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Foreword

*Lieutenant Colonel Michael O. Lacey
Professor and Chair, International and Operational Law Department
The Judge Advocate General's Legal Center and School
Charlottesville, Virginia*

Welcome to the International and Operational Law edition of *The Army Lawyer*!¹ This issue contains not only relevant articles on current International and Operational Law topics, but also a transcript of the remarks given by the new Department of Defense General Counsel—Mr. Jeh Johnson—at a recent Rule of Law symposium co-sponsored by Georgetown University and the University of Virginia School of Law as well as the The Judge Advocate General's Legal Center and School.²

The articles in this edition cover a wide variety of topics from international agreements to detainee issues at the brigade level. Major Marie Anderson and Major Katherine Krul have written an excellent primer for use by Judge Advocates assigned to a brigade staff that will inevitably face detainee issues.³ Major Jeremy Marsh has written a superior overview of Rule 99 of the ICRC study of Customary International Humanitarian Law which examines the relationship between the Law of War and Human Rights law.⁴ Major Shane Reeves revisits the *Tadic* case, a much overlooked war crimes decision that described a more expansive definition of what it means to be a “protected person” of the Fourth Geneva Convention.⁵ As the Chair of the Department, I chose the easiest topic, a quick overview of the new Oslo Treaty banning cluster munitions and what it might mean for the U.S. military.⁶ Our Vice-Chair, Commander Trevor Rush, has written an excellent practitioner's summary of the new Security Agreement with Iraq that should be required reading for anyone deploying to Operation Iraqi Freedom in the next year.⁷ Finally, the issue concludes with an excellent piece that looks to the future of the law of war. Colonel Stuart Risch looks at the United States and the International Criminal Court.⁸

As always, it is hoped that these articles will have some relevance to our most important audience—the Judge Advocate serving in the field. It is our honest belief that the best Operational Law attorney is the general practitioner, the individual who can give timely and accurate targeting advice one minute and spot fiscal law implications of the Commander's Emergency Response Program (CERP)⁹ expenditures the next. Hopefully, the articles in this edition of *The Army Lawyer* serve a greater purpose to strengthen the foundational knowledge for our Judge Advocates on key operational law issues.

¹ The International and Operational Law Department is composed of eight resident Judge Advocates: Lieutenant Colonel Michael O. Lacey (Chair); Captain Brian J. Bill (USN); Commander Trevor A. Rush USN); Lieutenant Colonel J. Porter Harlow (USMC), Major Christopher R. Brown (ARNGUS), Major Olga Marie Anderson; Major J. Jeremy Marsh (USAF); and Major Shane R. Reeves, and our Administrative Assistant Ms. Terri Thorne. The Department would like to thank our outside contributing authors, Colonel Stuart Risch and Major Katherine Krul. We greatly appreciate their expertise and contributions. Finally, the issue has benefited greatly from diligent fine-tuning by the Legal Center and School's resident footnote gurus, Mr. Chuck Strong, Major Ann Ching, and Captain Alison Tulud. Thank you all.

² Jeh Charles Johnson, Gen. Counsel of the Dep't of Defense, Keynote Address at Georgetown University Human Rights Institute, 2009 Samuel Dash Conference on Human Rights: Rule of Law in the Context of Military Interventions (Mar. 19, 2009) (transcript available at ARMY LAW., May 2009, at 2).

³ Major Olga Marie Anderson & Major Katherine A. Krul, *Unraveling Seven Detainee Operations Issues Prior to Your Deployment*, ARMY LAW., May 2009, at 7.

⁴ Major J. Jeremy Marsh, *Rule 99 of the Customary International Humanitarian Law Study and the Relationship Between the Law of Armed Conflict and International Human Rights Law*, ARMY LAW., May 2009, at 18.

⁵ Major Shane Reeves, *The Expansive Definition of “Protected Persons” in War Crime Jurisprudence*, ARMY LAW., May 2009, at 23.

⁶ Lieutenant Colonel Michael O. Lacey, *Cluster Munitions: Wonder Weapon or Humanitarian Horror?*, ARMY LAW., May 2009, at 28.

⁷ Commander Trevor A. Rush, *Don't Call It a SOFA! An Overview of the New U.S.-Iraq Security Agreement*, ARMY LAW., May 2009, at 34.

⁸ Colonel Stuart W. Risch, *Hostile Outsider or Influential Insider? The United States and the International Criminal Court*, ARMY LAW., May 2009, at 61.

⁹ COMBINED JOINT TASK FORCE-7, FRAGMENTARY ORDER 89 TO OPERATIONS ORDER 03-036, COMMANDER'S EMERGENCY RESPONSE PROGRAM (CERP) (19 JUNE 2003).

Remarks to the 2009 Samuel Dash Conference on Human Rights Rule of Law in the Context of Military Interventions¹

*Mr. Jeh Johnson, General Counsel for the Department of Defense, presented the following comments, in his individual capacity, as the keynote address at the 2009 Sam Dash Conference on Human Rights.² This year's conference, titled the Rule of Law in the Context of Military Interventions, was co-sponsored by the Georgetown University Law Center, the University of Virginia School of Law, and The Judge Advocate General's Legal Center and School, U.S. Army. "More than 70 men and women in the U.S. armed forces—wearing nearly every type of military uniform from dress blues to army fatigues—were among the more than 200 attendees who participated."³ Participants heard from three panels, comprised of military servicemembers, U.S. government interagency civilian personnel, non-governmental organization representatives, and academics, along with a lunch address from Tom Ricks, a Washington Post reporter and best-selling author on the Iraq war.⁴ The panels covered the following topics: *Military Involvement in Rule of Law Activities: Boots on the Ground*; *The Institutional Approach to Rule of Law: Whose Job Is It Anyway?*; and *Military Involvement in the Rule of Law: Surveying the Risks and Reasons*. With this background, Mr. Johnson capped off day one of the conference by providing insights on what the rule of law means.*

Jeh Charles Johnson⁵

¹ The Judge Advocate General's Legal Center and School (TJAGLCS) would like to extend its thanks to the Dash family for their support to Georgetown University's Human Rights Institute which made this conference possible. These remarks were delivered on 19 March 2009 by the keynote speaker, Jeh Charles Johnson at Georgetown University to the 2009 Samuel Dash Conference on Human Rights: Rule of Law in the Context of Military Interventions. It is sponsored by the Human Rights Institute at Georgetown Law and the Center for American Progress.

Mr. Sam Dash was a extraordinarily successful lawyer whose accomplishments, while too numerous to detail, include: ethics adviser to independent counsel Kenneth Starr during in the Whitewater Investigation; chief counsel to the Senate Watergate Committee; member of the Board of Directors for the International League of Human Rights; trial attorney, partner with various Philadelphia firms, and faculty of Georgetown University Law Center. His accomplishments are no surprise considering he was a member of the Greatest Generation who enlisted at age eighteen and served in Italy during World War II as a bombardier navigator in the Army Air Corps. For his service and his contributions which made this conference possible, TJAGLCS extends their appreciation to Mrs. Sara Dash and their daughters, Judi and Rachel.

² Webcast: Samuel Dash Conference on Human Rights: Rule of Law in the Context of Military Interventions, <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=772> (Georgetown Univ. Law Ctr. 2009).

³ Ann W. Parks, Dash Conference Examines the Military's Role in the Rule of Law, <http://www.law.georgetown.edu/news/webstory/3.25.09.html> (last visited Apr. 12, 2009).

⁴ Mr. Ricks is author of *Fiasco: The American Military Adventure in Iraq (2006)* and *The Gamble: General David Petraeus and the American Military Adventure in Iraq, 2006–2008 (2009)*.

⁵ Jeh Charles Johnson was appointed General Counsel of the Department of Defense on 10 February 2009, following nomination and confirmation by the Senate. In this capacity, he serves as the chief legal officer of the Department of Defense and the legal adviser to the Secretary of Defense.

Mr. Johnson's legal career has been a mixture of private practice and distinguished public service. Mr. Johnson began his career in public service as an Assistant U.S. Attorney in the Southern District of New York, where he prosecuted public corruption cases. From, 1989–1991, as a federal prosecutor, Mr. Johnson tried twelve cases and argued eleven appeals. He then moved on to become a successful trial lawyer in private practice at the New York City-based law firm of Paul, Weiss, Rifkind, Wharton & Garrison, LLP. While at Paul Weiss, he personally tried some of the highest stakes commercial cases of modern times, for corporate clients such as Armstrong World Industries, Citigroup and Salomon Smith Barney. In 2004, Mr. Johnson was elected a Fellow in the prestigious American College of Trial Lawyers.

In October 1998, President Clinton appointed Mr. Johnson to be General Counsel of the Department of the Air Force following nomination and confirmation by the Senate. He served in that position for twenty-seven months and returned to private law practice at Paul Weiss in January 2001.

Returning to private practice, Mr. Johnson was active in numerous civil and professional activities. From 2001–2004, he chaired the Judiciary Committee of the New York City Bar Association, which rates and approves all the federal, state and local judges in New York City. Mr. Johnson is also a member of the Council on Foreign Relations, and was a director or trustee of Adelphi University, the Federal Bar Council, the New York Community Trust, the Fund for Modern Courts, the Legal Aid Society, the Lawyers Committee for Civil Rights Under Law, the New York City Bar Fund, Inc., the Vera Institute, the New York Hall of Science, and the Film Society of Lincoln Theater. He also served on the Board of Governors of the Franklin & Eleanor Roosevelt Institute from 2007–2009.

In January 2007, Mr. Johnson was one of seven individuals nominated by the New York State Commission on Judicial Nominations to be Chief Judge of New York State. The governor reappointed the incumbent, Judith Kaye, though Mr. Johnson was rated well qualified for the position by the New York State Bar Association.

In early 2007, Mr. Johnson was recruited by Senator Barack Obama to become part of the Senator's presidential campaign. For the next twenty-one months, Mr. Johnson was involved in the campaign as an advisor on national security and foreign policy matters, and as a member of the campaign's national finance committee. During that time, Mr. Johnson also made numerous surrogate TV appearances for the campaign on MSNBC, Fox, NBC, and other networks.

Thank you for inviting me to be your keynote speaker. The topic of this conference is the role of the military in promoting the rule of law. The topic is a timely one for me because I was in Iraq and Afghanistan just two weeks ago, where I observed first-hand our efforts in those countries. My remarks this evening are my own, and do not reflect official Department of Defense or U.S. Government policy.

That said, promoting the rule of law is in fact one of the cornerstones of the national security policy of the new Administration, and is one of the reasons I joined this Administration, because I believe that the concept is a necessary part of the effort to combat international terrorism.

At the outset, it should be noted that reference to the rule of law means different things in different contexts, and we have to be careful how we use it.

The term has a political connotation, and carries some political baggage. To many, rule of law sounds a conservative theme. Some old enough to remember Richard Nixon's "Law and Order" society of the late 1960s, bristle at the term. During the campaign, I had a debate with an old-line ACLU attorney who did not like the term because it suggested to him the image of an authoritarian government, love it or leave it, a requirement that all swear allegiance to "the law" no matter what, and that it is disloyal or unpatriotic ever to want to change it through public advocacy or peaceful civil disobedience.

Obviously, that is not what we mean.

Some of you have heard me talk about a chapter from my own family history, the so-called Freeman Field Mutiny. I had two uncles who were Tuskegee Airmen. One of them, Lieutenant Robert B. Johnson, was a bombardier navigator in the Army Air Corps assigned to Freeman Field in Indiana in April 1945. The following is my recollection of published accounts with, I am sure, a bit of family folklore in between. At the time, the base commander had a rule requiring that the officers' club on base be white only. Lieutenant Johnson and about 100 other Tuskegee Airmen on base said no to that, and demanded entry into the club. They were ordered to leave. The next day the base commander asked all officers on base to sign a document acknowledging awareness of the rule that the officers' club was segregated. The Tuskegee Airmen refused to sign. Next, the commander, armed with a legal opinion from an Army lawyer, rounded up all the Tuskegee Airmen and told them it was a time of war, that it was a capital offense to violate an order during a time of war, and again ordered them to sign. And, again, they refused.

For their disobedience, my uncle and the other colored Airmen were sent to a military prison in Kentucky to be confined alongside German POWs (prior to passage of the law that prohibited such a thing). Eventually, General Marshall learned of the incident and told the base commander to knock it off. In that instance, who was promoting the rule of law? The base commander, armed with his base rule and a supporting legal opinion from an JAG, or my uncle, armed only with the idealistic notion of what the Equal Protection Clause should be, and eventually became?

My point here is that, for Americans, reference to the rule of law can be complicated, annotated by references in history such as this one. Reference to the rule of law is a good bumper-sticker message, but we need to be careful with it because it means different things in different contexts.

In Iraq, our rule of law initiatives have largely involved reviving the pre-Saddam Hussein system, including more progressive measures to protect individual rights.

In Afghanistan, our efforts are nothing short of creating a system where in many places none exists. From 1996 to 2001, Afghanistan simply had no functioning, legitimate government.

Domestically, reference to the rule of law in last year's political debate, as a goal for our new administration, and as one of my own personal goals in office, means respect, by the most powerful in our government, for the laws that we as a society create for ourselves—as a weapon to gain credibility and the moral high ground in the international struggle against terrorists.

In these remarks I will discuss all three.

Following the election, Mr. Johnson served on President-Elect Obama's transition team, and was then publicly designated by the President-Elect for nomination to the position of General Counsel of the Department of Defense on 8 January 2009, followed by formal nomination on 20 January 2009, and confirmation by the Senate on 9 February 2009.

Mr. Johnson is a member in good standing of the bars of New York State and the District of Columbia.

Shortly before the Iraq war was launched in 2003, Colin Powell reportedly warned President Bush of the so-called Pottery Barn Rule: “You Break it, You Own it.” When we go into a sovereign nation and push out its ruling government, we assume a moral obligation to the people there, who, as a result of our actions, may find themselves with no army, no police, and no running water or electricity. The Pottery Barn Rule is also codified in international law, in Article 43 of the Fourth Hague Convention:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.⁶

After six years and much cost in lives and tax dollars, it appears that we have turned the corner in Iraq. Thanks to the dedication and bravery of our military, levels of violence are way down, to a fraction of what they once were as recently as two years ago.

While in Iraq one of the most memorable experiences I had was visiting that nation’s Chief Justice Medhat al-Mahmoud. Appointed by the Coalition Provisional Authority in Iraq, Chief Justice Medhat remains in office and is regarded by many as a courageous leader of a judiciary that has made great progress toward independence and credibility as part of the new government. Chief Justice Medhat, personally, deserves much of the credit for that progress. I met with the Chief Justice late one night in the heavily-guarded apartment building where he lives, and he described to me with pride the history of the courts in Iraq and the progress made.

Our Army Corps of Engineers has executed numerous construction projects throughout Iraq supporting the courts, police and corrections services, and our Judge Advocates in Iraq have been instrumental in helping to coordinate our overall rule of law efforts there, in addition to their normal duties as lawyers for the commanders there.

A word about our JAGs. In Iraq and Afghanistan they work long hours in difficult conditions. In the corporate law world I come from, many of us are accustomed to comfortable surroundings to cushion the demands of practice. In Kabul, I visited the law office of the staff judge advocate there. The hours are from about 0800 to 2200 at night. The windows were boarded up because the glass had shattered from a nearby suicide bomb several weeks before. A twenty-one year old Army reservist died of her wounds from that blast while I was there. I met with the JAGs there and probed to learn if there was anything I could provide or advocate for back home that could make their life any easier. Are you having trouble meeting your CLE requirements? Can I get you some relief from bar association dues? In the middle of that very dangerous place, forward deployed in those conditions, no one wanted to complain about anything.

The government in Iraq has evolved to the point where last year it was in a position to negotiate with us a security agreement that requires that all U.S. Forces be out of the country by the end of 2011.

In Iraq we have turned the corner, and we have an exit strategy.

In Afghanistan our efforts are nowhere near this far along, and await direction as part of an overall strategy that the Administration is currently in the process of developing. Our rule of law initiatives there are scattered and have been under-resourced when compared with our activities in Iraq, and I fear that a successful effort in Afghanistan will require much more than our effort in Iraq.

While in Afghanistan I was struck by the degree of poverty and the lack of an infrastructure. The average life expectancy of an Afghan male is forty-four years. Even in the urban center of Kabul, in much of that city there is no electricity, no running water, and no drainage. Except for the dusty automobiles, a street scene in Kabul in March 2009 could be mistaken for March 1909 or March 1809. Donkeys, skinned goats, mud everywhere. On the perimeter of our air base in Baghram are mud huts where people live and children herd goats and play amidst old land mines buried in the fields from the Russian invasion. Not far away, one can also see the rusted remains of Russian tanks and trucks from that occupation—a stark reminder of the hazards for any outsiders there.

Some have said that Afghanistan is not really a nation; it is more a series of tribes that happen to reside within a national border. Most of the population is indeed tribal, and is largely untouched by any system of laws as we know them, or a court

⁶ Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, U.S.T.S. 539.

system. In tribal Afghanistan, the punishment and compensation for a felony committed by a member of one tribe visited on another tribe is resolved by the tribal elders, and may involve the transfer of a young girl into a forced marriage in the victim tribe. You and I would regard that as a crude form of alternative dispute resolution, or ADR—but in Afghanistan this is *not* the alternative, it is the cultural norm. The *courts* are the alternative, for both criminal offenses and civil disputes, but even when the courts are utilized, corruption is often part of the package.

In Afghanistan the Ministry of Defense counterpart whom I met with does not have a law degree from a graduate school, and the newly formed bar association in Afghanistan has, I'm told, only several hundred members in it.

On top of all this, whatever wealth there is in Afghanistan comes about from the illegal drug trade.

Any policy for a new U.S. direction in Afghanistan must take account of these harsh realities, as well as the harsh lessons learned from our recent experience in Iraq.

Whether in Iraq or Afghanistan, our rule of law efforts must be constrained by the art of the possible, sensitivity to the culture of the country, and the realization that much of *our* laws and system of justice reflect *our* Western culture, and not *their* culture.

The other thing we must be sensitive to is the very real possibility that a soldier with a gun and a uniform may not be the ideal messenger for change. Rule of law initiatives must be an interagency process, involving our partners at State and Justice.

Finally, there is the rule of law as it pertains to our own nation, and how we project ourselves on the world stage. It hangs over our first two initiatives in Iraq and Afghanistan, and all that we do to combat international terrorism. Like our President, I believe we must lead *not* by the example of our power, but by the power of our example, and that human rights abuses and failure by our own government to follow the rule of law actually harm our national security interests, and serve as a recruitment tool for al Qaeda and related terrorist organizations in the communities in which they recruit.

As a result of our broad assertions of executive authority, we also find ourselves in a situation where the executive's actions are today actually given less deference in the courts, and as we are forced to justify our detention decisions to skeptical judges (many of whom were appointed by the prior administration) in hundreds of cases in litigation.

This is why this administration has made adherence to the rule of law a cornerstone of our national security policy, in the international struggle against terrorism.

Our professional war fighters teach that terrorists will not be defeated by conventional means; they will not surrender by signing a peace treaty on the deck of a battleship. We combat terrorists by occupying the moral high ground, by marginalizing and discrediting the extremists in the communities in which they exist, thereby limiting their ability to recruit in those communities. The strategy is simple: capture or kill those who go through the training camps and take up arms against us, at a rate faster than their leaders can recruit new ones. Human rights abuses at the hands of our government constitute self-inflicted wounds because they bolster enemy recruitment and undermine the strategy.

This is one of my guiding principles in office, and I am pleased that on his second full day in office President Obama signed the three executive orders closing Guantanamo, and appointed task forces to find a new detention policy and a new interrogation policy for our government. Those task forces have begun their work, and the senior most officials of our government, the Attorney General, Secretary Gates, Secretary Clinton, Director Blair, and Director Panetta are personally involved in this effort.

Here, I want to spend a minute on the filing we made in court last Friday concerning the definition of "enemy combatant" that we had been using to defend the habeas cases brought by Guantanamo detainees. Three judges in those cases ordered the Department of Justice to inform them whether the new administration wished to make any refinements to the definition, and that we had to tell them this by March 13. We took them up on the invitation. *The New York Times* reported that the change we made appears largely cosmetic.

But they fail to appreciate the significance of what we did, which reflects the President's personal views on the subject. The first three words of the old definition reflected the problem with it: "At a minimum, the President's power to detain includes the ability to detain as enemy combatants those individuals who were part of, or supporting, forces engaged in hostilities against the United States or its coalition partners and allies."

To be sure, the President has the authority as Commander-in-Chief to direct military actions without congressional authorization in times of emergency or exigent threat to American lives or national security. In regard to detention, however, the new definition by its terms relies on the authority of the President to detain rooted in authorizations granted by Congress, in this case the authorization for the use of military force passed shortly after 9/11 in 2001 (as opposed to the Commander-in-Chief authority in the Constitution), as informed by international law embodied in the laws of war. This is in accord with the President's personal views of his authority.

The new definition also reflects our broader, new approach to the role of the law—the rule of law—in our society. The “just trust us” approach to empowering senior government officials to decide whether an individual enjoys the protections of our laws, based entirely upon the discretion of that individual to label you an “enemy combatant” or not, is fraught with problems. Even when that system is populated with senior officials with the best of intentions, those individuals, in the short term, eventually resign, lose elections, or serve out their terms. It is basic human nature that broad government authority conferred upon some will be abused by others. In my lifetime, in the 1950s and 60s, before the label “enemy combatant” became commonplace in our vocabulary, civil liberties and rights of privacy were lost for many simply upon the application by some in our government of the term “dangerous Communist subversive.” As I told you at the outset of this speech, my own uncle became a “detainee,” care of our U.S. military, simply because a JAG, in a time of war, found within the law the discretion to punish someone who dared assert his basic right to equal treatment in this country.

So, in this speech I have described three separate efforts in support of the rule of law: Our efforts in Iraq and Afghanistan are vital. But, the last effort is the most important to our long-term security and peace.

Thank you for listening.

Seven Detainee Operations Issues to Consider Prior to Your Deployment

Major Olga Marie Anderson* & Major Katherine A. Krul†

Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF) changed the complexity of the entire EPW [Enemy Prisoner of War] / detainee mission.¹

I. Introduction

Deployed Brigade Judge Advocates (BJAs) will likely find themselves enmeshed in the task of unraveling complex issues associated with detainee operations.² Although detainee operations cut across multiple staff sections, including command, intelligence, operations, military police, and legal,³ the Commander will frequently turn to the BJA for advice and solutions. To provide effective advice to the Commander, the BJA must consider a variety of issues ranging from the legal underpinnings of detention operations to more practical concerns such as the logistics of handling detainee files. The seven questions addressed in this article start with the legal issues and then move to more practical considerations. Recent deployments have yielded countless lessons learned in the realm of detention operations at all levels of command;⁴ however, the following observations are geared specifically towards assisting deploying BJAs during their pre-deployment training so they may be better prepared to assist their commanders in the realm of detention operations.

II. Seven Questions to Ponder Before Deploying

A. What is the Legal Authority to Detain this Individual?

Both the BJA and the individual Soldiers assigned to the Brigade Combat Team (BCT) should understand the legal basis to detain⁵ individuals during the specific conflict. Generally, the legal basis for detention stems from the Geneva

* Judge Advocate, U.S. Army. Presently assigned as an Associate Professor, Int'l & Operational Law Dep't, The Judge Advocate General's Legal Ctr. & Sch. (TJAGLCS), Charlottesville, Va. LL.M., 2007, TJAGLCS, J.D., 1997, West Virginia University College of Law; B.S.I.E. 1994, West Virginia University, Morgantown, W. Va. Previous assignments include Student, 55th Judge Advocate Officer Graduate Course, TJAGLCS, Charlottesville, Va.; 2005–2006 Brigade Judge Advocate, 1st Brigade Combat Team, 10th Mountain Division (Light Infantry) deployed to Baghdad, Iraq; 2004–2005 Chief of Justice, 10th Mountain Division (Light Infantry) Fort Drum, N.Y.; 2003–2004 Chief of Operational Law, Combined Joint Task Force-180, Bagram, Afg.; 2002–2003 Chief of Legal Assistance, 10th Mountain Division, Fort Drum, N.Y.; 2001–2002 Officer-in-Charge, Giessen Legal Center, F.R.G.; 2000–2001 Trial Counsel, 1st Brigade Combat Team, 1st Armored Division (deployed to Camp Bondsteel, Kosovo 2000); 1998–2000 Chief of Claims, Claims Judge Advocate, Legal Assistance Attorney, Fort Sill, Okla. Member of the state bar of West Virginia.

