed to any other member of that particular group.[24] As Salzman argues, "members of lineages were considered not as unique individuals but interchangeable equivalents."[25] This group loyalty is arrayed on how close one is to the member of the group who needs his aid.[26] If one injures another, he knows that, in turn, an individual of the injured party's group will confront him.[27] This confrontation will pit family against family, and, if escalated, lineage against lineage, tribe against tribe and so forth until, ultimately, Islamist against infidel.[28] As the Arab saying goes, "I against my brother; I and my brothers against my cousins; I and my brothers and my cousins against the world."[29] Thus, the "ingenious" aspect of balanced opposition is that it fosters security because of the pervasive threat of allied retribution.[30]

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[17] *Id.* at 17.
[18] *Id.* at 12.
[19] *Id.* at 107.
[20] *Id.* at 13.
[21] *Id.*
[22] *Id.* at 11.
[23] *Id.*
[24] *Id.* at 92.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 11.
[29] *Id.* at 211.
[30] *Id.* at 194.

C. The Contemporary Failure of Balanced Opposition

Although balanced opposition may afford a sense of security, Salzman argues that because it "resort[s] to violence to resolve conflicts, and governance by coercion," Arab Middle Eastern countries "do not function well" and have remained largely "premodern" with respect to their surrounding countries.[31] To shore up this argument, he relies in part on a study conducted in 2002 by the U.N. Development Programme and the Arab Fund for Economic and Social Development, titled *The Arab Human Development Report 2002*.[32] In this report, Arab countries consistently scored lower in a number of indices compared to other regions of the world.[33] Those indices varied widely from "voice and accountability," which considered "aspects of the political process [like] civil liberties, political rights and the independence of the media,"[34] to education and illiteracy.[35] The authors of this initial report conducted subsequent studies with the hope of creating a comprehensive strategy to overcome the deficits noted in the 2002 report.[36] In the 2003 report, the administrator of the U.N. Development Programme stated in the foreword that an outside source backed by a military occupation cannot achieve meaningful change in these countries; rather, the change must come from within.[37] Salzman parallels this notion when he states that "in the Arab world and elsewhere, culture matters."[38] Therefore, according to Salzman, to understand Arab culture one must understand balanced opposition.[39] However, his contention is not without its critics.

D. Criticism of Balanced Opposition

In *Culture and Conflict*, Salzman preemptively strikes at post-colonial theorists that may criticize his contention that balanced

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[31] *Id.* at 11.
[32] *Id.* at 187.
[33] *Id.* at 188–93.
[34] *Id.* at 189.
[35] *Id.* at 190.
[36] *See* United Nations Development Programme, Arab Human Development Reports, http://www.arab-hdr.org/ (last visited July 23, 2009) (explaining the purpose of creating the initial and subsequent Arab Human Development Reports).
[37] Mark Malloch Brown, *Foreword* to UNITED NATIONS DEV. PROGRAMME & ARAB FUND FOR ECON. AND SOC. DEV., THE ARAB HUMAN DEVELOPMENT REPORT 2003 I–II (2003), *available at* http://www.arab-hdr.org/contents/2003/intro-e.pdf.
[38] SALZMAN, *supra* note 1, at 195.
[39] *Id.*

opposition stifles the modernization of Arab countries.[40] The post-colonial movement, which was inspired by Edward Said's *Orientalism*,[41] contends that negative characterization of the Middle East can be attributed to the harmful effects of Western colonialism.[42] Salzman argues that this theory, which is widely held by many anthropologists and academics,[43] "negates both the possibility of knowledge in general and the fact-based understanding of the Middle East."[44] The fact that Salzman proactively refutes this potential criticism lends general credibility to his theory that balanced opposition has stunted the socio-economic advancement of Middle Eastern countries. Notwithstanding, the reader may find this advanced posturing distracting. In very short order, Salzman sums up post-colonialism and then systematically dismantles it, without much explanation or authority.[45] Consequently, one may be left with more questions than answers about post-colonialism's criticism of Western scholarship as it relates to Arab culture.

E. The Conflict Between COIN and Balanced Opposition

Salzman's theory of balanced opposition forces the military reader to consider how its application works, or potentially fails to work, with current COIN doctrine. If Salzman's contention has merit—that balanced opposition "makes an inclusive, integrated polity virtually

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[40] *Id.* at 207.