† Judge Advocate, U.S. Army. Presently assigned as the Brigade Judge Advocate, 3d Brigade Combat Team, 25th Infantry Division deployed to Iraq. LL.M., 2008, TJAGLCS, Charlottesville, Va.; J.D., 2000, University of South Carolina; B.A., 1997, Saint Bonaventure University. Previous assignments include Student, 56th Judge Advocate Officer Graduate Course, TJAGLCS, Charlottesville, Va.; Chief, Administrative Law, Fort Jackson, S.C. 2006–2007; Chief, Criminal Law, Fort Jackson, S.C. 2005–2006; Defense Counsel, Fort Jackson, S.C. 2004–2005; Brigade Judge Advocate/Trial Counsel, Fort Drum, N.Y. 2002–2004; Chief, Client Services, Kosovo 2001–2002; Legal Assistance Attorney, Fort Drum, N.Y. 2001. Member of the bars of South Carolina and the District of Columbia.

¹ Lieutenant Colonel Ed Lowe & Mr. Joseph Crider, *Detainee Operations: An Evolving Paradigm*, MIL. POLICE 1, 1 (Oct. 2005).

² CTR. FOR LAW & MILITARY OPERATIONS, JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, FORGED IN THE FIRE 28 (2008) [hereinafter FORGED IN THE FIRE].

³ See JOINT CHIEFS OF STAFF, JOINT PUB. 3-63, DETAINEE OPERATIONS, at II-3 to II-11 (30 May 2008) [hereinafter JOINT PUB. 3-63] (discussing the roles and responsibilities in detention operations for various members of the staff).

⁴ FORGED IN THE FIRE, *supra* note 2, at 28–52.

⁵ While the U.S. military uses the term “detention,” the Geneva Conventions have articles that use both the term “internment” and “detention.” Compare JOINT PUB. 3-63, *supra* note 3, with Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 42, 68, & 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. “Detention” is defined as “the act of holding a person in custody; confinement or compulsory delay.” BLACK'S LAW DICTIONARY 459 (7th ed. 1999). Therefore, detention tends to focus on potential criminal conduct committed by an individual. On the other hand, the term “intern” is defined as “to segregate and confine a person or group, especially those suspected of hostile sympathies in time of war.” *Id.* at 820. While detention of an individual focuses on past conduct, internment appears to be concerned with an individual's future activities. Note that *Department of Defense Dictionary of Military and Associated Terms* does not define internment; however, it does use this term in acronyms describing facilities used to hold detainees. See JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS app. A (12 Apr. 2001 as amended through 17 Oct. 2008). During armed conflict, U.S. doctrine calls for the military to establish Theater or Strategic Internment Facilities to hold detainees. See U.S. DEP'T OF ARMY, FIELD MANUAL 3-19.40, INTERNMENT/RESETTLEMENT OPERATIONS para. 4-183 (4 Sept. 2007) (C1, 17 Dec. 2007) [hereinafter FM 3-19.40]. Arguably, when the detention regime is grounded in Article 42 or 78 of the Fourth Geneva Convention, then the activities of the U.S. military should be known as “internment operations.” This terminology is consistent with the title of Part

Conventions,⁶ a United Nations Security Council Resolution (UNSCR),⁷ or the host nation's domestic criminal law.⁸ Understanding the legal authority to detain an individual is essential since it frequently impacts the procedures and due process used during detention.

During international armed conflict (IAC), the Geneva Conventions provide authority to detain both combatants and civilians. The Geneva Conventions only apply when properly triggered.⁹ The full body of the Geneva Conventions are triggered by declared war, armed conflict between two High Contracting Parties (commonly referred to as IAC), or partial or total occupation.¹⁰ The Third Geneva Convention (GC III) allows for the detention of prisoners of war (POW)¹¹ until the "cessation of active hostilities."¹² Similarly, the Fourth Geneva Convention (GC IV) provides legal authority to intern civilians who both meet the definition of protected person¹³ and who pose a security threat.¹⁴ While GC IV requires the Detaining Power to release civilian internees "as soon as the reasons which necessitated . . . internment no longer exist,"¹⁵ it also recognizes the potential to intern civilians until the "close of hostilities."¹⁶ Should the Detaining Power hold the

III, Section IV of the Fourth Geneva Convention, containing the "Regulations for the Treatment of Internees." The term "internee" and "internment" are used throughout the section. See generally GC IV, *supra* note, arts. 79 to 141. Since military doctrine does not appear to distinguish clearly between the two terms of detention and internment, the BJA should consider whether the authority called internment in the Geneva Conventions is described as detention in their specific operation and be aware that the internment provisions may likely apply at least as a matter of policy to their detention operations. See generally U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.1 (9 May 2006) [hereinafter DoDD 2311.01E] (requiring U.S. military personnel to comply with the law of war regardless of the characterization of the conflict).

⁶ GC IV, *supra* note 5, art. 2. The focus of this article will be the detention of civilians, not combatants. A detailed discussion of the Third Geneva Convention is beyond the scope of this article. Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]. Additionally, discussion of the potential definition for and status of these civilians as unlawful enemy combatants is also beyond the scope of this article.

⁷ See *infra* notes 19–25 and accompanying text.

⁸ See *infra* note 36 and accompanying text.

⁹ GC IV, *supra* note 5, art. 2. Common Article 2 is identical in all four of the Geneva Conventions. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (GC I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (GC II); GC III, *supra* note 6, art. 2.

¹⁰ GC IV, *supra* note 5, art. 2.

¹¹ GC III, *supra* note 6, art. 4(a). The Third Geneva Convention identifies six categories of individuals who qualify for prisoner of war status during international armed conflict. *Id.* These six categories include: (1) "members of the armed forces of a Party to the conflict," (2) members of a militia force who are commanded by responsible person, wear "a fixed distinctive sign recognizable at a distance," carry their weapons openly, and conduct "their operations in accordance with the laws and customs of war," (3) "members of a regular armed forces who proves allegiance to a government or an authority not recognized by the Detaining Power," (4) civilians "accompanying the armed forces without actually being members" of the armed forces, (5) merchant marines, and (6) *levee en masse*. *Id.* art. 4(a)(1)–(6).

¹² See *id.* arts. 4, 12, 118. If there is any doubt as to whether an individual qualifies for prisoner of war status, then the Detaining Power should convene an Article 5 tribunal. See GC III, *supra* note 6, art. 5; U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONER OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES para. 1-6 (1 Oct. 1997) (explaining the procedures for an Article 5 tribunal).

¹³ Article 4 defines "protected persons" to include "those who, at any given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hand of a Party to the conflict or Occupying Power of which they are not nationals." GC IV, *supra* note 5, art. 4. Next, Article 4 identifies four categories of individuals who are excluded from the "protected person" category: "[n]ationals of a State which is not bound by the Convention, . . . [n]ationals of a neutral States who find themselves in the territory of a belligerent State, and nationals of a co-belligerent States . . . while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are," and individuals who are protected by another Geneva Convention. *Id.*

¹⁴ Assuming that the individual qualified as a protected person, then Article 42 or Article 78 governs internment of an individual who poses a security threat and Article 68 provides a basis to detain "protected persons" who commit a criminal act against the Occupying Power. GC IV, *supra* note 5, arts. 42, 68, 78. These articles demonstrate the distinction between the two terms internment and detention as used in the Geneva Conventions. See *supra* note 5. Article 42 applies to aliens in the territory of a party to the conflict and states that, "[t]he internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary." GC IV, *supra* note 5, art. 42. Article 78 applies to occupied territories and states, "[i]f the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned resident or to interment." *Id.* art. 78. Note that Articles 42 and 78 apply two separate standards for internment: internment where it is absolutely necessary for security versus internment where it is necessary for imperative reasons of security. GC IV, *supra* note 5, arts. 42, 78. The Article 78 standard creates a higher burden as demonstrated by Pictet's Commentary that "[i]n occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise." COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 367 (Jean S. Pictet et al. eds., Major Ronald Griffen & Mr. C. W. Dumbleton trans., 1958) [hereinafter COMMENTARY].

¹⁵ GC IV, *supra* note 5, art. 132.

¹⁶ *Id.* art. 133 (assuming that the individual remains a security threat until the close of hostilities).

civilians for an extended period of time, then GC IV requires the Detaining Power to review the decision to intern the individual civilian every six months.¹⁷ Therefore, while the Geneva Conventions provide clear legal authority to intern individuals during IAC, the Conventions do not provide clarity or guidance on the specific procedural safeguards associated with their detention.¹⁸

In the absence of IAC or occupation, a UNSCR may provide authority to detain civilians.¹⁹ For example, from 28 June 2004 until 1 January 2009, coalition forces in Iraq were operating under a series of annually-renewed United Nations (U.N.) mandates.²⁰ Each mandate included the authority found in UNSCR 1546, dated 8 June 2004, which authorized coalition forces to intern civilians where it was “necessary for imperative reasons of security.”²¹ Similarly, coalition forces operating in Afghanistan in support of the International Security Assistance Forces (ISAF) also operate under a UNSCR.²² However, in Afghanistan, the U.N. mandate does not specifically extend the right to intern civilians.²³ Instead, ISAF’s detention authority appears to stem from the language in the UNSCR that directs ISAF to “take all necessary measures to fulfill its

¹⁷ *Id.* arts. 43, 78. Neither of these articles, or their associated commentary, provides detailed guidance regarding the procedures to use during the required period review. Both articles discuss a “competent body,” which seems to imply that an administrative review would be sufficient and that a judicial review is not required. Furthermore, the Conventions do not provide either the legal standard for the review authority or are the definition for specific terms such as “imperative” or “absolutely” necessary defined. *See id.* arts. 43, 78. Therefore, it appears that individual State parties can prescribe implementing guidance for these reviews.

¹⁸ *See infra* Part II.B for a discussion of the procedures adopted by the United States in Iraq and Afghanistan.

¹⁹ *See, e.g.*, S.C. Res. 1244, ¶ 9, U.N. Doc. S/RES/1244 (June 10, 1999) (providing a mission to ensure public safety and order which was interpreted to provide a basis for detention in Kosovo); S.C. Res. 1546, attached letter signed by Colin L. Powell, U.N. Doc. S/RES/1546 (June 8, 2004) (incorporating the language of internment for security internees found in the Article 78, Fourth Geneva Convention); *see also infra* notes 22–23 for further discussion.

²⁰ S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004); S.C. Res. 1637, U.N. Doc. S/RES/1637 (Nov. 11, 2005); S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006); S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007). From the time when the United States became an Occupying Power in April 2003 until 28 June 2004, as a matter of law, Article 78 of the Fourth Geneva Convention would have provided internment authority. *See generally* Annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 [hereinafter Hague IV] (defining occupation); GC IV, *supra* note 6, art. 2 (stating that occupation is one of three triggers for the full body and protections of the Geneva Convention). During the occupation, the Coalition Provisional Authority (CPA) passed several regulations, orders, and memorandum. One of which, CPA Memo 3, dealt with detention operations. Coalition Provisional Authority, Memorandum No. 3 (Revised), Criminal Procedures (17 June 2004) *available at* http://www.cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures_Rev.pdf. After the transfer of authority on 28 June 2004 from the CPA to the interim Government of Iraq which ended the occupation, the authority to detain individuals in Iraq stemmed from a series of U.N. Security Resolution mandates.

²¹ Some of the recognized specified tasks for Multi-National Forces in Iraq were documented in the UN Security Council Resolutions as attached letters from the Iraqi Prime Minister, Dr. Ayad Allawi and the U.S. Secretary of State Colin L. Powell. The following tasks were identified by Secretary of State Colin Powell in his letter attached to UNSCR 1546:

Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq’s political future through violence. This will include combat operations against members of these groups, internment where this is necessary for imperative reasons of security, and the continued search for and securing of weapons that threaten Iraq’s security. A further objective will be to train and equip Iraqi security forces that will increasingly take responsibility for maintaining Iraq’s security. The MNF also stands ready as needed to participate in the provision of humanitarian assistance, civil affairs support, and relief and reconstruction assistance requested by the Iraqi Interim Government and in line with previous Security Council Resolutions.

S.C. Res. 1546, *supra* note 20, Annex, at 11 (Letter by Colin Powell, Sec’ of State, to Lauro L. Baja, Jr., President, U.N. Security Council (June 5, 2004)). The language adopted in UNSCR 1546 by Secretary of State Colin L. Powell mirrors the language found in Article 78 of GC IV. The attached letter by Dr. Allawi to U.N. Security Resolution 1637 captures the Government of Iraq’s continuing acceptance of Multi-National Forces internment authority:

Until we are able to provide security for ourselves, including the defence of Iraq’s land, sea and air space, we ask for the support of the Security Council and the international community in this endeavour. We seek a new resolution on the Multinational Force (MNF) mandate to contribute to maintaining security in Iraq, including through the tasks and arrangements set out in the letter from Secretary of State Colin Powell to the President of the United Nations Security Council.

UNSCR 1546, *supra* note 20, Annex, at 8 (Letter from Dr. Ayad Allawi, Prime Minister of the Interim Iraqi Government, to Lauro L. Baja, Jr., President, U.N. Security Council (June 5, 2004)); *see* S.C. Res. 1637, U.N. Doc. S/RES/1637 (Nov. 11, 2005) (Letter from Dr. Ayad Allawi, Prime Minister of the Interim Iraqi Government, to Mr. Lauro L. Baja Jr., President of the U.N. Security Council).

²² S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001); S.C. Res. 1510, U.N. Doc. S/RES/1510 (Oct. 13, 2003); S.C. Res. 1833, U.N. Doc. S/RES/1833 (Sept. 22, 2008).

²³ *See* S.C. Res. 1386, *supra* note 22; S.C. Res. 1510, *supra* note 22; S.C. Res. 1833, *supra* note 22.

mandate.”²⁴ While both the Geneva Conventions and a UNSCR may provide authority to detain civilians, neither of these authorities provide detailed due process procedures on how to conduct the detention and review of detained civilians.²⁵

Assuming that detention of civilians is based on a UNSCR, then the BJA must become familiar with the theater-specific procedures associated with the due process owed to individuals in detention. For example, in Iraq, under the UNSCR 1546 mandate and its successors, each detainee’s file could receive up to five levels of review to determine if continued detention was necessary for imperative reasons of security.²⁶ In June 2007, Multi-National Forces–Iraq added another level of review.²⁷ The Multinational Force Review Committee (MNFRC), comprised of a three military personnel panel, provided each detainee the first opportunity to appeal his or her internment in person.²⁸ However, UNSCR applicable to other operations may be interpreted more narrowly and only authorize detention for a short period of time which would tend to eliminate the need for the multiple reviews. For example, in Afghanistan, ISAF is only authorized to detain an individual for ninety-six hours.²⁹ At the end of this time period, individuals are either released or turned over to Afghan officials who will review detention as a matter of domestic criminal law.³⁰ Neither of these due process models found in either Iraq or Afghanistan is currently captured in military doctrine outside of theater-specific standard operating procedures (SOPs). However, having developed the detailed process overtime in Iraq, it seems likely that future operations will require both multiple paper file reviews and the opportunity for a detainee to appeal his internment in person if the individual remains in detention for a lengthy period of time.

Perhaps the most detailed procedural guidance on detention stems from use of the host nation’s domestic criminal law in conjunction with international agreements as the legal basis for detention. For example, after 1 January 2009, U.S. forces are supporting the Government of Iraq and are conducting operations in accordance with a security agreement.³¹ Under the security agreement, “[n]o detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the United States forces and of the civilian component) except through an Iraqi decision issued in accordance with Iraqi Law and pursuant to Article 4.”³² Article 4 allows U.S. forces to conduct military operations that are coordinated with Iraqi authorities and conducted in accordance with Iraqi law.³³ “In the event the United States Forces detain or arrest persons as authorized by . . . [the] agreement or Iraqi law, such persons must be handed over to competent Iraqi

²⁴ S.C. Res. 1833, *supra* note 22 (extending the International Security Assistance Forces mandate to 13 Oct. 2009).

²⁵ Both Article 43 and Article 78 of the Fourth Geneva Convention require the detaining power to conduct a review of the individual’s internment two times a year. GC IV, *supra* note 5, arts. 42, 78. The United Nations Security Council Resolutions for both Iraq and Afghanistan were completely silent on the degree of due process required for internment of an individual.

²⁶ UNITED NATIONS ASSISTANCE MISSION FOR IRAQ, HUMAN RIGHTS REPORT, 1 July – 31 December 2007, at 26 (2008), available at <http://www.ohchr.org/Documents/Press/UNAMJuly-December2007EN.pdf>. The brigade legal section conducted the initial review within seven days. *Id.* If the Brigade recommended continued internment and transfer to the theater internment facility (TIF), then the division legal section would conduct a second review of the file. *Id.* Upon arrival at the TIF, an independent magistrate conducted a third legal review and could recommend expedited release, prosecution before the Central Criminal Court of Iraq (CCCI), or continued internment. *Id.* If the individual remained in the TIF for more than ninety days, then the file was reviewed by the Combined Review and Release Board (CRRB) which consisted of representatives from Iraqi ministries and members of the U.S. military. *Id.* Should the individual remain in detention for an extended period of time, then the CRRB would conduct subsequent reviews the file every six months. *Id.* If the individual remains interned for eighteen months, then the Joint Detainee Review Committee (JDRC), another board comprised of both Iraqi and U.S. military members, would conduct the fifth level of review. *Id.* Note that additional reviews by the JDRC occurred at eighteen month intervals. *Id.* All of these reviews were of the detainee’s file and did not provide any individual detainee a right to appeal his internment in person. *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Ashley Deeks, *Detention in Afghanistan: The Need for an Integrated Plan* (14 Feb. 2008), available at http://www.csis.org/media/isis/pubs/080213_deeks_s_afghanistan.pdf.

³⁰ *Id.*

³¹ Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq (Nov. 17, 2008) [hereinafter Security Agreement].

³² *Id.* art. 22.

³³ *Id.* art. 4. After 1 January 2009, U.S. forces are conducting detention operations under the Iraqi criminal procedure code and the Security Agreement between the United States and Iraq. *Id.* Iraq follows a civil law legal tradition. Major W. James Annexstad, *The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants—A Look at the Task Force 134 Process and the Future of Detainee Prosecutions* ARMY LAW., July 2007, at 72, 73. While Iraq does not appear to have specific evidentiary standards for warrants, there are some basic rules that apply to the warrant application process. *See id.* at 73–75; *see also* Iraqi Law on Criminal Proceedings ch. 4, sec. 2 (1971) (detailing how witnesses are heard and their testimony recorded under Iraqi law). The BJA should ensure that members of the unit partner with Iraqi Investigators and are able to develop enough evidence to properly present to an investigative judge (IJ), who can then provide a warrant. Adhering to the local criminal procedure code during detention operations will have the effect of helping to build the rule of law.

authorities within 24 hours from the time of their detention or arrest.”³⁴ The goal of these military operations is to help Iraqi forces maintain security and stability.³⁵ As demonstrated in Iraq, detention operations can transition from an international law model based on internment for security reasons to a domestic criminal law model based on criminal conduct, therefore, the BJAs must be familiar with both the international law standards associated with detention of security internees as well as the domestic criminal law of the host nation where the unit is deployed.

B. What Is the Standard of Treatment Due a Detainee?

While military policy reiterates a minimal standard of treatment due all detainees, “protected persons,” as defined by any of the four Geneva Conventions, are entitled to greater protections as a matter of law during IAC.³⁶ The baseline standard of treatment due all detainees is that they “shall be treated humanely and in accordance with U.S. law, the law of war, and applicable U.S. policy.”³⁷ According to policy, humane treatment requires the U.S. military to afford detainees protections consistent with Common Article 3 of the Geneva Conventions regardless of the “detainee’s legal status.”³⁸ However, specific individuals may be entitled to greater protections. During IAC, individuals who qualify for POW status are entitled to the protections of the GC III³⁹ and civilians are entitled to the protections of GC IV.⁴⁰ However, as a matter of policy, “[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”⁴¹ Therefore, prior to deploying, BJAs should check theater-specific SOPs to determine if they specify any additional protections, above humane treatment, which must be afforded to detainees who are not entitled, as a matter of law, to the full body and protections of GC III and GC IV.

C. What Documents and Information Are Required for a Detainee Packet?

The legal basis for detention will impact the decision-making of the Soldier at the point of capture (POC) to either release the individual, process the individual as a security detainee, or forward the individual to the local authorities for potential criminal prosecution. Both the BJA and all Soldiers assigned to the BCT need to understand the evidentiary standard associated with the initial detention decision and the potentially heightened evidentiary standard used in prosecutions before either the local court system or applicable international tribunal. Applying these standards allows Soldiers to collect evidence and to build detainee packets that best support the Command’s desired ultimate disposition of the individual.

At a minimum, each detainee packet must include sufficient evidence for a Judge Advocate, serving as a magistrate, to conclude that the individual either poses a threat to the security of the U.S. Armed Forces or has committed a crime under host nation domestic criminal law.⁴² Doctrine and theater-specific SOPs require several documents necessary to build a

³⁴ Security Agreement, *supra* note 31, art. 22.

³⁵ *Id.* art. 4.

³⁶ *See supra* notes 13, 15 and accompanying text.

³⁷ U.S. DEP’T OF DEFENSE, DIR. 2310.01E, THE DEPARTMENT OF DEFENSE DETAINEE PROGRAM para. 4.1 (5 Sept. 2006) [hereinafter DODD 2310.01E]. Enclosure four provides additional guidance on the specifics of humane treatment. *Id.* encl. 4.

³⁸ *Id.* para. 4.2. Common Article 3 requires humane treatment and specifically prohibits the following activities:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

GC I, *supra* note 9, art. 3(1); GC II, *supra* note 9, art. 3(1); GC III, *supra* note 6, art. 3(1); GC IV, *supra* note 5, art. 3(1),

³⁹ *See generally* GC III, *supra* note 6, arts. 2, 4 (defining the scope of protections afforded during international armed conflict and defining individuals entitled to prisoner of war status).

⁴⁰ *See generally* GC IV, *supra* note 5, arts. 2, 4 (defining the scope of the protections afforded during international armed conflict and defining civilians who qualify as protected persons). While all civilians are entitled to the general protections found in Part Two of GC IV, civilians who qualify as protected persons are entitled to additional protections afforded by Part Three of GC IV. *See id.* Parts II, III.

⁴¹ DODD 2311.01E, *supra* note 5, para. 4.1.

⁴² *See generally* Annexstad, *supra* note 33, at 77 (discussing the Task Force 134 magistrate review procedures conducted in Iraq prior to 1 January 2009).

complete detainee packet. Soldiers training to Army doctrine learn to process detainees at the point of capture (POC) using to the “Five S’s and T:” Search, Silence, Segregate, Safeguard, Speed to a Safe Area/Rear, and Tag.⁴³ Complying with this process requires Soldiers to complete a Department of Army (DA) Form 4137 (Evidence/Property Custody Document), Department of Defense (DD) Form 2745 (Enemy Prisoner of War (EPW) Capture Tag), and DA Form 2823 (Sworn Statement).⁴⁴ Theater-specific SOPs may require additional documentation such as multiple sworn statements,⁴⁵ cover sheets, such as the Coalition Provisional Apprehension Form,⁴⁶ diagrams, and photographs taken at the POC of the both the detainee and any contraband captured with the detainee.⁴⁷

Merely completing the required forms is frequently not sufficient to ensure an individual remains detained or can be successfully prosecuted. Instead, the substance of the documentation will determine whether the individual will remain in detention or will be processed for prosecution.⁴⁸ However, the thoroughness of the documentation in a detainee packet frequently represents a balance between the Soldiers’ desire to ensure that an individual, who potentially poses a threat to his or her life and security remains detained, and the need to start recovery and refit after completing a long patrol.⁴⁹ To help ensure high-quality detainee packets, the Commander must support and appropriately prioritize detention operations considering the extra time devoted to completing the necessary paperwork ultimately helps protect Soldiers and the local populace.⁵⁰

To help make certain that the paperwork is thorough, the Commander could require a Soldier, who was present at the POC, to go to the detention facility each time an individual is recommended for detention. In order to make this extra burden worthwhile, a representative from both the legal section and S2X (Counterintelligence and Human Intelligence), should be present and review every detainee packet prior to admitting an individual into the Brigade Holding Area. These section representatives will interview Soldiers, who were present at the POC, from both an intelligence gathering and evidence collection perspective while the case is still fresh. Any information not already provided in the packet can be added at that time to help ensure either continued long term detention or successful prosecution in a local court.

⁴³ U.S. DEP’T OF ARMY, FIELD MANUAL 3-90.6, THE BRIGADE COMBAT TEAM tbl.G-1 (4 Aug. 2006) [hereinafter FM 3-90.6]. Older doctrine may not include the separate mnemonic aid associated with the requirement to tag both personnel and seized property. See also CENTER OF ARMY LESSONS LEARNED HANDBOOK NO. 06-17, DETAINEE OPERATIONS AT THE POINT OF CAPTURE, TACTICS, TECHNIQUES, AND PROCEDURES 16–17 (May 2006) (providing further guidance to Soldiers on the subtasks associated with “search, silence, segregate, safeguard, speed to the rear and tag” at the point of capture, detainee collection point, and detainee holding area).

⁴⁴ FM 3-90.6, *supra* note 43, tbl.G-1.

⁴⁵ Sworn statements from local nationals are especially helpful as well. See generally Annexstad, *supra* note 33, at 77 (discussing the eligibility of local national to testify as witnesses).

⁴⁶ CENTER OF ARMY LESSONS LEARNED HANDBOOK NO. 07-26, TACTICAL SITE EXPLOITATION AND CACHE SEARCH OPERATIONS app. B (May 2006) [hereinafter CALL TSE HANDBOOK] (providing an example of the Coalition Provisional Authority (CPA) Apprehension Form used in Operation Iraqi Freedom). This form summarizes the critical information associated with the individual’s detention to include: legal and factual reasons for detention, identification of the detainee, identification of witnesses who were present at the point of capture, and contraband found with the detainee. *Id.*

⁴⁷ Annexstad, *supra* note 33, at 77–78 (discussing the process used to prosecute detainees before the Central Criminal Court of Iraq (CCCI)). Other documents, which may not specifically be required, but which are extremely useful, include target folders, with supporting data, such as Defense Intelligence Reports (DIRs), unit debriefs, and electronic media (CDs), burned with both the target folder and all photographs taken at the point of capture. The BJA should ensure that the capturing unit creates two identical CDs containing all of the information and documents in each detainee file to include: target folders, associated intelligence reports and photographs. One CD will remain with the packet and will be forwarded to the next echelon of detention. The second CD should remain with the legal section and provide a PDF copy of the entire detainee packet. This CD can be used for a number of reasons to include future prosecutions or as support for responding to freedom of information act requests.

⁴⁸ *Id.* at 75.

⁴⁹ Telephone Interview with Captain Steven L. Tingley, Commander, Bravo Company, 1st Brigade Special Troops Battalion, 1st Brigade, 10th Mountain Division (Light Infantry), in Fort Drum, N.Y. (Mar. 14, 2007) [hereinafter Tingley Interview] (discussing his previous assignment as a battalion intelligence officer deployed in Iraq from August 2005 to July 2006). Captain Tingley indicated that most Soldiers generally want to do a good job; however, the effects of military operations and weather sometimes combine to make Soldiers less focused on “paperwork” and more on combat operations. *Id.* This can result in statements written by Soldiers that are lacking the details needed for an effective prosecution.

⁵⁰ Commanders are frequently concerned that detainees who are released place the lives of Soldiers under their command at risk. Elaine M. Grossman, *New Rules in Iraq May Make It Tougher to Keep Insurgents Behind Bars*, INSIDE THE PENTAGON (Dec. 1, 2005) (discussing in an unclassified article the legal standard associated with detention). This concern provides a significant reason for commanders to send a Soldier who was at the point of capture to the detention facility for an interview so that all possible information is collected to build the strongest possible packet.

D. Where Are the Detainees Physically Located in the BCT?

While the specifics associated with moving detainees may vary from theater to theater, and sometimes even from operation to operation, detainees follow the same general path from POC to the Theater Internment Facility⁵¹ (TIF) or Strategic Internment Facility⁵² (SIF). Detainees will move from the POC, to an initial detainee collection point (DCP), to the detainee holding area (DHA), and finally to either the TIF or SIF.⁵³ Detainees should “be evacuated expeditiously through transit point to reach an internment facility in a secure area.”⁵⁴ At the BCT, the BJA must be aware of the location of all DCPs and the DHA to help ensure that detainees receive humane treatment from POC to final disposition.

By doctrine, the DCP should be “located close to the area of actual operations for quick evacuation of detainees, but should also be situated in a location intended to provide for the safety and security of the detainees and the security force.”⁵⁵ Ideally, the DCP should include provision for medical personnel, military intelligence personnel, military police, administrative personnel, as well as water and latrines for the detainees.⁵⁶ Doctrine indicates that the military police platoon is normally responsible for operating the DCP.⁵⁷ However, the limited number of military police personnel available in a BCT may mean that the maneuver battalions will operate their own facilities which will serve the same doctrinal function as a DCP.⁵⁸

While the detainee is located at the DCP, the unit will conduct tactical questioning, counterintelligence screening, and make an initial recommendation regarding whether or not the individual should be evacuated further to the DHA or released.⁵⁹ Additionally, Soldiers will be completing the documentation and paperwork necessary to in-process the individual at the DHA.⁶⁰ Although the battalion facilities may not be officially recognized by either doctrine or theater specific SOPs, the BJA should locate and periodically inspect all battalion holding areas. The BJA should ensure that Soldiers who are serving as the guard force and evidence custodians at these temporary facilities are trained to the same standard as the Soldiers operating the Brigade DHA.

E. Who Should Be Trained to Conduct Detention Operations?

The perfect detainee packet begins at home station with individual Soldier training. The BJA must be aware of the wide range of Soldiers who should be trained in detention operations and the unique skills that each Soldier must understand to perform his or her detention operation duties. At a minimum, Soldiers who should be trained include: any Soldier who will conduct tactical site exploitation (TSE) and process detainees at the POC, any Soldier serving as a guard at either a temporary DCP or the brigade DHA, any Soldier serving as an evidence custodian, Soldiers in the intelligence section, medical personnel providing care to detainees, and paralegals in the BCT.⁶¹ Considering the plethora of required training tasks prior

⁵¹ Camp Bucca in Iraq is an example of a theater internment facility. Am. Forces Press Serv., *Riot at Camp Bucca Leaves Four Detainees Dead, Six Injured*, Jan. 31, 2005, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=24214>.

⁵² The detention facility located at Guantanamo Bay is an example of a strategic internment facility. Lowe & Crider, *supra* note 1.

⁵³ Supervise Detainee Operations Point of Capture to Theater Internment Facility, U.S. Army Military Police School Training Support Package (22 Aug. 2005) (PowerPoint Presentation), available at <https://www.us.army.mil/suite/doc/5093288>; see also JOINT PUB. 3-63, *supra* note 3, at IV-1 to IV-5 (detailing the transfer to an individual from the point of capture to the detainee collection point and on to the theater internment facility); FM 3-19.40, *supra* note 5, tbl.4.2.

⁵⁴ JOINT PUB. 3-63, *supra* note 3, at IV-1; DODD 2310.01E, *supra* note 37, para. 4.3.

⁵⁵ JOINT PUB. 3-63, *supra* note 3, at IV-2.

⁵⁶ *Id.* at IV-2. Note that the facility should also have the capability to detain both females and minors in an area separate from adult male detainees.

⁵⁷ FM 3-19.40, *supra* note 5, tbl.4.2 and para. 4-142; FM 3-90.6, *supra* note 43, paras. G-3, G-8 (stating that military police should be included in either operating or supervising detainee collection points).

⁵⁸ Interview with Major William J. Johnson, Student, 57th Judge Advocate Officers Graduate Course, in Charlottesville, Va. (Feb. 18, 2009) (discussing his previous assignment as a trial counsel deployed in Iraq).

⁵⁹ FM 3-19.40, *supra* note 5, tbl.4.2.

⁶⁰ See *supra* Part II.C (discussing the paperwork required for each detainee packet).

⁶¹ See also JOINT PUB. 3-63, *supra* note 3, at III-1 (indicating that the following staff members have a role in detention operations: commanding officer, detention facility commander, intelligence personnel, civil affairs officer, psychological operations officer, judge advocates, chaplain, engineer, and public affairs officer).

to any deployment, Commanders may resist adding yet another training task. However, proper training yields huge dividends.⁶²

All Soldiers who leave the Forward Operating Base (FOB) to conduct either combat or convoy operations may encounter a situation where they have to detain an individual. Therefore, while all Soldiers receive training on the five S's and T,⁶³ they must also be trained that humane treatment of a detainee begins at the POC.⁶⁴ Furthermore, Soldiers should also become proficient in TSE.⁶⁵ "Tactical site exploitation (TSE) is the action taken to ensure that documents, material, and personnel are identified, collected, protected, and evaluated in order to facilitate follow-on action."⁶⁶ While TSE is critical to the targeting cycle,⁶⁷ when done properly, it also provides a solid foundation for Soldiers to collect all of the information necessary to build a detainee packet.⁶⁸ For Soldiers, who do not have a military occupation specialty (MOS) that includes training on identification, collection, protection, and evaluation of evidence, but who will engage in detention operation at the POC, Commanders should consider incorporating training from either civilian police⁶⁹ or military police on proper investigation techniques.⁷⁰

Although all Soldiers assigned to the BCT should be trained on the fundamentals of processing a detainee at the POC, some Soldiers in the BCT will require additional training given their unique role in detention operations. First, once the unit identifies the Soldiers who will operate the detention facility, the detention facility commander, the guard force, and the evidence room custodians, all of these individuals should receive specific training on operating a detention facility.⁷¹ Next, Soldiers in the intelligence section, who generate target folders, which form the potential basis of detention, must understand the evidentiary standards that will support detention under either international law or domestic criminal law as well as the type of evidence that may support the eventual prosecution of the target. Additionally, Soldiers who conduct interrogations in the detention facility must be "properly trained and certified to DoD standards."⁷² Next, medical personnel working with detainees have a specific responsibility to "uphold the humane treatment of detainees"⁷³ and to "protected detainees' physical and mental health."⁷⁴ Furthermore, special care must be taken to ensure that "health care personnel qualified in behavioral science" understand the limits of their role in providing "consultative services to support authorized law enforcement or intelligence activities."⁷⁵ The BJA should verify that these individual have been identified and trained on their specific roles associated with detention operations as early in the pre-deployment cycle as possible.

⁶² Commanders with prior deployment experience will likely support this training. Telephone Interview with Lieutenant Colonel Willard Burleson, Commander, 1st Battalion, 87th Infantry Regiment, 1st Brigade, 10th Mountain Division (Light Infantry), in Fort Drum, N.Y. (Mar. 15, 2007) [hereinafter Burleson Interview].

⁶³ See *supra* note 41 and accompanying text.

⁶⁴ See *supra* Part II.B.

⁶⁵ See CALL TSE HANDBOOK, *supra* note 46, at 1.

⁶⁶ *Id.* at 3.

⁶⁷ *Id.*

⁶⁸ See *supra* Part II.C (discussing the information required to a detainee packet).

⁶⁹ Law enforcement professionals (LEPs) are contract employees at nearly every battalion in Iraq who have significant law enforcement experience in a civilian capacity who are the perfect individuals to conduct such training. Captain Timothy K. Hsia, *Law-Enforcement Professionals and the Army*, ARMY, July 2008, at 57, 58.

⁷⁰ Burleson Interview, *supra* note 62. Having identified a deficiency in conducting tactical site exploitation during a prior deployment, Lieutenant Colonel Burleson used civilian police personnel to train his unit how to collect necessary evidence at the point of capture. *Id.* Now, the Army is embedding law enforcement professionals (LEPs) with deployed units to address this deficiency. Hsia, *supra* note 69, at 58.

⁷¹ See generally FM 3-19.40, *supra* note 5, paras. 3-54,-55 (listing the specific tasks associated with the guard force and the shift supervisor in a detention facility). See *supra* Part II.D (discussing the need to identify and train the Soldiers operating the temporary facilities as well as the long term detention facilities).

⁷² U.S. DEP'T OF DEFENSE, DIR. 3115.09, DoD INTELLIGENCE INTERROGATIONS, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING para. 3.d.1 (9 Oct. 2008). Additionally, the BJA must be familiar with the interrogation techniques authorized in FM 2-22.3. U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006) (including specifically the three techniques that specifically require a legal review by a Judge Advocate: Mutt and Jeff, False Flag, and Separation).

⁷³ U.S. DEP'T OF DEFENSE, DIR. 2310.08E, MEDICAL PROGRAM SUPPORT FOR DETAINEE OPERATIONS para. 4.1.1 (6 June 2006).

⁷⁴ *Id.* para. 4.1.2.

⁷⁵ *Id.* para. 3.1; see also *id.* encl. 2 (elaborating on the standards and procedures for behavioral science consultants).

Finally, the BJA⁷⁶ must ensure that the legal section is prepared for the task of providing legal support in detention operations. First, the paralegals must understand the legal basis for detention and the processing requirements from POC to final disposition. The discipline of detainee operations provides a unique opportunity for deployed paralegals⁷⁷ to be involved in military operations. While each paralegal could address the issues associated with only his or her Battalion, another method of dividing labor would be to assign each paralegal to a specialty area, such as, legal assistance, claims, administrative law, operational law, detention operations, or military justice. This allows the BJA to dedicate one paralegal to detainee operations.⁷⁸ Since this is a duty position not currently recognized by doctrine, a possible duty description for this paralegal would combine tasks from a Battalion paralegal who performs military justice and a Division paralegal who works pretrial. The recommended tasks for this paralegal's duty description include the following:

- review all detainee packets,
- prepare a magistrate's review shell with attached recommendation,
- notify each detainee of their appellate rights,
- make a duplicate copy of each packets associated with a detainee transferred to the TIF,
- identify witnesses required for trial,
- prepare witness production documents (most likely a fragmentary order (FRAGO)),
- locate any additional evidence from subordinate units,
- conduct witness preparation,
- help coordinate witness travel and ensure BCT Soldiers know the location, time and logistics associated with testifying in a foreign court,
- provide another set of eyes in the detention facility to prevent possible abuse, and
- establish a tracking mechanism for all Brigade detainees from admittance in the DHA to final disposition.⁷⁹

Depending on the nature of future conflicts and the developing doctrine associated with the due process owed each detainee during detention operations, the completion of these types of tasks would likely be a full-time job for a paralegal.

F. Is the Judge Advocate Prepared to Advocate for Release of the Detainee when Necessary?

Detainee Operations presents a danger area for the BJA to "go native" and potentially lose sight of legal standards in an effort to support the Command. Commanders want to reduce risk to their Soldiers.⁸⁰ To reduce risk, some Commanders may

⁷⁶ Prior to deploying, the BJA should identify the roles and responsibilities of each Judge Advocate assigned to the BCT. Dividing labor by legal discipline will increase individual Judge Advocate proficiency in an area of law. Furthermore, it will provide clarity to clients who will know which lawyer to approach on specific issues. "[T]he brigade legal section provides legal services across the core legal disciplines": military justice, international and operational law, administrative and civil law, contract and fiscal law, legal assistance, and claims. U.S. DEPT OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 4-5 (15 Apr. 2009). To improve efficiency, recommend that the Judge Advocate who provides operational law advice and participates in the targeting meetings also have primary responsibility for detention operations. This will reduce the amount of time required to review the detainee packets that are based on target folders since target folders are briefed during the targeting meetings.

⁷⁷ According to the BCT Modified Table of Organization and Equipment (MTOE), the Brigade Operational Law Team (BOLT) includes two Judge Advocates, a senior noncommissioned officer paralegal assigned to the brigade, and one paralegal assigned per battalion. Although the goal is to staff deploying units to 100% strength, the BJA should plan for the possibility of being under strength when deployed. This planning factor allows the BJA to account for the paralegal who should be left in garrison to complete the legal duties for the rear-detachment. Since not all of the BCT paralegals may deploy, each battalion might not have a dedicated paralegal; therefore, the BJA should consider establishing a consolidated legal office.

⁷⁸ The paralegal with primary responsibility for detention operations should have access to a digital sender. While detainees are held in the brigade holding area, either the intelligence community or the guard force has primary responsibility for maintaining all detainee packets. However, this original detainee packet will accompany the detainee when he is transferred to a higher echelon of detention like the TIF. The BJA should retain a copy of any detainee packet for individuals transferred to the TIF. First, if any items are lost from the packet during the transfer, then the Brigade will have a copy of all of the original documents. See generally Interview with Captain Christy Kisner, Student, 55th Judge Advocate Officer Advanced Course, in Charlottesville, Va. (Apr. 26, 2007) [hereinafter Kisner Interview] (indicating that documents were frequently lost from files by the time they reached the CRRB). Second, the paralegal will need the documents to assist with witness preparation before trial. Third, having a copy of the detainee packets at home station may be necessary to help respond to Freedom of Information Act (FOIA) requests. The digital sender allows the legal section to maintain a PDF file of each packet. Separate the detainee files on the CD ROMs into those that contain classified information and those that do not. This will make retrieval of information easier once the unit returns to garrison and has more limited access to Secret Internet Protocol Router Network (SIPR).

⁷⁹ Tracking detainees through the system can be a difficult and time consuming task. By doctrine, the U.S. military does not assign detainees an Internment Security Number (ISN) until the detainee arrives at the TIF. See generally JOINT PUB. 3-63, *supra* note 5, at IV-4 (stating that detainees will normally be assigned an ISN at the TIF). The ISN bears little relationship to the capture tag number assigned by the Brigade. See *id* at III-5 to III-6 (describing the individual components of the ISN). Therefore, identifying the Brigade's detainees among the thousands of detainees in the TIF, who are frequently listed under a different spelling or completely different name, requires time and attention to detail.

advocate detaining individuals who they believe either committed a hostile act or pose a security threat, even if there is insufficient proof of the specific detainee's involvement in the hostile act or security threat.⁸¹ Commanders may exert pressure to keep these individuals detained. The BJA, who becomes completely integrated into the BCT staff, may also feel pressure to protect Soldiers and may be tempted to authorize continued detention on less than solid legal grounds. To help enforce standards, the Brigade's higher headquarters should always serve as a second review authority before the detainee is transferred to TIF.⁸² Although this second review will apply the same legal standard for continued detention, the need to pass through another perceived administrative hurdle offers necessary cover to the BJA and allows him or her to "save face" with the command and uphold the standard. Additionally, the second review also serves as a sanity check to ensure that individuals with insufficient evidence are released in a timely manner. Ultimately, the BJA must be prepared to advise a Commander that release of individuals is required when there is insufficient evidence to support continued detention.

G. What Is the Plan to Release an Individual from Detention?

Because detainees captured by Coalition Forces (CF) will not remain in custody indefinitely,⁸³ units must have a well developed release plan. This plan should account for those detainees who are released to their family or a local leader, as well as those released to local law enforcement. Either type of release involves more than merely bringing the individual to the front gate and allowing the individual to walk away. The unit must be prepared to coordinate with a number of different local nationals in order to the desired effect associated with the release of the detainee.

If the community is willing, units may want to hold a "welcome home" ceremony for some detainee releases.⁸⁴ This not only helps the individual who was detained reintegrate into the community, but it can also have a positive Information Operations (IO) effect for the unit. Although holding welcome home ceremonies is frequently used with mass releases from the TIF,⁸⁵ the BCT can replicate this type of ceremony when releasing only one or two individuals back into a small community. Additionally, if authorized by the local law, units should consider the use of a "guarantor letter." For example, in Iraq, units releasing individuals to a family member, sheik,⁸⁶ or other local leader do not do so until a "guarantor letter" is signed, indicating that the guarantor is taking responsibility of the individual's health, welfare, and behavior. When used judiciously, guarantor letters can have a powerful effect for all parties involved.⁸⁷ Ultimately, the BJA can provide advice on the legal issues associated with the release of individuals.

Either the Command or law enforcement personnel may want some detainees released to the host nation police. To ensure criminals are not released into society, CFs must partner closely with their local police. Providing lists of upcoming releases to host nation investigators and investigative judges allow them to vet names to determine if there are outstanding warrants for their arrest. If the host nation criminal justice system determines an individual is wanted, then the detainee can be properly released into host nation custody. This not only protects the community, but enables the rule of law in the host nation as they become accountable for justice at all levels.

⁸⁰ Grossman, *supra* note 50.

⁸¹ *Id.*; see also Jeffrey Azarva, *Is U.S. Detention Policy in Iraq Working?*, MIDDLE EAST Q. 5, 7 (Winter 2009) (indicating that at times Commanders advocated "dragnet-type security sweeps").

⁸² E-mail from Major Thomas Stephens, USMC, Student, 55th Judge Advocate General Officer Advanced Course, to author (30 Apr. 2007, 6:33 EST) (on file with author) (indicating that the higher headquarters did not review detainee packets from his regiment before an individual was transferred to the TIF. Generally, detainee packets submitted from BCTs attached to Multi-National Division-Baghdad were reviewed by the division staff prior to transfer to the TIF.).

⁸³ *U.S. Begins Releasing Detainees Under Iraq Pact*, STARS & STRIPES (Feb. 5, 2009), available at <http://www.stripes.com/article.asp?section=104&article=60483>.

⁸⁴ Press Release, Multi-National Force-Iraq, Iraqi Parliament President Speaks at Detainee Release Ceremony (Baghdad) (June 26, 2008), available at http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=20821&Itemid=128.

⁸⁵ Press Release, Multi-National Force-Iraq Pub. Affairs, Coalition Detainee Operations Release More Than 14,000 (Sept. 29, 2008), available at http://www.cjtf7.army.mil/index.php?option=com_content&task=view&id=22647&Itemid=131.

⁸⁶ Am. Forces Press Serv., *Influential Iraqi Sheik Praises Reconciliation Efforts* (Jan. 14, 2009), available at <http://www.defenselink.mil/news/newsarticle.aspx?id=52670>.

⁸⁷ Press Release, Multi-National Force-Iraq, Program Allows Detainees to be Released During Ramadan (Oct. 14, 2007), available at http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=14608&Itemid=128 (however, requiring guarantor letters may decrease their effectiveness).

III. Conclusion

Recent operations demonstrate that detention operations is a growth industry for Judge Advocates.⁸⁸ When contemplating the questions posed in this article, the BJA should keep in mind some basic rules that may help define success in the area of Detention Operations. First, detain the right individuals for the right length of time under the right conditions.⁸⁹ Second, help the unit ensure that no detainee escapes from the facility.⁹⁰ Third, prevent the abuse or death of detainees while in the care of U.S. Soldiers.⁹¹

To help ensure that these keys to success are met, the BJA must have a physical presence in the detention facility to prevent potential misconduct and identify issues in what has become a zero-defect area. The BJA should visit the detention facility not only when detainees are admitted, but also at random, unexpected times. Frequent visits, during all guard shift rotations, can help prevent the possibility of abuse. By being part of the detention facility team, guards, evidence room custodians, interpreters, and interrogators will feel more comfortable asking questions and raising issues, including potential abuse of which they may be aware. All allegations of abuse must be investigated. The level of investigation, commander's inquiry, informal Army Regulation 15-6 investigation, or criminal investigation, will depend on the specific circumstances and theater specific SOPs. The BJA must be aware of the specific standards and ensure that the detention facility commander and his staff are properly trained on reporting and investigation requirements.

Reflecting on the issues raised in this article should help the BJA prepare for an upcoming deployment. Since detainee operations is not a legal discipline easily replicated in garrison, the BJA must spend time thinking about these issues early in the pre-deployment cycle to ensure that not only the legal section, but the entire BCT, is prepared. Recent conflicts, and incidents of abuse like those occurring at Abu Ghraib, serve to heighten the responsibilities of the BJA in the arena of detainee operations. By understanding the legal basis for detention and properly training Soldiers prior to deployment, the BJA can help the BCT succeed. For the BJA, detainee operations provides countless tangible opportunities to take care of Soldiers, and build the Rule of Law by helping detain individuals who present a security threat to their unit and the local populace.

⁸⁸ See generally FORGED IN THE FIRE, *supra* note 2, at 28–52 (capturing lessons learned in detention operations from 1994 to 2008).

⁸⁹ See generally *supra* Parts II.A, II.B (discussing the authority to detain and the standard of treatment owed to detainees).

⁹⁰ See generally *supra* Parts II.D, II.E (discussing the need for identification of holding facilities and training of personnel who work with detainees).

⁹¹ See generally *supra* Parts II.D & II.E. Furthermore, all Soldiers assigned to the BCT should be familiar with the familiar with requirement to report allegations of detainee abuse. DoDD 2310.01E, *supra* note 37, para. 4.9.1. Soldiers “shall report possible, suspected, or alleged violations of the law of war, and/or detention operations laws, regulations, or policy, for which there is credible information” *Id.* para. 4.10.

Rule 99 of the Customary International Humanitarian Law Study and the Relationship Between the Law of Armed Conflict and International Human Rights Law

Major J. Jeremy Marsh*

In 2005, the International Committee of the Red Cross¹ (ICRC) issued a 5000-page study, *Customary International Humanitarian Law*² (the Study), examining what the United States military refers to as the law of armed conflict or law of war.³ The Study's authors, Jean-Marie Henckaerts and Louise Doswald-Beck, did not include a separate analysis or discussion of customary international human rights law (IHRL); however, they considered IHRL a great deal when forming and justifying many of their 161 "rules" of customary international humanitarian law (IHL),⁴ especially those rules dealing with the treatment of civilians and combatants placed *hors de combat*. This prompts the question to what degree are IHL and IHRL related? Are they distinct bodies of law as is traditionally thought⁵ or are they in fact complementary? This paper will briefly explore these two questions by looking at Rule 99 of the ICRC Study.