[41] *Id.* at 14. Richard Bulliet described Said's work in the following way:

> *Orientalism*, Edward Said's celebrated critique of western thinking about Islam and the Arab world, focuses on Europeans rather than Americans. It illumines the ways in which travelers, writers, artists and scholars imagined a lurid Orient of sexual decadence, obscene cruelty, and craven pusillanimity—all, Said argues, with the hidden (or not hidden) design of justifying imperialism and adding intellectual to colonial subjugation.

RICHARD W. BULLIET, THE CASE FOR ISLAMO-CHRISTIAN CIVILIZATION 96 (2004).

[42] SALZMAN, *supra* note 1, at 207.

[43] E-mail from Philip Carl Salzman, Professor, McGill Univ., to author (30 Aug. 2008, 07:39 EST) (on file with the author) [hereinafter Salzman E-mail].

[44] SALZMAN, *supra* note 1, at 207.

[45] *Id.* at 14–15, 187, 207–08.

impossible"[46]—the success of COIN in Iraq and Afghanistan is up for debate.

The primary objective of COIN is to legitimatize the host-nation government.[47] As the doctrine prescribes, legitimate governments rule through the consent of the governed.[48] The rule of law establishes security, and those rules are preferably "recorded in a constitution."[49] Without security, "disorder spreads" and the voluntary acceptance of the governed is weakened.[50] If the governed do not feel secure, the host-nation cannot achieve legitimacy, and consequently the COIN effort will not achieve "lasting success."[51] This summary of COIN doctrine, which pairs the success of the host-nation with its ability to establish security through the rule of law and a constitution, is squarely at odds with Salzman's contemporary application of balanced operation in the Arab Middle East.

Salzman argues that balanced opposition is the fundamental alternative to the rule of law and constitutionalism.[52] Under balanced opposition, one is loyal to his group; he has no loyalty to a rule or some universal principle because "the frame of reference is always 'my group vs. the other group.'"[53] Under the rule of law and constitutionalism, "right and wrong" are defined principles and applied fairly to the governed.[54] In contrast, under balanced opposition "right and wrong" are not as important as whose group will be "advantaged or disadvantaged."[55] Because Salzman believes that his theory is woven into the cultural fabric of the Arab Middle East, absent a "delegitimization" of the tribal groups where power is shifted to individuals and not other groups, the prospect of legitimizing a central state authority in the Arab Middle East is a daunting task.[56] As Salzman

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[46] *Id.* at 205.
[47] FM 3-24, *supra* note 4, at 1-21.
[48] *Id.*
[49] *Id.* at 1-22.
[50] *Id.* at 1-23.
[51] *Id.* at 1-22.
[52] SALZMAN, *supra* note 1, at 205.
[53] *Id.*
[54] *Id.* at 211.
[55] *Id.*
[56] *Id.* at 210; *see also* Salzman E-mail, *supra* note 43 (explaining "delegitimizing" by a central power has worked with mixed results in the Middle East; the establishment of constitutionalism and the rule law can only be possible when the tribes are replaced by individuals, rather than "corporate groups").

suggests, for conditions to change in the Middle East, Arabs must "decide that *what they are for* is more important than *whom they are against*."[57]

III. Conclusion

Culture and Conflict in the Middle East is recommended, with some qualifications. Substantively, the book is quite dense, and without the academic background of an anthropologist or Arab scholar, the casual or military reader may struggle with the author's prose. Because Salzman's theory may be criticized by other academics in his field, I presume it was not intended to be an "easy" read. Nonetheless, his notion of balanced opposition is thought-provoking. Considering that the United States will likely have a presence in the Middle East for many years to come, U.S. servicemembers should be familiar with Salzman's perspective because of the challenge his theory poses to our COIN doctrine.

My recommendation to the reader is to read the last chapter of the book first. From the military reader's perspective, this is the most important chapter because Salzman applies his theory of balanced opposition to the future of the Arab Middle East. Because Salzman adequately defines the contours of his theory in this last chapter, it is not necessary to read the entire book to grasp the crux of his argument. If intrigued, the military reader can then, "cafeteria style," pick and choose portions of the book for further study.

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[57] SALZMAN, *supra* note 1, at 212.

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