Rule 99, appearing in a chapter of the Study labeled "fundamental guarantees," simply states, "Arbitrary deprivation of liberty is prohibited."⁶ The authors' discussion of this rule demonstrates that IHL contains specific rules and procedural requirements that protect one's right against arbitrary deprivation of liberty in the context of an international armed conflict (IAC), but almost no rules protecting this right in the context of a non-international armed conflict (NIAC). Consequently, in their discussion of this rule, the authors relied on IHL to establish the customariness of the rule in IAC, and IHRL to establish its customariness in NIAC. One might therefore conclude that Rule 99 illustrates the *lex specialis* principle as set out by the International Court of Justice in its Advisory Opinion on *Nuclear Weapons*⁷ and later in its Advisory Opinion on the *Legal Consequences of a Wall in the Occupied Palestinian Territory*.⁸ These advisory opinions suggest that international human rights law applies at all times (in IAC and NIAC and, of course, peacetime), but where IHL provides the more specific rule,

* Judge Advocate, U.S. Air Force. Currently assigned as Assistant Professor of Int'l and Operational Law, The Judge Advocate General's Legal Ctr. & Sch. (TJAGLCS), Charlottesville, Va. LL.M., 2008, TJAGLCS. The author considered Rule 45 of the ICRC Study dealing with destruction of the natural environment in armed conflict in the research paper he submitted as part of the requirements of the Graduate Course. See Major J. Jeremy Marsh, *Lex Lata or Lex Ferenda? Rule 45 of the ICRC Study on Customary International Humanitarian Law*, 198 MIL. L. REV. 116 (Winter 2008).

¹ The ICRC plays a unique and important role in promoting the development, implementation, and dissemination of international humanitarian law. See, e.g., *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 109 (Oct. 2, 1995).

² 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES (2005) [hereinafter RULES]; 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: PRACTICE (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter PRACTICE]. The Study is divided into two volumes. The first volume is an articulation of the Study's 161 rules, the second is a two-part and roughly 4000-page discussion of the practice that supports the rules. The Study's two leaders, Jean-Marie Henckaerts, the current legal advisor for the ICRC, and Louise Doswald-Beck, former head of the ICRC's legal division, are listed as authors of the first volume and editors of the second volume. For a thorough summary of the Study and its rules, see Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS NO. 857, 175, 178 (2005).

³ The U.S. Department of Defense (DoD) defines the law of war as "[t]hat part of international law that regulates the conduct of armed hostilities. It is often called the 'law of armed conflict.'" U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 3.1 (9 May 2006) [hereinafter DoDD 2311.01E]. The ICRC defines international humanitarian law as "a set of international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts." Advisory Serv. on Int'l Humanitarian Law, Int'l Comm. of the Red Cross, *International Humanitarian Law and International Human Rights Law: Similarities and Differences* (Jan. 2003), http://www.ehl.icrc.org/images/resources/pdf/ihl_and_ihrl.pdf. By contrast, the ICRC defines international human rights law as "a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain behavior or benefits from governments." *Id.*

⁴ "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(c)(2) (1987).

⁵ Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310, 310 (2007).

⁶ RULES, *supra* note 2, at 344.

⁷ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, para. 282 (July 8). The *Nuclear Weapons* opinion explained the interaction between IHL and IHRL in a similar manner as the *Wall* case. See *infra* note 8.

⁸ The Advisory Opinion in the *Wall* case explained this principle thusly:

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

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion of 9 July 2004, I.C.J. Rep. 36.

then it must be applied as *lex specialis*.⁹ Indeed, Rule 99, recognizes what has become the predominant view regarding the relationship between IHL and IHRL: they are complementary regimes that must always be viewed together, subject to the understanding that in some cases IHL-recognized necessities will override IHRL requirements based on the principle of *lex specialis*.

A. The ICRC Study and Rule 99

The Study's authors began their study of customary IHL at the behest of the participants of the 26th International Conference of the Red Cross and Red Crescent in order to identify and facilitate the application of existing rules of customary IHL in IAC and NIAC.¹⁰ As such, the Study's authors claimed that the end product does not create new rules of international humanitarian law but rather, "seeks to provide the most accurate snapshot of existing rules of international humanitarian law."¹¹ In an article summarizing the Study, one of its two authors, Jean-Marie Henckaerts, said that its purpose was "to overcome some of the problems related to the application of international humanitarian treaty law."¹²

Next, the Study's authors aimed to plug the gap that they believe exists between IAC and NIAC.¹³ According to the Study, there is insufficient treaty law regulating the latter type of armed conflict, the type that exists most often today.¹⁴ Thus, for each of the 161 rules of customary IHL in the Study, the authors stated whether the rule also applies in NIAC. In the case of Rule 99, they concluded that the rule applies in NIAC, a conclusion they also reached with 146 of the Study's 160 other rules.¹⁵

Chapter 32 of the Study contains Rules 87–105 and is entitled "Fundamental Guarantees." According to the authors, "[t]he fundamental guarantees listed in this chapter all have a firm basis in [IHL] applicable in both international and non-international armed conflicts."¹⁶ Notably, Chapter 32 contains references to human rights instruments, documents, and case-law.¹⁷ "This was done," claimed the authors, "not for the purpose of providing an assessment of customary human rights law, but in order to support, strengthen, and clarify analogous principles of humanitarian law." Citing United Nations (U.N.) General Assembly Resolution 2675¹⁸ and the International Court of Justice's (ICJ) Advisory Opinion on the Legality of *Nuclear Weapons*,¹⁹ the authors stated that "[h]uman rights law applies at all times although some human rights treaties allow for certain derogations in a "state of emergency."²⁰ They argued that the human rights provisions cited in Chapter 32 are listed in widely-ratified human rights treaties as rights that may not be derogated from in any circumstance.²¹ Also, they noted that "it is the consistent practice of human rights treaty bodies to insist on a strict interpretation of the provision that any derogation measures during a state of emergency be limited 'to the extent strictly required by the exigencies of the

⁹ *Id.*; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226.

¹⁰ Henckaerts, *supra* note 2, at 176.

¹¹ Press Release, Int'l Comm. of the Red Cross, Customary International Humanitarian Law: Questions and Answers, Question 2 (Aug. 15, 2005), <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/customary-law-q-and-a-150805?opendocument>.

¹² Henckaerts, *supra* note 2, at 177.

¹³ RULES, *supra* note 2, at xxviii.

¹⁴ *Id.* From 1997–2006, only three conflicts were fought between states: Eritrea-Ethiopia, India-Pakistan, and Iraq-United States and coalition forces. Lotta Harbom & Peter Wallensteen, *Patterns of Major Armed Conflicts, 1997–2006*, in STOCKHOLM INT'L PEACE RES. INST. YEARBOOK 2007: ARMAMENTS, DISARMAMENT, AND INTERNATIONAL SECURITY app. 2A (2007), available at <http://www.sipri.org/contents/conflict/YB07%20079%2002Asm.pdf>. The other thirty-one major armed conflicts (defined as a conflict including at least one state resulting in at least 1000 battle deaths in one year) recorded for this period were fought within states and concerned either governmental power or territory. RULES, *supra* note 2, at xxviii.

¹⁵ See RULES, *supra* note 2, at 156–57; see also Henckaerts, *supra* note 2, at 198–212.

¹⁶ RULES, *supra* note 2, at 299.

¹⁷ *Id.*

¹⁸ "[F]undamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict." G.A. Res. 2675 (XXV), pmb. and § 1, U.N. Doc. A/8028 (1971) (adopted by 109 in favor, 0 against, 8 abstentions on 9 December 1970).

¹⁹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. (July 8).

²⁰ RULES, *supra* note 2, at 300–01.

²¹ *Id.*

situation.”²² The authors listed several examples to “show how IHL and IHRL reinforce each other, not only to reaffirm rules applicable in times of armed conflict, but in all situations.”²³

Citing various U.N. General Assembly resolutions, official statements condemning violations of the fundamental guarantees in armed conflict, and the work of the U.N. Human Rights Commission, the authors concluded that “[t]here is extensive state practice to the effect that human rights law must be applied during armed conflicts.”²⁴ The authors briefly discussed the territorial scope of IHRL concluding that state practice has “interpreted widely” the “within its territory and subject to its jurisdiction” language of the International Covenant of Civil and Political Rights (ICCPR). The Study’s authors follow the lead of human rights treaty bodies who have viewed this requirement to be met, even extraterritorially, if there is “effective control.”²⁵

As stated, Rule 99 stands for the principle that “[a]rbitrary deprivation of liberty is prohibited.”²⁶ The Study’s authors claimed that “State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.”²⁷ The authors noted that common Article 3 of the Geneva Conventions and both Additional Protocols require that all civilians and persons *hors de combat* be treated humanely and, without further support, concluded that the arbitrary deprivation of liberty is incompatible with the humane treatment norms of these instruments.²⁸ In their brief summary of Rule 99, the authors stated:

The concept that detention must not be arbitrary is part of both international humanitarian law and human rights law. Although there are differences between these branches of international law, both international humanitarian law and human rights law aim to prevent arbitrary detention by specifying the grounds for detention based on needs, in particular, security needs, and by providing for certain conditions and procedures to prevent disappearance and to supervise the continued need for detention.²⁹

As with each of the other 160 rules, the authors discussed Rule 99’s application in IAC and NIAC separately. In addition, with Rule 99, the authors discussed grounds for detention and procedural requirements related to detention separately. The legal regimes that dictate grounds for detention and procedural requirements in IAC and NIAC are, according to the Study, much different. The authors’ discussion of both aspects of this “customary” rule in IAC focused almost completely on IHL, particularly Geneva Convention IV (GC IV),³⁰ which discusses the internment of civilians in Articles 42, 43, and 78.³¹ With respect to IAC, the authors also pointed to the role of Protecting Powers, also contained in the Geneva Conventions, and the “grave breach” of unlawful confinement mentioned in the GC IV to defend Rule 99’s customary status in IAC.³² It is interesting to note that nowhere in their separate discussion of Rule 99 in IAC did the authors specifically mention IHRL although their comment in the summary portion of the Rule suggests that they considered IHRL and IHL together when formulating the rule.

By contrast, the authors’ discussion of Rule 99 in NIAC is dominated by IHRL, so much so that one might even conclude that it, and not IHL, is the regime that establishes the customariness of this rule in NIAC. The very first sentence of the NIAC section of Rule 99 states, “The prohibition of arbitrary deprivation of liberty in non-international armed conflicts is established by State practice in the form of military manuals, national legislation and official statements, as well as on the

²² *Id.* at 301.

²³ *Id.* at 302. These examples were all in the form of comments made by various human rights treaty bodies on the conduct of states in armed conflict.

²⁴ *Id.* at 303–04. Here too the authors relied on the “practice” of human rights treaty bodies to establish the state practice requirement of customary international law. One might question whether such practice truly qualifies as state practice.

²⁵ See, e.g., *Loizidou v. Turkey*, App. No. 15318/89, Eur. H.R. Rep. 99 § 62 (1995) (Preliminary Objections); *Bankovic v. Belgium et al.*, App. No. 52207/99, 11 B.H.R.C. 435 § 71 (2001) (Decision as to Admissibility). The Inter-American Commission has cited these cases with approval.

²⁶ RULES, *supra* note 2, at 344.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

³¹ *Id.* at 345–46.

³² *Id.*

basis of international human rights law.”³³ Many of the Study’s rules are defended by their presence in various military manuals as opposed to “harder” sources of IHL.³⁴ The problem with this is that military manuals, as well as the national legislation and official statements upon which the authors relied, almost never make a distinction between obligations in IAC and NIAC.³⁵ And because most of the written law of armed conflict is geared towards IAC, it is fair to say that these manuals are primarily aimed at IAC. Consequently, one must question the evidentiary weight of military manuals and national legislation to establish customary rules in NIAC.

As it pertains to NIAC, therefore, Rule 99, as well as many of its sister rules in the fundamental guarantees section, is based less on military manuals and legislation than on IHRL, specifically the ICCPR, the Convention on the Rights of the Child (CRC) and the European and American Conventions on Human Rights, all of which include this rule against the arbitrary deprivation of liberty.³⁶ The authors pointed to these references, and to human rights treaty bodies’ interpretation of them, in their explanation of the three procedural requirements that must accompany any deprivation of liberty in NIAC: (1) an obligation to inform a person who is arrested of the reasons for arrest; (2) an obligation to bring a person arrested on a criminal charge promptly before a judge; and (3) an obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention (*i.e.*, the writ of habeas corpus).³⁷ Citing advisory opinions of the Inter-American Court of Human Rights, the Study’s authors claimed that the writ of habeas corpus is an essential and non-derogable remedy that protects humans from the arbitrary deprivation of liberty in NIAC.³⁸ Having discussed the way in which the Study’s authors defended Rule 99 in the Study, this article will now consider how Rule 99 demonstrates the principles of complementarity and *lex specialis*.

B. Complementarity and *Lex Specialis*

Rule 99 appears to be a textbook example of the paradigms of complementarity and *lex specialis* as they are described and defended by the ICJ, by human rights treaty bodies, and by the majority of modern legal scholarship.³⁹ These sources tend to view the question of how to consider IHRL in armed conflict as one of application and not applicability.⁴⁰ Thus, IHRL always applies, but IHL may modify how it applies based on IHL’s status as *lex specialis*. One commentator put it this way:

If it is accepted that both humanitarian law and human rights law may be simultaneously applicable [complementarity], there is a need for a principle [*lex specialis*] which will ensure at the minimum that the application of the two sets of rules will not lead to conflicting results and ideally that the fit between the two sets of rules will be as close as possible. That could be achieved by saying that one area of law should be interpreted in the light of the other.⁴¹

This is clearly the approach that the Study’s authors followed with regard to Rule 99, a rule that well demonstrates the principles of complementarity and *lex specialis*. As stated in the previous section, IHL has much to say about the deprivation of liberty in IAC but is virtually silent on the subject in NIAC. Applying complementarity, the Study’s authors thus looked to IHRL as providing the only applicable norms in NIAC (since IHL is silent) and, applying *lex specialis*, they looked to

³³ *Id.* at 347.

³⁴ Rule 45 of the Study, for example, bases its prohibition of “methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment” primarily on military manuals. *See, e.g.*, RULES, *supra* note 2, at 151–58.

³⁵ *See, e.g.*, INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK (2008). The Study authors viewed the *Operational Law Handbook (OLH)* as a “military manual” for purposes of the Study even though it is better viewed as a training guide for Judge Advocates. *See, e.g.*, PRACTICE, *supra* note 2, at 883. However one chooses to view it, the *OLH* seldom separately considers how the law of war applies in IAC and NIAC. In addition, it is the stated policy of the DoD to comply with the law of war in all military operations, no matter how characterized. *See* DoDD 2311.01E, *supra* note 3.

³⁶ RULES, *supra* note 2, at 348–50.

³⁷ *Id.* at 348–51.

³⁸ *Id.* at 351. *See, e.g.*, INTER-AMERICAN COMM’N ON HUMAN RIGHTS, REPORT ON TERRORISM AND HUMAN RIGHTS, III(B)(1), para. 126 (Oct. 22, 2002), available at <http://www.cidh.oas.org/Terrorism/Eng/toc.htm> (“[W]hile the right to personal liberty and security is derogable, the right to resort to a competent court . . . which by its nature is necessary to protect non-derogable rights during a criminal or administrative detention . . . may not be the subject of derogation in the inter-American system.”).

³⁹ *See, e.g.*, Droege, *supra* note 5 (discussing modern scholarship on IHRL).

⁴⁰ Francoise Hampson, *Other Areas of Customary Law in Relation to the Study*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 66–68 (Elizabeth Wilmshurst & Susan Breau eds., 2007).

⁴¹ *Id.* at 67.

IHL—no doubt interpreted “in the light of” IHRL—as providing the applicable norms in IAC. One might question whether it is appropriate to apply only IHRL to establish a customary norm of IHL in NIAC. According to the same commentator who wrote the above quote, it is appropriate so long as the IHRL materials relied on to establish the norms specifically relate to situations of armed conflict and there is no conflict between the IHRL norm and IHL norms.⁴² The key is that the IHRL norm being relied on to establish the rule overlaps and does not conflict with IHL.

Perhaps because Rule 99 represents such an overlap between IHL and IHRL, it should not surprise the reader to find “arbitrary” undefined in the Study’s formulation of a rule against the arbitrary deprivation of liberty. It is as if the Study’s authors understand that what is arbitrary will depend on not only on the context but also on variables that may apply differently in situations of IAC and NIAC. By leaving arbitrary undefined the authors adhered to the idea that the two regimes are complementary but that the *lex specialis* of IHL may modify how a rule like Rule 99 is applied and what is, in a given situation, arbitrary.

C. Conclusion

“It is submitted that the way in which human rights law and human rights material is used in the Study is legitimate, necessary and conservative,”⁴³ claimed Francoise Hampton, who commented on the fundamental guarantees section of the Study. The approach embodied in Rule 99—applying IHL and IHRL as complementary regimes subject to the *lex specialis* principle—is indeed now so ingrained as to warrant the label customary by the ICRC. While certain key actors in the international community such as the United States and Israel may prefer to view these two regimes as separate and distinct, it is now beyond argument that the majority of the international community views them as complementary.⁴⁴ That being the case, Hampton’s submission is at least partially correct: the authors’ use of IHRL in the ICRC Study, and particularly with respect to Rule 99, appears to be both legitimate and necessary, and it is certainly understandable given the trend towards complementarity. Whether the authors’ use of IHRL in the Study is conservative is a separate question that is perhaps best left for another day and another article.

⁴² *Id.* at 298.

⁴³ *Id.* at 73.

⁴⁴ *See generally* Droege, *supra* note 5.

The Expansive Definition of “Protected Persons” in War Crime Jurisprudence

Major Shane Reeves*

While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance Under these conditions, the requirement of nationality is even less adequate to define protected persons.¹

I. Introduction

In August 2006 Mounthir Abbas Saud, a Sunni Iraqi, was evacuated to a Baghdad hospital after having his jaw and arm ripped off by a car bomb.² A few days after arriving at the hospital, Shiite militiamen burst into Mr. Saud’s room, tore intravenous tubes out of his nose and arms, and dragged him down the hall.³ At the end of the hall, the Shiite militiamen repeatedly fired their automatic weapons into Mr. Saud.⁴ Like Mr. Saud, the Shiite militiamen were Iraqi nationals, yet, despite their common nationality, the militiamen slaughtered Mr. Saud solely because of his Sunni beliefs.⁵

Increasingly, conflicts are defined not by nationality or geographical boundaries but instead by ethnicity and religious affiliation.⁶ It is questionable whether these religious, ethnic, and tribal wars are internal or international armed conflicts and the specific facts of each conflict are dispositive in making this determination.⁷ Assuming these conflicts are defined as international armed conflicts and thus the full protections of the Geneva Conventions apply,⁸ the traditional definition of “protected persons” found within Geneva Convention IV (GC IV), Article 4 is clearly antiquated and outdated when discussing these complex forms of violence.⁹ As a result, international jurisprudence is moving towards giving protected person status under Geneva Convention IV, Article 4 to ethnic, religious, or tribal groups that are victims at the hands of their

* Judge Advocate. Presently assigned as Associate Professor, Int’l & Operational Law Dep’t, The Judge Advocate General’s Legal Ctr. & Sch., Charlottesville, Va.

¹ Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 166 (Oct. 2, 1995), *reprinted in* MARCO SASSOLI & ANTOINE A. BOUVIER, *HOW DOES LAW PROTECT IN WAR?* 1858 (2d ed. 2006).

² Amit R. Paley, *Iraqi Hospitals Are War’s New “Killing Fields,”* WASH. POST, Aug. 30, 2006, at A1 (detailing how Shiite militiamen are targeting Sunnis at medical facilities).

³ *Id.*

⁴ *Id.*

⁵ *See id.*

⁶ *See, e.g., Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *in* SASSOLI & BOUVIER, *supra* note 1, at 1858; Loius Chabonneau, *U.N. Council Demands End to Kenya Ethnic Violence*, CNN.com/politics, Feb. 6, 2008, available at <http://www.reuters.com/article/worldNews/idUSN0630699320080206> (discussing “ethnically motivated attacks” throughout Kenya); Lydia Polgreen, *Attacks Pushing Darfur Refugees Into Chad*, N.Y. TIMES, Feb. 11, 2008, available at <http://www.nytimes.com/2008/02/11/world/africa/11darfur.html> (“The morass of conflict engulfing the region has become more complex and difficult to control since it first grabbed the world’s attention in 2003, when the Arab-dominated government of Sudan unleashed tribal militias known as the janjaweed on non-Arab rebel groups in Darfur.”).

⁷ *See, e.g., Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *in* SASSOLI & BOUVIER, *supra* note 1. In *Tadic* the International Criminal Tribunal for the former Yugoslavia found that an international conflict occurred in the former Yugoslavia due to the “involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army (“JNA”).” *Id.* at 1812. Thus, the full protections of the Geneva Conventions applied despite the ethnic and religious overtones of the conflict. *See id.* at 1857. Similarly, the sectarian violence in Iraq between the Sunni and Shiite religious groups is arguably an international armed conflict due to support provided to the Shiite militiamen by Iran. *See, e.g., Report to Congress on the Situation in Iraq: Hearing Before the House Armed Service Committee*, 110th Cong. 2.4 (2007) (statement by General David H. Petraeus) (discussing the involvement of Iran in the sectarian violence in Iraq). Conversely, the current ethnic violence in Kenya is most likely an internal conflict due to the lack of any external state involvement. *See* David McKenzie & Kim Mortared, *New Doubts Over Flawed Kenyan Vote*, CNN (Nairobi, Kenya), Jan. 2, 2008 (discussing the internal political turmoil in Kenya and the resulting ethnic violence).

⁸ *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 [hereinafter GC IV]; *see also* INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 235 (2008) (discussing when the Convention and all of its articles applies).

⁹ GC IV, *supra* note 8, art. 4 (“Persons protected by the Convention are those [that fall under the control] of a Party to the conflict or Occupying Power of which they are not nationals.”). Therefore, groups abused by their own governments do not seem to fall within this definition of protected persons and must rely upon the general protections offered to all civilians in GC IV. *But see infra* Section III (discussing why this definition of protected persons is too narrow).

own nation.¹⁰ This expansion of the definition of protected persons results in a greater pool of possible victims of grave breaches of international law and therefore an increasing number of state actions being defined as war crimes.¹¹

II. The Problem: Who Is Protected from “Grave Breaches”?

Article 147 of GC IV states, “Grave Breaches . . . shall be those involving any of the following acts, if committed against persons or property protected by the present Convention”¹² This raises the question: who is a person “protected” by the present Convention and thus shielded from the war crimes listed in Article 147?¹³ Article 4 clearly limits the definition of protected persons and expressly excludes from protected person status those individuals that are nationals of the occupying state or nationals within their own state.¹⁴ Exclusion from protected person status means that a national within the geographic boundaries of his home nation will not receive the full penumbra of civilian protections in time of war but instead may only rely upon the limited protections offered in Part II of GC IV.¹⁵ It is unclear whether Part II is a stand-alone section, but a plain reading of GC IV in its entirety supports the contention that the only protections a national has in reference to his home nation are those discussed within the parameters of Part II.¹⁶ This traditional interpretation of protected persons seemingly gives a government the ability to commit an atrocity listed in Article 147 against their own nationals without consequence or international criminal culpability.¹⁷ Further, a national that is victimized by his own government does not have an avenue to seek redress¹⁸ or the ability to hold his government accountable for war crimes.

The traditional definition and interpretation of protected persons does not provide adequate protections to certain oppressed groups and, at a minimum, the question is left open whether a government that commits atrocities upon a religious or ethnic group within their own geographic boundaries are culpable under international law.¹⁹ Clearly, in the context of contemporary hybrid conflicts that include traits of both internal and international conflicts the traditional definition of

¹⁰ See *infra* Section III (discussing the *Tadic* case and the movement towards expanding the definition of protected persons).

¹¹ See *Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, in SASSOLI & BOUVIER, *supra* note 1, at 1857 (noting that the status of protected person makes an individual a possible victim of a grave breach of international law).

¹² GC IV, *supra* note 8, art. 147. Article 147, in its entirety, states:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Id.

¹³ *Id.*

¹⁴ See *id.* art. 4. Article 4 also expressly excludes from the definition of protected persons those that are from a state which is not bound by the conventions, nationals from a neutral state, or co-belligerent state, that still has normal diplomatic representation with the occupying state, and those that are protected by the other enumerated Geneva Conventions. See *id.*

¹⁵ See *id.* art. 13 (“The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.”).

¹⁶ See *generally id.* Article 13 specifically states that Part II covers the whole population of the countries in conflict and clearly incorporates more individuals than simply those that are protected persons. See *id.* However, Part III only refers to protected persons. See *id.* art. 27 (referring specifically to the entitlements of protected persons). Part IV refers generally to protected persons. See *id.* arts. 142, 143.

¹⁷ Another possibility is that Article 147 is referring to all persons mentioned in the Convention, thus including nationals within the geographic boundaries of their own nation receiving protections under Part II. See *generally id.* However, this argument seems unlikely since Article 147 repeatedly refers to protected persons which is clearly defined in Article 4 as excluding nationals within their own State. See, e.g., *id.* art. 147. For example, Article 147 lists as a grave breach “compelling a protected person to serve in the forces of a hostile Power.” *Id.* It is difficult to envision this phrase not referencing “protected persons” as defined in Article 4. See *id.* art. 4.

¹⁸ In theory, the national could attempt to use its domestic courts to pursue prosecution of the war crimes. In practice, this does not seem realistic. See *generally* GC IV, *supra* note 8, art. 10; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993), available at <http://www1.umn.edu/humanrts/icty/statute.html> (noting the need of the international tribunal to try those whose war crimes had been deemed “ordinary crimes” ensuring that the domestic proceedings were not used to shield war criminals).

¹⁹ See *supra* text and accompanying notes 12–18.

protected persons is grossly inadequate.²⁰ Recognizing this issue, international jurisprudence has begun to incorporate these underrepresented groups within the rubric of protected persons and in the process placed greater emphasis on human rights rather than state sovereignty.²¹

III. The *Prosecutor v. Tadic*: The Move to Expand “Protected Person” Status

Similar to the current environments in Iraq, Sudan, and other contemporary conflicts,²² the dissolution of the nation-state of Yugoslavia in the early 1990s quickly led to a brutal inter-ethnic and religious conflict.²³ As Yugoslavia disintegrated, ethnic Serbians, in a calculated plan to create a Greater Serbia, committed multiple inhumane acts including rape, kidnapping, and murder against the non-Serbian population.²⁴ Despite a common nationality between many of the aggressors²⁵ and the targeted victims, the ethnic and religious affiliation of the Serbian population trumped their national identity as prior citizens of Yugoslavia or as current nationals of Bosnia and Herzegovina.²⁶ In addition, numerous parties in the conflict were from neighboring states whose involvement was based solely upon ethnicity and religion versus traditional national alliances or treaties.²⁷ The result was violence that resembled both an internal and international conflict in which the application of the traditional interpretation of protected persons was not suitable to address the ethnic cleansing taking place.²⁸

Recognizing numerous shortcomings with traditional application of the Geneva Conventions,²⁹ The International Criminal Tribunal for the former Yugoslavia (ICTY) determined the contemporary world environment required a progressive and expansive definition of protected persons.³⁰ The ICTY, in *Prosecutor v. Tadic*, noted that the complexities of modern international armed conflicts diminished the importance of nationality in defining an individual as a protected person under Article 4.³¹ Rigid adherence to the traditional definition of protected persons in contemporary international conflicts, and specifically in the situation of the former Yugoslavia, had absurd results.³² Notably, Bosnian non-Serbian civilians would be protected persons when attacked by Bosnian Serbians who were acting as agents of the Federal Republic of Yugoslavia (Serbia-Montenegro),³³ while Bosnian Serbian civilians would not be protected persons when attacked by the Bosnia-Herzegovina army.³⁴ Thus, the traditional protected person definition in context of the conflict in Bosnia and Herzegovina

²⁰ See *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, in SASSOLI & BOUVIER, *supra* note 1, at 1814 (Oct. 2, 1995) (explaining that the U.N. Security Council purposely refrained from classifying the conflict in the former Yugoslavia as internal or international due to the limitations that would have been placed upon the tribunal and the illogical results that would have followed); see also *supra* note 7 (discussing the difficulty in defining the conflicts in Yugoslavia and Iraq as internal or international); *supra* text and accompanying notes 33–35 (detailing the absurd results that would result by applying the traditional definition of protected persons in the context of the former Yugoslavia).

²¹ See *Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, in SASSOLI & BOUVIER, *supra* note 1, at 1809.

²² See *supra* text and accompanying notes 1–8.

²³ See *Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, in SASSOLI & BOUVIER, *supra* note 1, at 1857–58.

²⁴ See *id.* at 1865 (“An aspect of this conflict was a policy to commit inhumane acts against the non-Serb civilian population of the territory in the attempt to achieve the creation of a Greater Serbia.”).

²⁵ Some of those that committed grave breaches against the non-Serbian population were not nationals of Bosnia. See *id.* at 1812.

²⁶ See *id.* at 1858 (“In the instant case the Bosnian Serbs, including the Appellant, arguably had the same nationality as the victims, that is, they were nationals of Bosnia and Herzegovina.”).

²⁷ See *id.* at 1812.

²⁸ See *id.* at 1812–13 (discussing the internal and international aspects of the conflict).

²⁹ In addition to expanding the definition of protected persons, the court also articulated the difficulty in defining a conflict as internal or international and noted that in the amicus curiae brief the United States’ opinion was that “the ‘grave breaches’ provisions of Article 2 of the International Tribunal Statute appl[ie]d to armed conflicts of a non-international character as well as those of an international character.” See *id.* at 1816 (citing U.S. Amicus Curiae Brief, at 35). Despite supporting this expansive application of grave breaches in *dicta*, the *Tadic* court determined that this statement was unsupported and thus grave breach provisions of the Geneva Conventions still only applied in international conflicts. See *id.*

³⁰ See *supra* note 7.

³¹ See *Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction in SASSOLI & BOUVIER, *supra* note 1, at 1858.

³² See *id.* at 1814.

³³ *Id.* (“[A]trocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as ‘grave breaches’, because such civilians would be ‘protected persons’ under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State . . .”).

resulted in disparate protections for civilians in the same geographic area dependent solely upon which group was committing the atrocity.³⁵

Rejecting this legalistic application of the protected person definition in Article 4, the *Tadic* court instead stated the Geneva Conventions were intended “to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection.”³⁶ To support this expansive argument, the court referenced the situation of German Jews “who had fled to France before 1940, and thereafter found themselves in the hands of German forces occupying French territory.”³⁷ Instead of relying upon an individual’s nationality to determine their status as a protected person, the court referenced the object and purpose of the Geneva Conventions in offering a new test in which “allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test” in determining protected person status.³⁸

The *Tadic* opinion recognized that in modern international armed conflicts a national may lack “both allegiance to a State and diplomatic protection” by their State due to their ethnicity or religion.³⁹ Due to the evolution of the international armed conflict and the over-arching goal of Article 4 to “protect[] civilians to the maximum extent possible,” protected person status could no longer be determined based solely on legal relations between an individual and a State.⁴⁰ For this reason, the ICTY determined that Article 4, and the corresponding protections given to protected persons, should apply to those who possess the same nationality as the perpetrators of war crimes.⁴¹

IV. Conclusion

Contemporary international armed conflicts are more likely to resemble the inter-ethnic and religious conflicts of Yugoslavia and Iraq than the state-versus-state conflicts envisioned by the drafters of the Geneva Conventions.⁴² This explosive rise of inter-ethnic and religious conflicts often means that ethnicity is “determinative of national allegiance” and in this environment “the requirement of nationality is [] less adequate to define protected persons.”⁴³ Therefore, the changing dynamics of international armed conflicts requires a more expansive definition of protected person which includes offering protections to those ethnic or religious groups that have grave breaches committed upon them by their own government.⁴⁴

This inclusive interpretation of protected persons under GC IV, Article 4 coupled with the growing number of international ethnic and religious conflicts is expanding the reach of war crimes jurisprudence.⁴⁵ States no longer have the unfettered ability to commit atrocities against their own ethnic or religious minorities and previously immune state acts are

³⁴ See *id.* The ICTY noted that “serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians would not be regarded as ‘grave breaches’” because the Serb civilians were nationals of Bosnia-Herzegovina. *Id.* The court went on to say, “This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage vis-à-vis the central authorities of Bosnia-Herzegovina.” *Id.*

³⁵ See generally *id.*

³⁶ *Id.* at 1857.

³⁷ *Id.* The court noted that the situation of German Jews who fled to France and subsequently found themselves in the hands of the German state after occupation demonstrated that “the legal bonds of nationality was not regarded as crucial.” *Id.*

³⁸ *Id.* at 1858.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 1859 (“Hence, even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable.”).

⁴² See *id.* at 1858; see also *supra* text and accompanying notes 6–7.

⁴³ *Id.*

⁴⁴ This expansive definition of protected persons more fully complies with the spirit of the Geneva Conventions. The *Tadic* opinion notes that “Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations.” *Id.* at 1858.

⁴⁵ See *supra* text and accompanying notes 22–40.

now likely to be defined as a war crime.⁴⁶ As noted by the ICTY in *Tadic*, “borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.”⁴⁷ As contemporary international armed conflicts increasingly include inter-ethnic and religious violence, the definition of protected persons is seemingly evolving to reflect this new reality.

⁴⁶ See *Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, in SASSOLI & BOUVIER, *supra* note 1, at 1809 (“It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights.”).

⁴⁷ *Id.*

Cluster Munitions: Wonder Weapon or Humanitarian Horror?

*But at the end of the day, I believe we should be guided by the conviction that this is, above all, a moral issue. Weapons that are inherently indiscriminate, whether by design or effect, should have no place in today's world.*¹

—Sen. Leahy

*Lieutenant Colonel Michael O. Lacey
Professor and Chair, International and Operational Law Department
The Judge Advocate General's Legal Center and School
Charlottesville, Virginia*

Recent international humanitarian efforts have targeted cluster munitions (CMs) as the latest cause *de jour* to eliminate harm to civilians on the battlefield. In May of 2008, over 100 nations met in Dublin, Ireland and produced an agreement that would ban the use, production, transfer, and stockpiling of CMs.² This diplomatic conference produced the Convention on Cluster Munitions (CCM).³ Although the heart of the treaty deals with the prohibition on the use, production and transfer of such weapons, the treaty also contains language that prohibits each state party from assisting, encouraging or inducing anyone to take action prohibited by the treaty.⁴ This is particularly significant to the United States in this era of coalition operations given our reliance on CMs as an intricate part of any warfighting plan.

United States policy is that CMs are legitimate weapons with clear military utility.⁵ Cluster munitions remain an important part of the U.S. Armed Forces inventory and are an important weapon “to engage area targets that include massed formations of enemy forces, individual targets dispersed over a defined area, targets whose precise location are not known, and time sensitive or moving targets.”⁶ Both the Army and the Air Force have stockpiles of CMs. However the Army inventory has over 90% of the total, including over 600 million CMs, primarily in their multiple launch rocket system, Army tactical missile system, and in the dual purpose improved conventional munitions.⁷

Cluster munitions are groups of smaller bombs that are dropped together in a large bomb canister (or case) that is designed to break apart in flight and distribute the submunitions or bomblets over a wide area.⁸ Each submunition has a fuse that, depending on how it is set, will cause it to explode either at a certain height above ground, on impact, or in a delayed mode.⁹ These CMs, generally designated as cluster bomb units, are very effective against troops in the open and there are several variants including anti-armor, anti-personnel, and anti-materiel.¹⁰ These CMs can either be delivered by fixed wing aircraft, by artillery, or by rocket. In 1991, during Operation Desert Storm, CMs were used extensively by coalition forces—over 61,000 were dropped on a variety of targets including Iraqi conventional forces, early warning radars, surface to air missile sites, and Iraqi infrastructure that could support the war effort such as communications and transportation facilities.¹¹ Cluster munitions have also been used by the United States extensively during Operation Allied Force (Balkans 1999), Operation Enduring Freedom (Afghanistan 2002) and Operation Iraqi Freedom (2003).

¹ *Cluster Munitions Survivors Forum World Conference on Cluster Munitions*, STATES NEWS SERV., May 26, 2008, [hereinafter *World Conference on Cluster Munitions*].

² *Cluster Bomb Ban Treaty Approved*, BBC NEWS, May 28, 2008, <http://news.bbc.co.uk/1/hi/world/europe/7423714.stm>.

³ Convention of Cluster Munitions, 30 May 2008 [hereinafter CCM], available at <http://www.icrc.org/ihl.nsf/INTRO/620?OpenDocument>.

⁴ *Id.* art. 1, para. 1(c).

⁵ Memorandum from Sec'y of Defense to Sec'ys of the Military Dep'ts et al., subject: DoD Policy on Cluster Munitions and Unintended Harm to Civilians (U) (13 June 2008) [hereinafter DoD Policy Memo].

⁶ *Id.*

⁷ Information Paper, Richard Jackson, Special Assistant to the Judge Advocate Gen. on Law of War, Office of the Judge Advocate Gen., Int'l & Operational Law Div. (23 Sept. 2008) [hereinafter Jackson Info Paper].

⁸ ERIC PROKOSCH, THE TECHNOLOGY OF KILLING, A MILITARY AND POLITICAL HISTORY OF ANTIPERSONNEL WEAPONS 82 (1995).

⁹ U.S. Dep't of the Air Force, Air Univ., *Cluster Bombs*, available at <http://www.au.af.mil/database/projects/ay1966/acsc/96-004/hardware/docs/cluster/htm> (last visited Dec. 19, 2009).

¹⁰ Major Thomas J. Herthel, *On the Chopping Block: Cluster Munitions and the Law of War*, 51 A.F. L. REV. 229 (2001).

¹¹ See generally *Ticking Time Bombs*, 11 HUMAN RIGHTS WATCH NO. 6 (June 1999), available at <http://www.hrw.org/legacy/reports/1999/nato2/>.

However, it was the Israeli use of CMs during their invasion of Lebanon in 2006 that was the real catalyst for the renewed emphasis to ban CMs. An Amnesty International report on the conflict condemned the Israeli use of CMs—calling it “indiscriminate and disproportionate.”¹² Mounting civilian casualties, apparently caused by the Israeli use of CMs during the last few days of the conflict, resulted in an investigation by the UN Human Rights Council.¹³ The investigation produced a report that accused Israel of the improper use of CMs, resulting in human rights violations.¹⁴ Jan Egeland, a member of the UN Council, said “[w]hat is shocking and completely immoral is 90% of the cluster bomb strikes occurred in the last 72 hours of the conflict, when we knew there would be resolution.”¹⁵ Excessive civilian casualties in the conflict resulted in calls for international regulation on the use and production of CMs.

Years before the negotiations for the Oslo Treaty concluded in 2008, there was a steady chorus from the international humanitarian community and certain individual nations that the use of CMs failed to adhere to one of the foundational principles under the law of war—that of distinction.¹⁶ Specifically, they argued that CMs are unlawful because their bomblets, which spread over such a wide area, cannot be employed with the required level of accuracy to discriminate between a legitimate military objective and surrounding civilians and infrastructure. Also there is the additional concern that because of the high “dud” rate (sub-munitions that fail to explode as designed) of certain types of cluster bombs, the use of these munitions violate the principle of discrimination because the persistent and dangerous explosive remnants threaten civilians returning to the area long after the battle is over.¹⁷

The first concern of the opponents of CMs is easily dismissed. No weapon is required to be delivered with pinpoint accuracy. From the individual rifleman laying down suppressive fire, to the battleship firing a 16-inch shell from fifteen miles away against a target located in a certain grid square, the law of war has never required that a weapon be delivered with pinpoint precision.¹⁸ Indeed, if anything, the precision guided munitions (PGMs) that characterize such CMs have made for an increase in bombing accuracy and effectiveness since World War II.¹⁹ Artillery using indirect fire is by its very nature an area weapon, and such shells are designed to throw their fragments over as large an area as possible. While there is always the affirmative obligation of the commander or Soldier to identify their target as a military objective before employing kinetic means,²⁰ those means need not be a perfect laser beam of lethality that will with 100% certainty destroy only the military objective, causing no collateral damage. If that were the case, there would be no need for commanders and Soldiers to engage in the delicate and difficult balancing test that is the proportionality principle.²¹

¹² *Israel to Probe Cluster Bomb Use*, BBC NEWS, 21 Nov. 2006, available at http://news.bbc.co.uk/2/hi/middle_east/6167458.stm.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Mark Tran, *US Studies Israel's Cluster Bomb Use*, GUARDIAN (London), Jan. 29, 2007 (quoting Jan Egeland, UN humanitarian chief), available at <http://www.guardian.co.uk/world/2007/jan/29/israelandthepalestinians.usa>.

¹⁶ INT'L COMM. OF THE RED CROSS, CONFERENCE OF GOVERNMENTAL EXPERTS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS (SECOND SESSION-LUGANO) 1999 (1976) [hereinafter LUGANO CONFERENCE].

¹⁷ Herthel, *supra* note 10, at 336.

¹⁸ The law of war implicitly recognizes this concept in its definition of proportionality as found in Article 51(5)(b) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3, 26 [hereinafter Protocol I]. Article 51(5)(b) prohibits attacks which are “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilians objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage to be gained.” *Id.* art. 51(5)(b). The idea that the law of war demands that commanders weigh the collateral damage that his targeting decision causes with the military advantage to be gained recognizes that no weapon can hit with pinpoint accuracy every time and that there will be some collateral damage caused by weapons that hit unintended non-military targets.

¹⁹ See, e.g., Richard P. Hallion, *Precision Guided Munitions and the New Era of Warfare* (Air Power Studies Centre, Paper No. 53, 1995), available at <http://www.fas.org/man/dod-101/sys/smart/docs/paper53.htm>.

It took 108 B-17 bombers, crewed by 1080 airmen, dropping 648 bombs to guarantee a 96 per cent chance of getting just two hits inside a 400 x 500 feet German power-generation plant; in contrast, in the Gulf War, a single strike aircraft with one or two crewmen, dropping two laser-guided bombs, could achieve the same results with essentially a 100 per cent expectation of hitting the target, short of a material failure of the bombs themselves..

Id.

²⁰ See Protocol I, *supra* note 18, art. 48. In order to ensure respect for and protection of civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives. *Id.*

²¹ For a discussion of proportionality, see *supra* note 18.

The distinction concerns of the opponents of CMs are more difficult to resolve. The opponents of CMs allege that because of the particularly high unexploded ordnance (UXO) rate of some of the sub-munitions, civilians (especially children) are at great risk for becoming casualties when such unexploded CMs are disturbed.²² The problem is further exacerbated by the fact that many of the submunitions are colored in orange or yellow hues. While this coloring scheme makes it easier for explosive ordnance demolition (EOD) teams to find and disarm or destroy such UXO, it also makes such bomblets the proverbial “attractive nuisance” to small children.

The UXO rate of CMs is difficult to approximate. Some studies have put it at between 5 and 7%,²³ while others have put it as high as 30%.²⁴ The UXO problem was recognized by the U.S. military and addressed in the 13 June 2008 Department of Defense (DoD) Policy on Cluster Munitions and Unintended Harm to Civilians.²⁵ The policy states:

After 2018, the Military Department and Combatant Commands will only employ cluster munitions containing submunitions that, after arming, do not result in more than 1% unexploded ordnance (UXO) across the range of intended operational environments. The 1% UXO limit will not be waived. Although the use of self-deactivation devices or mechanisms can reduce the harm to civilians, self-deactivated submunitions will still be considered UXO.²⁶

Also, “[u]ntil the end of 2018, use of cluster munitions that exceed the 1% UXO rate must be approved by the Combatant Commander.”²⁷

The United States also actively sought to reduce the threat to civilians posed by CMs by negotiating the Explosive Remnants of War (ERW) Protocol V²⁸ to the Certain Conventional Weapons Treaty (CCW).²⁹ The ERW Protocol requires State Parties to mark locations of ERW (including unexploded CMs), transmit information about their locations after the conflict, prohibit civilians from entering hazardous areas, and endeavour to clean up explosive remnants after the conflict.³⁰ In addition, “best practices,” contained in a technical annex, were intended to improve the reliability of such weapons, to “minimize the occurrence of explosive remnants of war.”³¹ Actual implementation of this protocol could have provided considerable relief from CMs. But the urgency from public outcry after the Israel-Lebanon conflict, drove expedited efforts to regulate the use of CMs.³²

Finally, in November of 2007, parties to that treaty agreed to attempt to “negotiate a proposal” on such munitions.³³ The ERW process was in many ways short-circuited by the ultra-fast negotiation and passage of the CCM in Oslo, an international negotiation process outside of the CCW process, which requires consensus-building between State Parties to

²² Paul Wiseman, *Cluster Bombs Kill in Iraq, Even after Shooting Ends*, USA TODAY, Dec. 16, 2003, available at http://www.usatoday.com/news/world/iraq/2003-12-10-cluster-bomb-cover_x.htm.

²³ Ron Laurenzo, *Cluster Bomb Dud Rates Cut, Army Says*, DEFENSE WK., June 1, 1999, at 3.

²⁴ Robert Evans, *US Insists Cluster Bombs Not Bad If Used Right*, REUTERS UK, Jan. 16, 2008, http://uk.reuters.com/article/homepageCrisis/idUKL16822789_CH_242020080116.

²⁵ See DoD Policy Memo, *supra* note 5.

²⁶ *Id.* at 2.

²⁷ *Id.*

²⁸ Protocol on Explosive Remnants of War (Protocol V), reprinted in INT’L & OPERATIONAL L. DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 427 (2008) [hereinafter ERW].

²⁹ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCW], reprinted in ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAW OF WAR 515 (2001).

³⁰ See *id.*; ERW, *supra* note 28, at 427 (2008).

³¹ CCW, *supra* note 29.

³² See, e.g., UN Position on Cluster Munitions at 2007 Meeting of States Parties to the CCW.

³³ John Borrie, *How the Cluster Munition Ban Was Won: Oslo Treaty Negotiations Conclude in Dublin*, DISARMAMENT DIPL., NO. 88, Summer 2008, available at <http://www.acronym.org.uk/dd/dd88/88jb.htm>.

obtain unanimous consent over each protocol.³⁴ There will be further CCW cluster munition discussions in February, April, and at the CCW Revision Conference in November of 2009.³⁵

The result of such a streamlined, outside the normal channel negotiating process was that most of the major manufacturers and largest militaries that plan on using CMs, such as the United States, Russia, China, Israel, India, and Pakistan, did not participate in the negotiations or sign the Oslo Treaty.³⁶ In fact, Mr. Stephen Mull, Acting Assistant Secretary for Political-Military Affairs for the United States State Department stated that “unless you get all the major producers and users of these weapons to agree on how they’re going to regulate them, the—you’re not going to meet your goal of addressing the humanitarian impact of them.”³⁷

While the success of such a treaty, which does not include the major players in the cluster bomb world, is doubtful at best, many of the proponents of the treaty hope that “even without China, India, Pakistan, Russia and the US coming on board in the short term, the treaty’s ban on cluster munitions will nevertheless have a stigmatizing effect on the use and transfer of these inhumane weapons.”³⁸

Also,

[t]hey note that, despite some significant countries not joining major disarmament-related treaties in the past, they have often had an eventual change of heart [a]nd they cite the effectiveness of the Mine Ban Treaty in stigmatizing anti-personnel mine production, transfer and use, not only among states but non-state armed groups.³⁹

The introductory clause of the CCM speaks to the underlying humanitarian purpose of the treaty. Such language as “[d]eeply concerned that civilian populations and individual civilians continue to bear the brunt of armed conflict . . . [d]etermined to put an end for all time to the suffering and casualties caused by Cluster bombs . . . [c]oncerned that cluster munitions remnants kill or maim civilians”⁴⁰ clearly indicates the overriding humanitarian mission of the state parties to the convention.

Article 2 of the treaty provides several definitions, not all of which are in agreement with the U.S. Department of Defense position. While the treaty’s definition of CMs is only a sentence long, what is excluded from the definition takes up an additional sixteen lines and is at least as important as what is considered a CM:

Cluster munition means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those exploded submunitions. It does not mean the following:

- (a) A munition or submunition designed to dispense flares, smoke pyrotechnics or chaff; a munition designed exclusively for an air defense role;
- (b) A munition or submunition designed to produce electrical or electronic effects;
- (c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:

³⁴ CCM, *supra* note 3, art 8, at 523.

³⁵ E-mail from Mr. Richard B. Jackson, Special Assistant to the Judge Advocate General on Law of War to Colonel Mark S. Martins (16 Dec. 2008, 14:48 EST) (on file with author).

³⁶ Kevin Sullivan & Josh White, *111 Nations, Minus the U.S., Agree to Cluster-Bomb Ban*, WASH. POST (Foreign Serv.), May 29, 2008, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/story/2008/05/28/ST2008052803176.html>.

³⁷ Stephen D. Mull, Acting Assistant Sec’y for Political-Military Affairs, On-the-record-briefing on U.S. Cluster Munition Pol’y, Wash., D.C. (21 May 2008) (transcript available at <http://www.america.gov/st/texttrans-english/2008/May/20080522163101eafas0.8921015.html>).

³⁸ Borrie, *supra* note 33, at 16 (citing Sam Cassanos, Rights: *Cluster Bomb Treaty’s Moral Force May Deter U.S.*, INTER PRESS SERV. (July 14, 2008), <http://www.ipsnews.net/news.asp?idnews=43177>).

³⁹ *Id.* (citing Mylena Fiori, *Brazil will Stick to the Agreement to End the production of Cluster Bombs*, AGÊNCIA BRASIL, June 17, 2008, <http://www.agenciabrasil.gov.br/noticias/2008/06/17/materia.2008-06-17.4882961072/view>; BRIAN RAPPERT, A CONVENTION BEYOND THE CONVENTION: STIGMA, HUMANITARIAN STANDARDS AND THE OSLO PROCESS, LANDMINE ACTION (London 2008)).

⁴⁰ See CCM, *supra* note 3, pmb1. (emphasis added).

- (i) Each munition contains fewer than ten explosive submunitions;
- (ii) Each explosive submunition weighs more than four kilograms;
- (iii) Each explosive submunition is designed to detect and engage a single target objective;
- (iv) Each explosive submunition is equipped with an electronic self-destruct mechanism;
- (v) Each explosive submunition is equipped with an electronic Self-deactivating feature;⁴¹

The DoD policy letter contains a slightly different definition:

For the purposes of this policy, cluster munitions are defined as munitions composed of a non-reusable canister or delivery body containing multiple, conventional explosive submunitions. Excluded from the definition are nuclear, chemical, and biological weapons as well as obscurants, pyrotechnics, non-lethal systems (e.g. leaflets), non-explosive kinetic effect submunitions (e.g. flechettes or rods) or electronic effects.

Landmine submunitions are also excluded since they are covered by existing policy and international agreements.⁴²

Another important definition in Article I is that of the word “Transfer”:

“Transfer” involves, in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over cluster munitions, but does not involve the transfer of territory containing cluster munition remnants.⁴³

This is particularly important to the United States because of interoperability concerns with our allies. A reasonable reading of the passage would suggest that a country that has signed on to the Oslo Treaty may not allow the United States to transport CMs through any sector that the signatory is responsible for. The ramifications are obvious. In coalition operations where different NATO allies are responsible for specific sectors in a country or region (such as Kosovo or Afghanistan), the difficulties for the United States in transporting CMs from the airhead or sea port to the units that need them, may well involve travel through multiple national sectors.⁴⁴

Throughout the Oslo negotiation process, interoperability with coalition partners was a major concern, not only of the United States, but for many of the key proponents of the treaty. Many of these nations realized that not only was it highly likely that their militaries would be engaged in coalition operations with the United States in the future, but they must also protect their servicemembers from possible criminal prosecution in coalition operations where cluster bombs were used by a country that was not a party to the convention.⁴⁵

Article 21 of the treaty seeks to ameliorate many of the concerns of these signatories. Concerned about future joint operations with their militaries and the U.S. Armed Forces, key U.S. allies obtained the so called “interoperability exception” outlined in Article 21.⁴⁶ The exception outlines under what circumstances signatories to the treaty may engage in military operations with countries that have not signed onto Oslo. Specifically, paragraph 3 of Article 21 states

Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, State Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.⁴⁷

⁴¹ *Id.* art. 2.

⁴² See DoD Policy Memo, *supra* note 5.

⁴³ See CCM, *supra* note 3, art. 2, para. 8.

⁴⁴ There are of course even issues with the United States having these munitions on their military bases in the home territory of NATO allies such as Germany and Great Britain. In some cases, international agreements on the legal status of the base is such that the home country does not exercise national jurisdiction over the property—such as in the case of U.S. bases in Germany.

⁴⁵ See Borrie, *supra* note 33 and interoperability discussion on pp. 32–33.

⁴⁶ See Jackson Information Paper, *supra* note 7.

⁴⁷ CCM, *supra* note 3, art. 21, para. 3.

Obviously the language of *may engage in military cooperation and operations with states not a party to this Convention* opens up a panoply of questions on what is and is not permitted by the so-called interoperability exception. Can the cooperation include the storage of U.S. CMs on a U.S.-controlled base inside a signatory to the Oslo Treaty? Can military cooperation include the mere transport of CMs through an airport that an ally controls on the way to their final U.S. sector destination? Can a sixty-year-old alliance such as NATO be the basis for the exception that allows for military operations with a non-signatory to the treaty? For example, could the United States and Germany conduct joint training together where the United States drops CMs as part of a live fire? Is a UN resolution authorizing a multi-national military operation required as the *sin equa non* for the interoperability exception to apply? There are numerous questions that have yet to be answered regarding the complete meaning of Article 21.

There are currently negotiations ongoing with many of the United States' closest allies—the United Kingdom, Japan, Germany, Norway, and Afghanistan—on how the interoperability exception will impact on not only our storage of CMs inside their sovereign territory, but on the impact of United States transport of such munitions through their air and sea ports on a temporary basis.⁴⁸ The outcome of such talks will obviously have major ramifications on U.S. strategy, not only for the global war on terror, but for any confrontation with a peer competitor in the near future.

In conclusion, the Oslo Treaty stands as just one of the many challenges for the United States as it attempts to wage the war on terror. The fact that over one hundred nations have signed the treaty, including many of our closest NATO allies and other coalition partners, means that it is an international agreement that the United States cannot simply ignore.⁴⁹ Although the full extent of the interoperability exception described in Article 21 has yet to be fully defined, all practitioners need to be aware of the restrictions and the policies of coalition partners as they are involved in joint planning and operations. Although the United States remains committed to minimizing the harm to civilians caused by unexploded ordnance from cluster bombs, for policy reasons it has decided to do so by means of the Certain Convention Weapons Treaty and/or policy decision papers such as the one dated June 13, 2008. Practitioners need to be fully aware of U.S. policy on the use of CMs and future measures the United States is taking to improve the UXO rate of such weapons.

⁴⁸ See DoD Policy Memo, *supra* note 5.

⁴⁹ Many would argue that since the majority of the world's significant military powers are not signatories to the Oslo Treaty the agreement must be more symbolic than enforceable international law. However, critics of cluster munitions hope the treaty will gain moral authority and stigmatize the use of the weapons resulting in the reduced use of the munitions. See, e.g., Liz Sly, *Can the Cluster Bomb Be More Than a Symbol?*, CHI. TRIB., Dec. 3, 2008, available at http://archives.chicagotribune.com/2008/dec/03/nation/chi-lebanon-cluster_slydec03 ("The moral stigma is going to be so powerful we think cluster bombs also will quickly become a thing of the past." (quoting Thomas Nash, coordinator of the Cluster Munitions Coalition)).

In addition, a minority view holds that the Oslo Treaty could ripen over time into customary international law, and thus be effectively binding on the United States unless persistently objected to, if a vast majority of the world community are signatories and adhere to its requirements. See, e.g., *World Conference on Cluster Munitions*, *supra* note 1 ("These negotiations could not come at a better time. The Oslo treaty will not only set the rules for states parties, but it will also influence the conduct of non-parties." (statement by Sen. Leahy)).

Whether the proponents of the Oslo Treaty reduce the use of cluster munitions by successfully arguing that the weapons are immoral or by making the agreement enforceable under the principles of customary international law, the United States has a significant interest in participating in the discussion.

Don't Call It a SOFA! An Overview of the U.S.-Iraq Security Agreement

Commander Trevor A. Rush*

Part I. Introduction

On 1 January 2009, the United States and Iraq entered a new phase in their relationship as the United Nations Security Council Resolution 1790 (UNSCR 1790)¹ authorizing the multinational force in Iraq expired and two new bilateral agreements took its place.² On the surface, much of the U.S.-Iraq relationship and the on-going military operations may not seem immediately different; however, fundamental changes have been made to the existing legal and operational structure. Most importantly, the new bilateral regime makes the Government of Iraq (GOI) solely responsible for its security and stability, instead of the multinational forces operating under UNSCR 1790 and prior Resolutions. The two bilateral agreements constitute a request by Iraq for U.S. Forces to assist with Iraq's security and stability, but this request carries a number of restrictions, including an acknowledgement that the United States "recognizes the sovereign right of the Government of Iraq to request the departure of the United States Forces from Iraq at any time."³

There were many diplomatic and political twists and turns during the negotiations between the United States and Iraq,⁴ but ultimately the two agreements were signed on 17 November 2008. These agreements are: (1) The U.S.-Iraq Strategic Framework Agreement (SFA)⁵ and (2) the U.S.-Iraq Security Agreement (SA).⁶ Neither agreement is referred to as a Status of Forces Agreement, or SOFA.⁷ This is purposeful. Though the SA contains many provisions common to other SOFAs,⁸ the term SOFA should not be used for two reasons.

First, in a technical sense, it is not accurate to use the term SOFA for either of the two agreements. The SFA is an agreement that defines the long-term strategic relationship between the U.S. Government and the GOI. It contains none of the typical provisions one might expect to find in a SOFA and, with regard to "Defense and Security Cooperation," the SFA contains no actual substance. Instead, it specifically refers to the U.S.-Iraq SA, for the nature of that cooperation.⁹ On the other hand, the SA goes far beyond a regular SOFA, to include authorizing combat missions and detentions, discussing the deterrence of "security threats" and the termination of U.N. Security Council measures, as well as U.S. efforts to safeguard Iraqi economic assets and obtain Iraqi debt forgiveness.¹⁰

* Judge Advocate General's Corps, U.S. Navy. Presently assigned as Vice Chair and Associate Professor for the Int'l and Operational Law Dep't, The Judge Advocate General's Legal Ctr. & Sch., Charlottesville, Va. Special thanks to the many colleagues who took the time to review and critique this article.

¹ S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007) [hereinafter UNSCR 1790]. This resolution was the last in a series of resolutions that reaffirmed and extended the authorization for the multinational force set forth in UNSCR 1546. S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004) [hereinafter UNSCR 1546].

² This article will only address bilateral agreements between the United States and Iraq. Bilateral agreements with other countries, such as the United Kingdom, are outside the article's scope.

³ Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, art. 24, para. 4, Nov. 17, 2008 [hereinafter SA], available at http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf. This article also states, "The Government of Iraq recognizes the sovereign right of the United States to withdraw the United States Forces from Iraq at any time." *Id.*; see *infra* Part V (providing further discussions of withdrawal and termination).

⁴ Barring some minor discussion *infra*, the process of the agreement's negotiation, and the domestic politics surrounding the negotiations in both the United States and Iraq, is beyond the scope of this article.

⁵ Strategic Framework Agreement for a Relationship of Friendship and Cooperation Between the United States of America and the Republic of Iraq, U.S.-Iraq, Nov. 17, 2008 [hereinafter SFA], available at http://www.mnf-iraq.com/images/CGs_Messages/strategic_framework_agreement.pdf.

⁶ SA, *supra* note 3.

⁷ Status of forces agreements "generally establish the framework under which U.S. military personnel operate in a foreign country, addressing how the domestic laws of the foreign jurisdiction shall be applied toward U.S. personnel while in that country." R. CHUCK MASON, CONG. RESEARCH SERV. REPORT, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW MIGHT ONE BE UTILIZED IN IRAQ?, RL34531, summary (2008).

⁸ See *infra* note 135 (providing a break-out of SA sections that are common to SOFAs).

⁹ SFA, *supra* note 5, sec. III.

¹⁰ See SA, *supra* note 3, art. 4 (missions), art. 22 (detention), art. 25 (measures to terminate the application of chapter VII to Iraq), art. 26 (Iraqi assets), art. 27 (deterrence of security threats).

Second, and more importantly, the reason not to use the term SOFA for these two agreements is related to the significant political sensitivities surrounding the presence of foreign forces in the Middle East. The coalition campaigns in Iraq and Afghanistan have added new twenty-first century images to those deep-seated regional concerns. History has witnessed various western powers seek to control Middle Eastern territories, but these attempts at colonization and foreign domination have ultimately, always, been rejected. In this context, a “SOFA” can give the impression of a willing consent to *permanent* foreign military occupation. Skeptics need only look to such places as Europe, Korea, and Japan and see more than half a century of U.S. military presence operating under SOFAs.

More specifically, referring to either of these agreements as a SOFA between the United States and Iraq raises the specter of the failed U.S.-Iran SOFA agreed to in 1964. That SOFA granted full immunity to American personnel in Iran and created an image among Iranians of their government’s weakness in the face of foreign domination.¹¹ Objections to that agreement formed a primary pillar of the Ayatollah Khomeini’s platform for revolution in Iran.¹² Almost three decades later, the Iranian influence was a constant threat to the successful completion of U.S.-Iraq negotiations.¹³ But efforts were made to counter the Iranian influence, which included distinguishing the current U.S.-Iraq agreements from that 1964 SOFA with Iran. The differences between the new Iraq agreements and the inflammatory Iran agreement are real. As will be discussed below, under the terms of the SFA and SA, the Iraqis exercise significant sovereignty,¹⁴ including the primary jurisdiction over American contractors, and the possibility of jurisdiction over American servicemembers.¹⁵ Additionally, the SA is drafted to be temporary and to provide for the withdrawal of U.S. Forces, as even its official title suggests: “Agreement Between the United States of America and the Republic of Iraq on the *Withdrawal* of United States Forces from Iraq and the Organization of Their Activities During Their *Temporary Presence* in Iraq.”¹⁶

The SA’s title was politically important to the Iraqis and, for similar reasons of strategic communications, it is in the United States’ best interests to avoid the term “SOFA.” At the same time, regardless of titles used, these U.S.-Iraq agreements should be heralded as a major step forward in Iraq’s assumption of responsibility for its own security and governance. It was a step that was made publicly and openly, which was subjected to the politics of democracy and the scrutiny of the press in both countries, and was only made possible through the courage and sacrifice of many Americans, coalition personnel, and Iraqis that set the conditions for the negotiations to take place. If the agreements are viewed as a mistake, if Iraqi public perception is turned against the newly established bilateral framework, then those sacrifices may have been in vain. United States Forces have already been accused of breaching the agreement,¹⁷ and the first true test of public perception could come in 2009 if an Iraqi referendum on the agreements is held as planned.¹⁸ An unsuccessful referendum could dramatically change the U.S. position in Iraq, leading to a withdrawal earlier than either government intends. A substantial key to insuring good public perception in Iraq is for members of the U.S. Forces to understand the U.S. rights, obligations, and authorities under the SFA and SA and to work within those constraints. This article is offered to assist in that effort.

There is no substitute for reading the agreements first hand and those Judge Advocates deploying to Iraq should make it a priority to do so. However, this article provides an overview of the two U.S.-Iraq agreements, to include a highlight of the

¹¹ See, e.g., JAMES A. BILL, *THE EAGLE AND THE LION: THE TRAGEDY OF AMERICAN-IRANIAN RELATIONS* 156 (1989) (“On October 13, 1964, the Majlis approved a law that provided American military personnel and their dependents stationed in Iran with full diplomatic immunity. This action effectively exempted Americans serving in military advisor positions in Iran from Iranian law.”).

¹² See *id.* Ayatollah Khomeini “powerfully and frontally attacked the shah and America for attempting to destroy the dignity, integrity and autonomy of Iran.” *Id.* at 159. “Ayatollah Khomeini established his nationalist credentials with Iranians by his outspoken opposition to this agreement. His blunt criticism of the SOFA led to the Shah’s sending him into exile, where he remained until early 1979.” JOHN W. LIMBERT, *NEGOTIATING WITH THE ISLAMIC REPUBLIC OF IRAN* 15 n.7 (U.S. Inst. of Peace Special Rep. 199) (Jan. 2008), available at <http://www.usip.org/pubs/specialreports/sr199.pdf>.

¹³ See, e.g., Ernesto Londoño, *Iran Interfering in U.S.-Iraq Security Pact, General Says*, WASH. POST, Oct. 13, 2008, at A14, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/12/AR2008101201871.html>.

¹⁴ Even though there was an “assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004,” and the U.N. Security Council has recognized “the importance of consent of the sovereign Government of Iraq for the presence of the multinational force and of maximum coordination and close partnership between the multinational force and that Government,” the expiration of the UNSCR regime and the start of a new bilateral regime represents a new level of authority by the Government of Iraq. UNSCR 1546, *supra* note 1, at 1; UNSCR 1790, *supra* note 1, at 2.

¹⁵ See *infra* Parts IV.A and IV.F.

¹⁶ See SA, *supra* note 3 (emphasis added).

¹⁷ See *Iraqi Leader: U.S. Raid That Killed 2 Breached Accord*, CNN.com, Apr. 26, 2009, <http://www.cnn.com/2009/WORLD/meast/04/26/iraq.troops.raid/index.html> (“Iraq Prime Minister Nuri al-Maliki is accusing U.S. troops of violating the security agreement between the two countries after a raid in Wasit province Sunday that left two people dead . . .”).

¹⁸ See *infra* Part V.

provisions which required a change in U.S. operations. Also, areas of potential friction between the United States and Iraq based on the agreements' language or lack thereof, will be noted so that they can be anticipated. The SFA forms the foundation out of which the SA rises, therefore the SFA will be reviewed first in Part II. Part III will introduce the SA, covering the preliminary scope and definitions, as well as the SA's effect on U.S. military operations, including detention operations. Part IV will discuss the status of U.S. Forces in Iraq, including matters of jurisdiction and contractors. Part V concludes with a discussion of the SA's withdrawal and termination provisions.

Part II. The U.S.-Iraq Strategic Framework Agreement (SFA)

The SFA is an agreement that defines the long-term strategic relationship between the U.S. Government and the GOI. The first section of the agreement sets out the principles of cooperation, followed by seven additional sections covering a wide range of cooperation areas.¹⁹ The SFA also requires the formation of a Higher Coordinating Committee to monitor the SFA's implementation and lays the foundation for the establishment of further Joint Coordination Committees and other agreements or arrangements as may be required.²⁰

As is typical of such provisions, the SFA contains no binding language in the preamble. However, the preamble sets the stage for the SFA by affirming both countries' sovereignty,²¹ recognizing the GOI no longer poses a threat to international peace and security,²² and affirming that a long-term relationship between the United States and Iraq "will contribute to the strengthening and development of democracy in Iraq, as well as ensuring that Iraq will assume full responsibility for its security, the safety of its people, and maintaining peace within Iraq and among the countries of the region."²³ The SFA then sets out the following general principles "to establish the course of the future relationship" between the United States and Iraq:

1. A relationship of friendship and cooperation is based on mutual respect; recognized principles and norms of international law and fulfillment of international obligations; the principle of non-interference in internal affairs; and rejection of the use of violence to settle disputes.
2. A strong Iraq capable of self-defense is essential for achieving stability in the region.
3. The temporary presence of U.S. forces in Iraq is at the request and invitation of the sovereign Government of Iraq and with full respect for the sovereignty of Iraq.
4. The United States shall not use Iraqi land, sea, and air as a launching or transit point for attacks against other countries; nor seek or request permanent bases or a permanent military presence in Iraq.²⁴

Principles 3 and 4 set a strong tone regarding the activities of U.S. forces in Iraq. As discussed below, that restrictive tone is amplified in the SA.

In addition to the above general principles, the SFA covers the following seven areas of cooperation:

1. Political and Diplomatic;²⁵
2. Defense and Security;²⁶
3. Cultural;²⁷
4. Economic and Energy;²⁸
5. Health and Environment;²⁹

¹⁹ SFA, *supra* note 5, secs. I to VIII.

²⁰ *Id.* secs. IX to X. These committees contain representatives from both the United States and Iraq.

²¹ *Id.* pmb., para. 1.

²² *Id.* pmb., para. 2.

²³ *Id.* pmb., para. 5.

²⁴ *Id.* sec. I: *see infra* Part III.B.1 (providing a discussion of the Iraqi Government's displeasure with a U.S. operation into Syria in October 2008).

²⁵ SFA, *supra* note 5, sec. II.

²⁶ *Id.* sec. III.

²⁷ *Id.* sec. IV.

²⁸ *Id.* sec. V.

²⁹ *Id.* sec. VI.

6. Information Technology and Communications;³⁰
7. Law Enforcement and Judicial.³¹

Leaving aside the first two cooperation areas of “Political and Diplomatic” and “Defense and Security,” the other five areas contain aspirational and political language with very general commitments to achieve the various goals set forth. The language is generally a promise that “the Parties agree to cooperate to” bring to fruition the provisions set out in the area of cooperation.³² However, the first cooperation area, “Political and Diplomatic,” uses more binding language:

[T]he United States **shall ensure maximum efforts to work with and through** the democratically elected Government of Iraq to: . . . [s]upport and strengthen Iraq’s democracy . . . [s]upport and enhance Iraq’s status in regional and international organizations . . . [and s]upport the Government of Iraq in establishing positive relations with the states of the region.³³

Clearly a stronger commitment was desired in this area of cooperation by deviating from the “agree to cooperate to” language in other sections and using the words “shall” and “maximum efforts.”³⁴ But perhaps more important is the commitment to “work with and through the . . . Government of Iraq.”³⁵ Not only has the United States agreed to do its utmost to support the GOI, this is a clear demonstration of the GOI’s assertion of its sovereignty in international relations.

As for the area of “Defense and Security Cooperation,” the SFA contains no actual substance. Instead, it specifically refers to the U.S-Iraq SA, stating that security and defense cooperation between the two countries “shall be undertaken pursuant to” that separate agreement.³⁶ Therefore, we turn now to the SA.

Part III. The U.S.-Iraq Security Agreement (SA)

The full title of the SA is the “Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq.”³⁷ The title alone expresses the temporary nature of the agreement with its use of the words “withdrawal” and “temporary presence.” Given the nature of the agreement, along with the regional political sensitivities previously discussed,³⁸ servicemembers are encouraged to use the acronym “SA” vice “SOFA.”

As with the SFA, the SA’s preamble offers preliminary non-binding language, but does frame the situation as an undertaking between “two sovereign, independent, and coequal countries.”³⁹ This theme of acknowledging Iraqi sovereignty and the associated limitations on U.S. Forces is pervasive throughout many of the agreement’s thirty articles. The SA overview begins with Articles 1 and 2.

³⁰ *Id.* sec. VII.

³¹ *Id.* sec. VIII.

³² This language is used in SFA secs. IV to VIII. *See, e.g., id.* sec. V (regarding economic and energy cooperation which begins by noting that Iraq will require “unprecedented capital investment in reconstruction, the development of Iraq’s extraordinary natural and human resources, and the integration of Iraq into the international economy and its institutions.”). But then the agreement goes on to say only

[t]o that end the Parties agree to cooperate to: . . . [s]upport Iraq’s efforts to invest . . . [m]aintain active bilateral dialogue . . . [p]romote expansion of bilateral trade . . . [f]acilitate the flow of direct investment into Iraq . . . [p]romote Iraq’s development of the Iraqi electricity, oil, and gas sector . . . [e]ncourage the creation of a positive investment environment . . . [and] [e]ncourage increased Iraqi agricultural exports.

Id. Such language is clearly more of a political than legal nature.

³³ *Id.* sec. II (emphasis added).

³⁴ *Id.*; *see supra* note 32 (discussing the “agree to cooperate” language).

³⁵ SFA, *supra* note 5, sec. II.

³⁶ *Id.* sec. III.

³⁷ SA, *supra* note 3.

³⁸ *See* discussion *supra* Part I.

³⁹ SA, *supra* note 3, pmb1.

A. Scope and Definitions

According to Article 1, the SA applies to “the temporary presence, activities, and withdrawal of the United States Forces from Iraq.”⁴⁰ Therefore, the agreement covers only U.S. Forces in Iraq. It does not speak to the activities of other U.S. Government entities or individuals, nor does it cover any foreign government entity or force. This is made clear in Article 2 of the SA, which defines “United States Forces,”⁴¹ “Member of the United States Forces,”⁴² and “Member of the civilian component.”⁴³ Specifically these definitions state:

[1]. “United States Forces” means the entity comprising the members of the United States Armed Forces, their associated civilian component, and all property, equipment, and materiel of the United States Armed Forces present in the territory of Iraq.

[2]. “Member of the United States Forces” means any individual who is a member of the United States Army, Navy, Air Force, Marine Corps, or Coast Guard.

[3]. “Member of the civilian component” means any civilian employed by the United States Department of Defense. This term does not include individuals normally resident in Iraq.⁴⁴

Thus, only U.S. Department of Defense servicemembers and civilians are covered by the SA.⁴⁵ As further clarification, Article 2 also defines U.S. contractors and their employees as:

[N]on-Iraqi persons or legal entities, and their employees, who are citizens of the United States or a third country and who are in Iraq to supply goods, services, and security in Iraq to or on behalf of the United States Forces under a contract or subcontract with or for the United States Forces. However the term does not include persons or legal entities normally resident in the territory of Iraq.⁴⁶

There are a number of provisions in the SA that discuss contractors,⁴⁷ but the separation between contractors and personnel of the U.S. Forces becomes significant when the agreement discusses the exercise of personal jurisdiction over individuals. However, before covering jurisdictional issues, this article will provide an overview of the SA’s effects on U.S. military operations, including self-defense and detention operations.

B. Missions

Article 4 of the SA covers “missions” or military operations and is one of the articles which make the agreement fundamentally different from all other U.S. SOFAs.⁴⁸ Article 4 begins with a request from the GOI for “the temporary assistance of the United States Forces for the purposes of supporting Iraq in its efforts to maintain security and stability in Iraq, including cooperation in the conduct of operations against al-Qaeda and other terrorist groups, outlaw groups, and remnants of the former regime.”⁴⁹ Standard SOFAs do not discuss engaging in combat operations, whereas this SA provision invites U.S. Forces to participate in Iraq’s internal armed conflict.⁵⁰ It also provides internationally accepted legal authority

⁴⁰ *Id.* art. 1.

⁴¹ *Id.* art. 2, para. 2.

⁴² *Id.* art. 2, para. 3.

⁴³ *Id.* art. 2, para. 4.

⁴⁴ *Id.* art. 2, paras. 2–4. Note that the definition of a member of the U.S. Forces civilian component as a “civilian employed by the United States Department of Defense” is distinguished from “United States contractors” and “United States contractor employees” which are defined at Article 2, paragraph 5. *Id.* art. 2, para. 5.

⁴⁵ United States Government employees under chief of mission authority will receive privileges and immunities pursuant to the Vienna Convention on Diplomatic Relations. *See* Vienna Convention on Diplomatic Relations of April 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502. Also note that military dependents are not covered by the SA, but their presence in Iraq would be extremely unlikely.

⁴⁶ SA, *supra* note 3, art. 2, para. 5. Note that this language will not cover contractors for other agencies, such as the Department of State.

⁴⁷ *See infra* Part IV.F.

⁴⁸ *See supra* Part I (discussing why the SA should not be referred to as a SOFA).

⁴⁹ SA, *supra* note 3, art. 4, para. 1.

⁵⁰ There seems to be a reluctance to refer to Iraq’s situation as an internal (or non-international) armed conflict. Be that as it may, with the expiration of UNSCR 1790, and the request in the SA for U.S. assistance by a fully-sovereign Iraq, there is no basis to argue that the United States is engaged in an “international armed conflict.” However, a state of armed conflict must still exist, otherwise there is no basis in international law to engage in the type of

for U.S. Forces to conduct combat operations in Iraq. This was necessary to fill the legal vacuum created by the expiration of UNSCR 1790.⁵¹

The SA's grant of authority for military operations is based upon Iraq's sovereignty, which includes the right to consent to the presence of the U.S. military and to allow the United States to conduct military operations that comply with international and domestic Iraqi law. This differs from the U.N. Security Council's Chapter VII authorization to the multinational force to "take all necessary measures to contribute to the maintenance of security and stability in Iraq."⁵² Now, instead of U.S. Forces operating unilaterally, subject only to multinational force regulations and rules,⁵³ their operations must be "conducted with full respect for the Iraqi Constitution and the laws of Iraq."⁵⁴ Additionally, such operations are limited to those "conducted with the agreement of the Government of Iraq"⁵⁵ and, in fact, must "be fully coordinated with Iraqi authorities."⁵⁶ This coordination "shall be overseen by a Joint Military Operations Coordination Committee [hereinafter JMOCC] to be established pursuant to" the SA.⁵⁷ Lastly, military operations "shall not infringe upon the sovereignty of Iraq and its national interests, as defined by the Government of Iraq."⁵⁸

The practical reality of these limitations is that U.S. commanders must work "by, with, and through"⁵⁹ the Iraqis and develop processes for obtaining the appropriate Iraqi operating authorities. Preferably this cooperation and coordination is occurring at the lowest levels through U.S. commanders' relationships with the GOI and Iraqi Security Forces (ISF) leadership. However, the exact level of mission coordination required by Article 4 may prove to be a significant friction point between the United States and Iraq. For instance, in April 2009, U.S. Forces conducted a raid in Wasit province that

lethal offensive military operations which the United States is conducting in Iraq. Since it cannot be an "international armed conflict," it must be an internal (or non-international) armed conflict.

⁵¹ See UNSCR 1790, *supra* note 1.

⁵² See, e.g., UNSCR 1546, *supra* note 1, para. 10.

⁵³ These rules and regulations implemented the authority from various U.N. Security Council resolutions and U.S. domestic requirements.

⁵⁴ SA, *supra* note 3, art. 4, para. 3. Paragraph 3 goes on to provide that "[i]t is the duty of the United States Forces to respect the laws, customs, and traditions of Iraq and applicable international law." *Id.* (emphasis added). This is similar to language within Article 3 that "[w]hile conducting military operations pursuant to this Agreement, it is the duty of members of the United States Forces and of the civilian component to respect Iraqi laws, customs, traditions, and conventions and to refrain from any activities that are inconsistent with the letter and spirit of this Agreement." *Id.* art. 3, para. 1 (emphasis added).

The author has read speculation about whether the word "respect" in the SA means something different (i.e., less) than "comply." This may stem, in part, to the previous language that governed U.S. personnel under Coalition Provisional Authority (CPA) Order Number 17, which provided: "All MNF, CPA and Foreign Liaison Mission Personnel and International Consultants shall respect the Iraqi laws relevant to those Personnel and Consultants in Iraq including the Regulations, Orders, Memoranda and Public Notices issued by the Administrator of the CPA." COALITION PROVISIONAL AUTHORITY ORDER NO. 17 (REVISED), sec. 2, para. 2 (27 June 2004) [hereinafter CPA ORDER 17] (emphasis added), available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf. The CPA and CPA Order 17 will be discussed further *infra* Part IV.A.

Because the CPA Order 17 uses the word "relevant," there appears to be more latitude in interpreting what that means than allowed by the language in the SA. More importantly, CPA orders were unilateral acts without input or interpretation by a sovereign Iraq. This is vastly different from the current bilateral framework. Lastly, it is submitted that since service member conduct is a recognized key to creating a positive perception of the SA within the Iraqi population, and since U.S. Forces are attempting to help Iraq establish a system based on the rule of law, teaching U.S. Forces that the word "respect" means anything less than full compliance is not in the interests of mission success. This is true whether or not the word "respect" was intentionally inserted in the SA to provide an obligation different than required by the word "comply."

⁵⁵ SA, *supra* note 3, art. 4, para. 2.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* art. 4, para. 3.

⁵⁹ This is a common phrase used to describe the expected relationship between United States and Iraqi units. The policy to work by, with, and through the Iraqi Security Forces (ISF) has been described as follows:

ISF are the principal enforcers of security and stability in Iraq. These forces include the Iraqi Army, National Iraqi Police, Border Enforcement Police, Local Iraqi Police, and Facility Protection Services.

- Mentor ISF to enforce Iraqi Law
- Mentor ISF before illegal conduct escalates
- Mentor ISF to avoid serious corruption and sectarianism
- Allow ISF to take the lead when possible
- Don't enforce minor criminal laws

MULTI-NATIONAL CORPS–IRAQ, LEADERS' GUIDE TO THE SECURITY AGREEMENT pt. IV (n.d.) [hereinafter LEADERS' GUIDE] (on file with author).

left two Iraqis dead and resulted in the detention of six men.⁶⁰ The raid “set off public protests and drew a pointed complaint from Prime Minister Nuri Kamal al-Maliki that the operation violated [the SA].”⁶¹ U.S. Forces issued a statement that “the raid had been ‘fully coordinated and approved’ by the Iraqi government.”⁶² At the same time, “the Iraqi Defense Ministry announced it had detained two top Iraqi military officials in Wasit province for authorizing the American raid without obtaining approval from their commanders.”⁶³ This incident illustrates the difficulties of coordination, but despite the inherent challenges in such processes, the transition of security responsibilities to the ISF is a necessary part of creating a stable Iraq in which the ISF assumes the major role for defending the nation.

It is important to note that nothing in the SA, including Article 4, changes the overall mission of the U.S. Forces:

US Forces . . . will continue to focus on combating al-Qaeda and other extremist groups . . . continue to treat all Iraqi citizens with the utmost dignity and honor . . . continue to build Iraqi capacity to exercise full sovereignty and achieve sustainable stability, and . . . continue to help Iraq progress from a fragile state to one that is secure, stable, and committed to good governance and regional stability.⁶⁴

1. Use of Iraqi Territory, Security Commitments, and Deterrence of Security Threats

Although the U.S. Forces mission remains unchanged, during negotiations there were some concerns about the expansion of that mission to include binding obligations related to the deterrence of security threats. Specifically, some individuals in the United States questioned whether the Bush administration was using the SA to provide Iraq with a binding “security commitment” without the formal input of Congress, and which would tie the hands of the next U.S. president.⁶⁵ Whether there was originally any intent to do this or not, the end result is that the SA does not bind the United States to any particular course of action except “[i]n the event of any external or internal threat or aggression against Iraq . . . and upon request by the Government of Iraq, the Parties shall immediately initiate strategic deliberations.”⁶⁶ This provision adds very little to the security equation, since, in the face of any such threats, the United States would naturally engage in high level consultations with Iraq simply based on the potential jeopardy to the multitude of U.S. personnel in Iraq.

As for actions beyond the strategic deliberations, the SA provides that “as *may be mutually agreed*, the United States shall take appropriate measures . . . to deter such a threat.”⁶⁷ The agreement also makes it extremely clear that U.S. Forces in Iraq will not be used for U.S. purposes beyond their mission within Iraq. This issue arose at the end of October 2008, when U.S. Forces launched an attack from Iraq into Syria.⁶⁸ The operation was apparently targeted at foreign fighters moving through Syria into Iraq.⁶⁹ The GOI criticized the attack and declared that Iraqi territory should not be used for attacks on neighboring countries.⁷⁰ Since the SA was not yet signed,⁷¹ it was subject to modification to accommodate the GOI’s desire.

⁶⁰ Steven Lee Myers, *After a U.S. Raid: 2 Iraqis Dead, Protests and Regrets*, N.Y. TIMES, Apr. 26, 2009 at 8, available at <http://www.nytimes.com/2009/04/27/world/middleeast/27iraq.html>.

⁶¹ *Id.*

⁶² Ernesto Londono & Zaid Sabah, *Deaths in U.S. Raid Elicit Anger in Iraq*, WASH. POST, Apr. 27, 2009, at 6, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/26/AR2009042600410.html>

⁶³ *Id.*

⁶⁴ Letter from General Raymond T. Odierno, to the Soldiers, Sailors, Airmen, Marines, Coast Guardsmen, and Civilians of Multi-National Force–Iraq (Dec. 4, 2008).

⁶⁵ See, e.g., Letter from Senator Joseph R. Biden, Chairman of the Senate Committee on Foreign Relations, to the President of the United States (Dec. 19, 2007) (on file with author).

⁶⁶ SA, *supra* note 3, art. 27, para. 1.

⁶⁷ *Id.* (emphasis added).

⁶⁸ See Assoc. Press, *Syria: Deadly U.S. Attack “Serious Aggression”: Eight Reported Dead; U.S. Says Raid Targeted Foreign Fighter Network*, MSNBC.com, Oct. 26, 2008, <http://www.msnbc.msn.com/id/27389245/>.

⁶⁹ See *id.*

⁷⁰ See *Syria Protests Deadly Helicopter Raid to UN Chief*, VOA News.com, Oct. 28, 2008, <http://www.voanews.com/english/archive/2008-10/2008-10-28-voa22.cfm?CFID=135284429&CFTOKEN=10232382&jsessionid=de306f8fc7c2eed294f5f7d5d7b635205877>.

⁷¹ The SA was signed on 17 November 2008, approximately three weeks after the U.S. operation into Syria. See SA, *supra* note 3, signature page.

The restriction on the United States' use of Iraqi territory begins as a general principle in the SFA: "The United States shall not use Iraqi land, sea, and air as a launching or transit point for attacks against other countries."⁷² The SA reiterates the restriction in Article 27,⁷³ and then builds upon it by prohibiting the United States' use of Iraqi airspace, other than "exclusively for the purposes of implementing" the SA.⁷⁴ Similarly, the United States "shall use telecommunications systems exclusively for the purposes of" the SA.⁷⁵ The SA also limits U.S. Forces and contractors to importing and exporting "equipment, supplies, materials, and technology . . . exclusively for use by the United States Forces exclusively for the purposes of" the SA.⁷⁶ This is further enforced by granting Iraqi authorities "the right to request the United States Forces to open in their presence any container in which such items are being imported in order to verify its contents."⁷⁷ Lastly, U.S. Forces' use of cash and financial instruments in Iraq is limited to the exclusive purposes of the SA.⁷⁸ Obviously, every effort was made by Iraqi negotiators to foreclose the possibility of another unilateral operation into a neighboring country or any similar use of Iraqi territory. While this restriction is understandable, a future problem could arise concerning the limits of U.S. self-defense in border areas. As discussed in the next section, the SA permits U.S. Forces to act in self-defense.⁷⁹

2. U.S. Forces and Self-Defense

In addition to not changing the U.S. mission, the SA does not change U.S. Forces' right to self-defense. This is recognized in Article 4, paragraph 5, which states, "The Parties retain the right to legitimate self defense within Iraq, as defined in applicable international law."⁸⁰ This separate paragraph distinguishes self-defense from other "military operations that are carried out pursuant to" the SA.⁸¹ Thus, U.S. self-defense does not require coordination with Iraqi authorities. Nor would such a requirement make sense because self-defense is an "inherent right" of U.S. unit commanders.⁸² Plus, self-defense is exercised "in response to a hostile act or demonstrated hostile intent" and is therefore generally time-critical.⁸³ The word "legitimate" arguably adds no additional requirements to the practice of U.S. Forces, as all self-defense conducted in accordance with the Rules of Engagement (ROE) is considered legitimate.⁸⁴

Thus, the normal U.S. paradigm remains. A hostile act or demonstrated hostile intent remains sufficient grounds to engage the threat with proportional force, up to and including deadly force.⁸⁵ Yet despite this recognition of the standard U.S. self-defense paradigm, there is the potential for future friction on this issue. As previously discussed, the restriction on acting against Iraq's neighbors potentially affects self-defense at the border areas.⁸⁶ Thus, a hot pursuit in self-defense that resulted in crossing an international border would be problematic. Additionally, there is gray area between engaging in self-defense and the requirement that military operations be "fully coordinated with Iraqi authorities."⁸⁷ For instance, what if a U.S. patrol gets shot at by a sniper and the point-of-origin is inside a closed Iraqi military compound? Is it self-defense to enter the compound and look for the culprit? If the point-of-origin was a village, could U.S. Forces engage in a company-

⁷² SFA, *supra* note 5, sec. I, para. 4.

⁷³ See SA, *supra* note 3, art. 27, para. 3 ("Iraqi land, sea, and air shall not be used as a launching or transit point for attacks against other countries.").

⁷⁴ See *id.* art. 9. Iraqi airspace will be discussed in greater detail *infra* Part IV.D.

⁷⁵ *Id.* art. 11, para. 6; see *infra* Part IV.D (discussing frequencies and telecommunications in Iraq in greater detail).

⁷⁶ SA, *supra* note 3, art. 15, para. 1.

⁷⁷ *Id.*

⁷⁸ *Id.* art. 20, para. 1.

⁷⁹ See *id.* art. 4, para. 5.

⁸⁰ *Id.*

⁸¹ *Id.* para. 2.

⁸² INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK ch. 5, para. III.E.2.a(1) (2008) [hereinafter OPLAW HANDBOOK].

⁸³ *Id.*

⁸⁴ The word "arguably" is inserted into this sentence as it is entirely conceivable that a self-defense incident could give rise to controversy. "Each nation's understanding of what triggers the right to self-defense is often different, and will be applied differently . . ." *Id.* ch. 5, pt. IV.B, at 77; see IRAQI PENAL CODE (3d ed. 1969) (with amendments, pt. one, ch. 3, sec. 4, paras. 42–46), available at http://law.case.edu/saddamtria/documents/Iraqi_Code_1969.pdf (providing the Iraqi criminal law requirements to engage in self-defense).

⁸⁵ See, e.g., LEADERS' GUIDE, *supra* note 59, pt. I.

⁸⁶ See *supra* Part III.B.1.

⁸⁷ SA, *supra* note 3, art. 4, para. 2.

level cordon and search of the village? Or, at what point do patrols for purposes of force protection, or route clearance for convoys, become military operations requiring coordination? There is definite tension between the concept of self-defense and the requirement for coordination of military operations.

There is also the question of how expansive is the definition of hostile intent? The U.S. paradigm holds that it is “[t]he threat of imminent use of force against the United States, U.S. forces, or other designated persons or property. It includes the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. government property.”⁸⁸ The United States makes the determination of whether there is a threat of imminent use of force “based on an assessment of all facts and circumstances known to U.S. forces at the time and . . . [i]mminent does not necessarily mean immediate or instantaneous.”⁸⁹ Does this definition of an imminent threat allow U.S. Forces to take unilateral action (i.e., not coordinated with Iraqi authorities) based on intelligence that an individual poses an imminent threat to the security and stability of Iraq or U.S. Forces?

These questions are not easily answered. Since the SA entered into force on January 1, 2009, the United States and Iraq have been filling in the SA’s gray areas with a new custom of practice. To the extent that any disagreements arise, the intent is to resolve it at lower levels, but ultimately it could be up to the JMOCC to address.⁹⁰

C. Detention Operations

In addition to the changes in military operations established by Article 4, the SA also significantly modifies U.S. Forces’ detention operations. Before the SA took effect, U.S. Forces could detain any person believed to be a threat to the security or stability of Iraq.⁹¹ Detainees were essentially held for “imperative reasons of security,” which was not linked to a requirement for future criminal prosecution.⁹² Therefore, classified information and intelligence often served as the basis to detain. Following the SA’s implementation on January 1, 2009, no arrest or detention may be carried out without a valid arrest warrant issued by an Iraqi investigative judge (subject to the exceptions discussed in the next section below).⁹³ This warrant requirement comes from Article 22 of the SA, which states, “No detention or arrest may be carried out by the United States Forces . . . *except through an Iraqi decision* issued in accordance with Iraqi law”⁹⁴ Additionally, warrantless searches have also been curtailed. Article 22, paragraph 5 states, “The United States Forces may not search houses or other real estate properties *except by order of an Iraqi judicial warrant* and in full coordination with the Government of Iraq, except in the case of actual combat operations conducted pursuant to Article 4.”⁹⁵

To obtain a warrant (and ultimately a conviction), Iraqi judges require physical evidence and witnesses.⁹⁶ As U.S. Forces will be unable to share classified information with the Iraqi judges, they must shift to evidentiary based targeting and detentions and away from security and intelligence based targeting and detentions. That does not mean that classified intelligence is useless, only that operations must be conducted in a way that prepares for eventual criminal prosecution and conviction.

⁸⁸ OPLAW HANDBOOK, *supra* note 82, ch. 5, para. III.E.2.d, at 76.

⁸⁹ *Id.* para. III.E.2.e, at 76.

⁹⁰ *See* SA, *supra* note 3, art. 4, para. 2.

⁹¹ In general, this is based on the authority under the U.N. Security Council Resolutions. *See* UNSCR 1790, *supra* note 1; UNSCR 1546, *supra* note 1. Discussion about the basis of detention authority before the SA is beyond the scope of this article.

⁹² *See* Multi-National Force–Iraq, Press Conference with Major General Douglas Stone, Deputy Commanding General, Detainee Operations (Mar. 23, 2008) [hereinafter Stone Press Conference] (transcript available at http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=17793&Itemid=131).

⁹³ *See, e.g.,* LEADERS’ GUIDE, *supra* note 59, pt. II(1). As a civil law based system, Iraqi investigative judges play a far greater role in the investigation of crimes than any U.S. judge. It is imperative now for Judge Advocates and leaders within the U.S. Forces to be familiar with the civil law system in general, and Iraqi law specifically. A good resource to begin that familiarization is in chapters V and IX in the *Rule of Law Handbook*. *See* THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH. & CTR. FOR LAW AND MILITARY OPERATIONS, *RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES* chs. V, IX (2008).

⁹⁴ SA, *supra* note 3, art. 22, para. 1 (emphasis added). The full paragraph reads: “No detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the United States Forces and of the civilian component) except through an Iraqi decision issued in accordance with Iraqi law *and* pursuant to Article 4.” *Id.* (emphasis added). The emphasized “and” at the end of the paragraph is disjunctive, which provides an exception to the warrant requirement, as discussed *infra* Part III.C.1. Detention of U.S. personnel will be discussed *infra* Parts III.C.2 and IV.F.

⁹⁵ SA, *supra* note 3, art. 22, para. 5 (emphasis added).

⁹⁶ The requirements to obtain a warrant and conviction in Iraq are beyond the scope of this article.

1. Exceptions to the Warrant Requirement

The law often includes exceptions and there are several for the SA's warrant requirement. As already cited above, Article 22's requirement for a *search* warrant is not applicable during "combat operations conducted pursuant to Article 4."⁹⁷ This is the only exception. The requirement to have a warrant to *detain*,⁹⁸ on the other hand, has two exceptions that apply: (1) U.S. Forces may detain a person who is engaging in combat activity,⁹⁹ or (2) U.S. Forces may detain a person who is committing a serious crime.¹⁰⁰

At first blush, the "combat activity exception" appears deceptively simple. First, as with the search warrant exception, if U.S. Forces are engaged in an approved mission under SA Article 4,¹⁰¹ there is no warrant requirement to detain or capture an individual that is either a target of that approved mission, is taking a direct part in hostilities, or is otherwise a threat to the security or stability of Iraq, because U.S. Forces are operating under law of armed conflict authorities.¹⁰² An example is when servicemembers witness someone planting an improvised explosive device (IED). In such a scenario, U.S. Forces do not require an arrest warrant issued by an Iraqi judge to detain the person.

The "combat activity exception" is also applicable if U.S. Forces are acting in self-defense under the ROE. It would be absurd to accept a contrary interpretation that results in the legal authority to kill a person in self-defense but denies the legal authority to detain the same person under those circumstances.¹⁰³ The more difficult questions relating to self-defense are those involving Article 4's requirement of coordination, as discussed earlier in Part III.B.2. However, this coordination issue potentially overlaps with the warrant exceptions as well. To return to the hypothetical previously posed, what if the United States decides to take unilateral action purported to be in self-defense (i.e., not coordinated with Iraqi authorities) based on intelligence that an individual poses an imminent threat to the security and stability of Iraq or U.S. Forces? If it is unilateral, then it is not authorized by the SA, unless it is in self-defense. If the Iraqis do not support the U.S. interpretation of the imminent threat element of hostile intent,¹⁰⁴ then related detentions could be considered unauthorized. This, in turn, could result in the release of any persons detained. Clearly, the way to avoid this situation is to maximize U.S.-Iraq coordination.

The more problematic exception to the arrest warrant requirement is when U.S. Forces observe "criminal activity." For the exception to apply, U.S. Forces will need to observe the activity first-hand.¹⁰⁵ Should servicemembers intervene when

⁹⁷ SA, *supra* note 3, art. 22, para. 5.

⁹⁸ *Id.* art. 22, para. 1.

⁹⁹ This is not stated directly in the SA but can be based on an interpretation of the SA in conjunction with the law of armed conflict.

¹⁰⁰ This is not stated directly in the SA but can be based on an interpretation of the SA in conjunction with Iraqi law. The Iraq Law on Criminal Proceedings states: "Any person may arrest any other person accused of a felony or misdemeanour without an order from the authorities concerned . . . [i]f the offence was committed in front of witnesses." 2 IRAQI LAW ON CRIMINAL PROCEEDINGS WITH AMENDMENTS, Civil Proceedings para. 102(A)(i) (1971) [hereinafter IRAQI LAW ON CRIMINAL PROCEEDINGS] (Baghdad, Iraq), available at http://law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf; see also LEADERS' GUIDE, *supra* note 59, pt. II(2).

¹⁰¹ As discussed *supra* note 94, this is based on a reading of a disjunctive "and" within Article 22, para. 1.

¹⁰² The authority to detain is based on the proposition that Iraq is engaged in an internal armed conflict, that the United States is a party to that internal armed conflict pursuant to the security agreement, which includes a request for U.S. assistance in maintaining security and stability in Article 4. See SA, *supra* note 3, art. 4, para. 1. Therefore, the law of noninternational armed conflict applies in Iraq which permits the capture, detention or internment of various actors. Further discussion on LOAC detention rules is beyond the scope of this article, but for an excellent analysis of the various LOAC sources of detention authority see Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48 (2009), available at <http://www.law.harvard.edu/faculty/rgoodman/pdfs/RGoodmanCivilianDetentionAJIL.pdf>.

[I]f states have authority to engage in particular practices in an international armed conflict (e.g., targeting direct participants in hostilities), they a fortiori possess the authority to undertake those practices in noninternational conflict. Simply put, whatever is permitted in international armed conflict is permitted in noninternational armed conflict. Hence, if IHL permits states to detain civilians in the former domain, IHL surely permits states to pursue those actions in the latter domain.

Id. at 50 (citations omitted).

¹⁰³ See Goodman, *supra* note 102, at 57.

¹⁰⁴ See discussion *supra* note 89.

¹⁰⁵ See, e.g., LEADERS' GUIDE, *supra* note 59, pt. II(2). Additionally, the Iraqi Law on Criminal Proceedings states:

The offence is considered witnessed if it was witnessed whilst being committed or a shortly afterwards or if the victim followed the perpetrator afterwards or if shouting crowds followed him afterwards or if the perpetrator was found a short while later carrying the equipment or weapons or goods or documents or other things pointing to the fact that he was a perpetrator or participant in the offence or if traces or signs indicate this at the time.

IRAQI LAW ON CRIMINAL PROCEEDINGS, *supra* note 100, para. 1(B).

any crime is observed? The policy guidance is “no.” The mission of U.S. Forces is not to enforce minor Iraqi criminal laws.¹⁰⁶ Specific direction provided to U.S. Forces leaders states:

ISF are in the lead for law enforcement. When minor crimes are observed, report to ISF. Do not enforce minor Iraqi laws to the detriment of your primary mission. However, a seemingly minor crime, such as a curfew violation, may be evidence of a more serious crime and require assessment. Use judgment and discretion and work **by/with/through the ISF**. Crimes where, absent exceptional circumstances, US Forces should not intervene:

Crimes When there is NO Risk of Imminent Harm:

- Pick pocketing
- Trespassing
- Minor altercations between LNs [Local Nationals]
- Burglary/robbery
- Fraud and bribery
- Traffic violations
- Squatting
- Drunk and disorderly¹⁰⁷

The guidance to leaders goes on to discuss crimes in which U.S. Forces should intervene, such as terrorism crimes,¹⁰⁸ crimes threatening death or grievous bodily harm,¹⁰⁹ or crimes threatening public properties.¹¹⁰ Deciding when to detain without a warrant, and when not to, will not be an easy task for those faced with the realities on the ground. Ultimately, the preferred course of action is for the ISF to take the lead on the detention of any individual.

2. Post-Detention Requirements

If U.S. Forces, instead of the ISF, detain a person, they must comply with another significant change in operations. The SA requires that when U.S. Forces “detain or arrest persons as authorized by this Agreement or Iraqi law, such persons *must be handed over to competent Iraqi authorities within 24 hours* from the time of their detention or arrest.”¹¹¹ Who the “competent” Iraqi authority, or CIZA,¹¹² is will depend on the area of operations. In some cases the CIZA is still being determined. It could be an Iraqi Army commander at certain levels, or it could be the local police chief. What is important is that the CIZA has the authority to extend U.S. Forces detention of the individual.¹¹³ An Iraqi investigative judge can also serve in this capacity, but for the judge to issue a detention order, U.S. Forces will need to provide evidence of criminal conduct.¹¹⁴ Without CIZA authorization, a detainee must be released at the end of twenty-four hours.¹¹⁵

¹⁰⁶ See, e.g., LEADERS’ GUIDE, *supra* note 59, pt. IV.

¹⁰⁷ *Id.* pt. VII.

¹⁰⁸ *Id.* pt. VIII (including possession or emplacement of explosives/IED materials, torture, kidnapping, and possession of unauthorized weapons).

¹⁰⁹ *Id.* (including murder, rape, assault, battery, and arson).

¹¹⁰ *Id.* Such crimes include causing damage to infrastructure or critical public utilities, stealing or causing serious damage to public property and riotous looting. See *id.*

¹¹¹ SA, *supra* note 3, art. 22, para. 2 (emphasis added).

¹¹² “IZ” is an acronym used to indicate “Iraq.”

¹¹³ See SA, *supra* note 3, art. 22, para. 3. This provision states, “The Iraqi authorities may request assistance from the U.S. Forces in detaining or arresting wanted individuals.” *Id.* Not only does this provision relate to the competent authority authorizing continued detention of an individual by U.S. Forces, but it also authorizes a situation where ISF asks U.S. Forces to take a detainee for them. However, holding persons for ISF should be the exception and not the norm. United States Forces personnel facing such a situation should seek chain-of-command guidance and approval.

¹¹⁴ See *supra* notes 91 to 110 and accompanying text (discussion regarding warrants).

¹¹⁵ Another option is to turn over the detainee to the ISF.

It is also not entirely clear from the SA when the twenty-four hour clock starts. The SA uses the language “from the time of their detention or arrest.”¹¹⁶ But is that at the point of capture? Is it at some point after the individual is processed? However this ambiguity is resolved, it certainly will not add much (if any) time to the detention clock. Therefore, U.S. Forces must move quickly to gain an extension of time or turn over the individual to Iraqi authorities.

One final note on detention and warrants: Article 22 does not apply when U.S. Forces arrest or detain members of their own force or of the civilian component.¹¹⁷ Such arrests and detentions can continue in accordance with U.S. domestic and military laws and regulations. However, detention or arrest of U.S. contractors and their employees by U.S. Forces is *not* specifically provided for under the SA. This could potentially affect the maintenance of good order and discipline on base. This issue, and contractors in general, will be discussed in greater detail in Part IV.F.

3. Legacy Detainees

In addition to reducing the U.S. ability to unilaterally detain personnel to only twenty-four hours, Article 22 also addresses the status of all the detainees held by U.S. Forces when the SA entered into force. At one point in 2007, the population of detainees held by U.S. Forces was in excess of 25,000.¹¹⁸ Although this was significantly reduced throughout 2008,¹¹⁹ there were still over 15,000 detainees in U.S. custody at the start of 2009.¹²⁰ Under the SA, the United States must provide the GOI with “available information on all detainees who are being held by them.”¹²¹ Based on this information, Iraqi authorities will issue arrest warrants for those who are wanted for criminal offenses.¹²² The United States will turn custody over to Iraq for those with warrants and the remainder shall be released “*in a safe and orderly manner*, unless otherwise requested by the Government of Iraq and in accordance with Article 4 of this Agreement.”¹²³

Out-processing detainees for release is a very involved process. To do it in the “safe and orderly manner” required by the SA takes time. The process requires that they undergo a physical exam, after which they are provided with any follow-on medication they may need.¹²⁴ Their property is then returned, they are paid any money that is owed them for work completed during their detention, given clothes, and then out-processed for release at their point of capture.¹²⁵ Thus, U.S. Forces have determined they can release approximately 50 detainees a day, for a total of 1500 a month, in a “safe and orderly manner.”¹²⁶ This will continue into the summer of 2009.¹²⁷ Based on available evidence and intelligence information, the United States has prioritized the planned releases from the least-dangerous to the most.¹²⁸ Ultimately, there will be 5000–6000 detainees left that are “the most dangerous.”¹²⁹ It is hoped there will be sufficient evidence to obtain Iraqi detention orders for these

¹¹⁶ SA, *supra* note 3, art. 22, para. 2.

¹¹⁷ See *id.* art. 22, para. 1 (“No detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the United States Forces and of the civilian component) except through an Iraqi decision issued in accordance with Iraqi law and pursuant to Article 4.”).

¹¹⁸ See Stone Press Conference, *supra* note 92. This rise in detainees resulted from the “surge” of U.S. Forces brought in to help stabilize the country.

¹¹⁹ A record 18,500 Iraqi detainees were freed in 2008. See Andrea Stone, *Some Worried About Detainee Transfer to Iraq*, USA Today.com, Jan. 25, 2009, http://www.usatoday.com/news/world/2009-01-25-detainees_N.htm.

¹²⁰ As of 23 February 2009 there were 14,270 after the release of approximately 1200 in the month of February in accordance with the SA. See *id.*

¹²¹ SA, *supra* note 3, art. 22, para. 4.

¹²² *Id.* art. 22, para. 4.

¹²³ *Id.* (emphasis added).

¹²⁴ See Multi-National Force–Iraq, Media Roundtable: Brig. Gen. David Quantock, Deputy Commanding General of MNF-I Detainee Operations and CG of Task Force 134 (Feb. 23, 2009) [hereinafter Quantock Media Roundtable] (transcript available at http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=25573&Itemid=128).

¹²⁵ Property used as evidence will not be returned. See *id.* Many detainees earn \$4 an hour working at U.S. detention facilities. See *id.*

¹²⁶ See *id.* The United States began executing this plan in February but was only able to release approximately 1200 detainees. *Id.* However, expectations were that the goal of 1500 a month would be reached in March. See *id.*

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *id.*

detainees and to ultimately convict them in the Iraqi courts.¹³⁰ But if not, those individual deemed the most dangerous will also be released.¹³¹

Once the total number of detainees held by the United States is below 8000, U.S. Forces plan to shut down the detention facility at Camp Bucca.¹³² There is a new facility opening in Taji which will hold approximately 5000 detainees with detention orders or convictions.¹³³ This facility will be transferred to the GOI in December of 2009 or early 2010, at which point only Camp Cropper will continue to be a joint facility between the Iraqis and the U.S. Forces. The plan is for that facility to also be transferred to the GOI sometime in 2010.¹³⁴

Part IV. The Status of U.S. Forces

Thus far, this article has focused on the specifics of U.S. military operations, including self-defense and detainee operations. Now it is appropriate to step back and look at the overall status of U.S. Forces in Iraq. Although the U.S.-Iraq SA is not being referred to as a SOFA, there are still many provisions within in it that are typical of other SOFAs.¹³⁵ This section discusses some of those provisions, specifically those related to jurisdiction, freedom of movement, claims, airspace, frequencies, basing and contracting.

A. Criminal Jurisdiction Over U.S. Personnel

Generally, a key provision of any agreement about the status of foreign forces in a country discusses the division of jurisdiction between the parties. The general rule in international law is that “foreign military personnel and their dependents, while stationed within the territory of another country, are fully subject to the law of that country unless expressly or impliedly exempted by the host country through agreement with the sending state, or by operation of customary international law.”¹³⁶ This is based on the concept of territorial jurisdiction in which “a sovereign nation has jurisdiction over all persons found within its borders.”¹³⁷ Thus, a nation which receives deployed forces (known as the “receiving state”) will have jurisdiction over those forces by virtue of territorial sovereignty.

An exception to this general rule arises from the law of armed conflict which recognizes “that military forces in enemy territory, including occupied territory, are immune from the jurisdiction of local law.”¹³⁸ This concept arose from the proposition that when armed forces are deployed for combat they are subject to the exclusive jurisdiction of the “sending state” which deployed them.¹³⁹ This has been referred to as the “law of the flag.”¹⁴⁰

¹³⁰ See Stone, *supra* note 119.

¹³¹ See Quantock Media Roundtable, *supra* note 124.

¹³² See *id.*; see also Stone, *supra* note 119.

¹³³ See Quantock Media Roundtable, *supra* note 124; see also Stone, *supra* note 119.

¹³⁴ See *id.*

¹³⁵ The following articles in the SA would be considered standard SOFA provisions: The Preamble, Article 1 (scope and purpose), Article 2 (definition of terms), Article 3 (laws), Article 5 (property ownership), Article 6 (use of agreed facilities and areas), Article 7 (positioning and storage of defense equipment), Article 8 (protecting the environment); Article 9 (movement of vehicles, vessels, and aircraft), Article 10 (contracting procedures), Article 11 (services and communications), Article 12 (jurisdiction), Article 13 (carrying weapons and apparel), Article 14 (entry and exit), Article 15 (import and export), Article 16 (taxes), Article 17 (licenses or permits), Article 18 (official and military vehicles), Article 19 (support activities services), Article 20 (currency and foreign exchange), Article 21 (claims), Article 23 (implementation), and Article 29 (implementing mechanisms). SA, *supra* note 3.

The following Articles in the SA would be considered “non-standard” SOFA provisions: Article 4 (missions), Article 22 (detention), Article 24 (withdrawal of the U.S. Forces from Iraq), Article 25 (measures to terminate the application of chapter VII to Iraq), Article 26 (Iraqi assets), Article 27 (deterrence of security threats), Article 28 (The Green Zone), and Article 30 (The period for which the agreement is effective). *Id.*

¹³⁶ Colonel Richard J. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F.L. REV. 137, 138 (1994) (providing an excellent overview of the history, purpose and content of SOFAs); see also Major Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F.L. REV. 169, 186 (1994).

¹³⁷ OPLAW HANDBOOK, *supra* note 82, ch. 7, para. IV.B.1.b, at 121.

¹³⁸ Erickson, *supra* note 136, at 138.

¹³⁹ OPLAW HANDBOOK, *supra* note 82, ch. 7, para. IV.B.1.c, at 121.

¹⁴⁰ See Lieutenant Commander Ian Wexler, *A Comfortable SOFA: The Need for an Equitable Foreign Criminal Jurisdiction Agreement with Iraq*, 56 NAVAL L. REV. 43, 54–55. This “law of the flag” in its original meaning dealt with “the immunity of a military force temporarily passing through the territory of another state in peacetime.” Erickson, *supra* note 136, at 138.

It was the law of the flag that applied to U.S. and coalition forces during the initial 2003 Iraq campaign and the subsequent occupation. However, as the multinational forces mission in Iraq shifted toward restoring sovereignty to the Iraqis, something beyond the law of the flag was desired to ensure the continued immunity of those forces from Iraqi legal processes. The Coalition Provisional Authority (CPA), which wielded legislative, executive, and judicial powers in Iraq,¹⁴¹ thus issued CPA Order 17.¹⁴² This order was specifically intended to substitute for a SOFA.¹⁴³ The desired immunity was set forth as follows:

Unless provided otherwise herein, the MNF [Multinational Force], the CPA [Coalition Provisional Authority], Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants *shall be immune from Iraqi legal process.*

. . . .

All MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to the *exclusive* jurisdiction of their Sending States. They *shall be immune* from any form of arrest or detention other than by persons acting on behalf of their Sending States . . .

The Sending States of MNF Personnel shall have the right to exercise within Iraq any criminal and disciplinary jurisdiction conferred on them by the law of that Sending State over all persons subject to the military law of that Sending State.¹⁴⁴

Under the new SA, the blanket immunity originally created by CPA Order 17 has been altered.¹⁴⁵ The general rule in international law, that a sovereign nation has jurisdiction over all persons found within its borders, is now applicable.¹⁴⁶ Thus Iraq has jurisdiction over members of the U.S. Forces within the country by virtue of its sovereignty. But the United States also has jurisdiction based on the Uniform Code of Military Justice and other domestic U.S. legislation.¹⁴⁷ This is known as a situation of “concurrent jurisdiction” vice “exclusive jurisdiction.” In other words, both states could exercise jurisdiction. Therefore an agreement between the sending and receiving states is necessary to clarify the legal relationships. The SA fulfills this function in Article 12.

The end result of Article 12 is that the United States continues to retain the *primary* right to exercise jurisdiction over members of the U.S. Forces and of the civilian component in most cases. But, the GOI now has the *primary* right to exercise jurisdiction over U.S. contractors and their employees,¹⁴⁸ as well as over members of the U.S. Forces and the civilian

This principle that a military force “operating on foreign soil is in no way subject to the territorial sovereign and exercises an exclusive right of jurisdiction over its members” . . . governed U.S. foreign policy and military policy for almost 150 years. Its view that U.S. forces were abroad were subject only to the laws of the United States was also embraced by many other nations with forces outside their borders. Customary international law thus evolved to the point where license to enter foreign territory carried with it an express or implied right to maintain military discipline free from the territorial sovereign’s interference.

Lepper, *supra* note 136, at 171 (citation omitted). However, after World War II, there was a complete reversal of this traditional doctrine such that “negotiation of a SOFA became imperative because no exception to the general rule [that territorial jurisdiction extends to foreign military personnel] could be relied upon any longer by any nation.” Erickson, *supra* note 136, at 139. Thus the “law of the flag” today relates only to the law of armed conflict exception that military forces in enemy territory, including occupied territory, are immune from the jurisdiction of local law.

¹⁴¹ The CPA was established as a transitional government following the invasion of Iraq by the United States, United Kingdom and the other members of the coalition of the willing which was formed to oust the government of Saddam Hussein in 2003. The CPA’s authority was set forth in CPA Regulation Number 1 and was based on “relevant U.N. Security Council resolutions, including Security Council Resolution 1483 (2003), and the laws and usages of war.” COALITION PROVISIONAL AUTHORITY REGULATION NO. 1 (16 May 2003) [hereinafter CPA ORDER NO. 1]; *see also* S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

¹⁴² *See* CPA ORDER 17, *supra* note 54.

¹⁴³ Wexler, *supra* note 140, at 43–44.

¹⁴⁴ CPA ORDER 17, *supra* note 54, sec. II, paras. 1, 3, 4 (emphasis added).

¹⁴⁵ Even though the CPA dissolved on 30 June 2004, its orders remained in effect pursuant to the Law of Administration for the State of Iraq for the Transitional Period. Law of Administration for the State of Iraq for the Transitional Period art. 26 (c) (Mar. 8, 2004), *available at* <http://www.cpa-iraq.org/government/TAL.html> (“The laws, regulations, orders, and directives issued by the Coalition Provisional Authority pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law.”).

¹⁴⁶ *See* discussion *supra* Part IV.

¹⁴⁷ *See* UCMJ art. 2(a)(10) (2008); Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. ch. 212 (2006) [hereinafter MEJA].

¹⁴⁸ SA, *supra* note 3, art. 12, para. 2.

component who commit “grave premeditated felonies . . . when such crimes are committed *outside* agreed facilities and areas and *outside* duty status.”¹⁴⁹ Additionally, Iraq can request the United States to waive its primary right to jurisdiction in a particular case, and vice versa.¹⁵⁰

1. Addressing U.S. Concerns About the Exercise of Iraqi Criminal Jurisdiction

Leaving aside the issues of civil jurisdiction and jurisdiction over contractors for now,¹⁵¹ the idea of subjecting U.S. servicemembers to the *criminal* jurisdiction of Iraq is troublesome for many Americans. Concerns are heightened by questions about the capacity and fairness of the Iraqi criminal justice system.¹⁵² The SA addresses these concerns in a number of ways.

First, as mentioned above, Iraq will only have the primary right to exercise jurisdiction in a limited number of situations involving grave premeditated felonies. These felonies will be enumerated by a Joint Committee.¹⁵³ Second, primary Iraqi jurisdiction only applies when the grave premeditated felonies are committed off base *and* off duty.¹⁵⁴ This should be extremely rare. Additionally, the duty status of members will be determined by U.S. authorities, not Iraqis.¹⁵⁵ Therefore, this involves only a very small number of persons, if any, and they will be ones who have committed an abhorrent act against the local populace.¹⁵⁶ By agreeing to primary Iraqi jurisdiction (albeit in very narrowly tailored situations) the U.S. Government signals to critics “that it does not act with impunity in Iraq; that it respects the Iraqi judicial system that it has helped to regenerate; and that the U.S. truly considers Iraq to be a sovereign nation capable of managing its affairs.”¹⁵⁷

The third way in which the SA addresses the concerns about the capacity and fairness of the Iraqi criminal justice system is by limiting the pre-trial custody of a member of the U.S. Forces or civilian component. Iraqi authorities may not arrest or detain such persons for more than twenty-four hours before turning them over to U.S. authorities, who will then maintain custody of the accused member.¹⁵⁸ Fourth, in order to exercise its right to primary jurisdiction over a member of U.S. Forces or of the civilian component, Iraq must notify the United States “in writing within 21 days of the discovery of an alleged

¹⁴⁹ *Id.* art. 12, para. 1

¹⁵⁰ *Id.* art. 12, para. 6. A full discussion of waivers of jurisdiction is beyond the scope of this article, however readers should consider the guidance set out in Army Regulation 27-50/SECNAVINST 5820.4G, *Status of Forces Policies, Procedures, and Information* which, in general, lays out the considerations and procedures to follow if the designated Commanding Officer (DCO) believes that a request should be made for a foreign country to forego their right to exercise jurisdiction over an accused, and also establishes that the United States will not grant a waiver of U.S. jurisdiction without prior approval of the Judge Advocate General of the accused’s Service. See U.S. DEP’T OF ARMY, REG. 27-50/ SECNAVINST 5820.4G, STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION para. 1-7 (15 Dec. 1989).

¹⁵¹ Civil jurisdiction will be discussed *infra* Part IV.C and contractors will be discussed *infra* Part IV.F.

¹⁵² See, e.g., HUMAN RIGHTS WATCH, THE QUALITY OF JUSTICE: FAILINGS OF IRAQ’S CENTRAL CRIMINAL COURT (2008), available at <http://www.hrw.org/en/reports/2008/12/14/quality-justice-0>.

¹⁵³ SA, *supra* note 3, art. 12, paras. 1, 8. The term “joint” reflects that the committee is composed of both United States and Iraqi representatives.

¹⁵⁴ *Id.* art. 12, para. 1. The importance of this protection has already been demonstrated. In the disputed raid discussed *supra* Part III.B, Iraq’s prime minister made a statement that “his government intends to prosecute U.S. soldiers who carried out the operation.” Londono & Sabah, *supra* note 62. However, under no reasonable interpretation of the SA does the agreement give jurisdiction to Iraq over U.S. Forces engaged in operations ordered by U.S. commanders. Even when those operations have not been “fully coordinated” to the Iraqi’s satisfaction under Article 4 of the SA, Iraq has no reasonable basis to claim such U.S. Forces have forfeited their “duty status” for purposes of Iraqi prosecution under Article 12 of the SA. “American officials, speaking on the condition of anonymity, suggested Prime Minister Nouri al-Maliki’s move could be politically motivated. National elections are to be held next winter.” *Id.*

¹⁵⁵ SA, *supra* note 3, art. 12, para. 9. However:

In those cases where Iraqi authorities believe the circumstances require a review of [the U.S. certification that a member was in a duty status] the Parties shall consult immediately through the Joint Committee, and United States Forces authorities shall take full account of the facts and circumstances and any information Iraqi authorities may present bearing on the determination by United States Forces authorities.

Id.

¹⁵⁶ Consider, for instance, the 9 July 2006 incident at Mahmoudiya. See Wexler, *supra* note 140, at 47. This is perhaps the most egregious crime to-date by U.S. servicemembers against Iraqi citizens. *Id.* On that day, five U.S. Soldiers in the village of Mahmoudiya raped, mutilated, and murdered a young Iraqi girl and her family. *Id.* Four of the five Soldiers have plead guilty and/or been convicted at court-martial. *Id.* The fifth Soldier was discharged from the military before facing court-martial and was recently convicted in U.S. district court. See Fifth Campbell Robertson & Atheer Kakan, *Iraqis Seek Death Penalty for American*, N.Y. TIMES, May 8, 2009, available at <http://www.nytimes.com/2009/05/09/world/middleeast/09green.html>.

¹⁵⁷ Wexler, *supra* note 140, at 81.

¹⁵⁸ SA, *supra* note 3, art. 12, para. 5.

offense” of its intent to exercise jurisdiction.¹⁵⁹ Failure to do so would be grounds for the United States to exercise jurisdiction. Fifth, and perhaps most importantly, if Iraq exercises primary jurisdiction, the member “shall be entitled to due process standards and protections consistent with those available under United States and Iraqi law.”¹⁶⁰ These due process standards and protections must be established by the Joint Committee.¹⁶¹

2. What About Double Jeopardy?

One due process concern that is not clearly addressed by the SA is the issue of double jeopardy. Article 12 discusses when the United States or Iraq has the *primary* right to exercise jurisdiction over members, but does not discuss the subsequent exercise of jurisdiction by either State. Although not technically double jeopardy,¹⁶² “[i]n any system involving two or more sovereigns capable of prosecuting offenses, the question of double jeopardy arises”¹⁶³ in that both sovereigns could prosecute an individual for the same offense. When the NATO SOFA was drafted, this possibility was acknowledged and the following constraint was laid out:

Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offense within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of another Contracting Party.¹⁶⁴

No similar language is found in the SA. Thus, although the United States has, in most cases, the “*primary* right to exercise jurisdiction,” there appears to be no limitation on the subsequent exercise of Iraqi jurisdiction. The potential loophole is cause for concern. What if the GOI is not satisfied with the manner in which the United States has exercised jurisdiction? For instance, what if U.S. authorities decide to exercise nonjudicial punishment in a case instead of pursuing a court-martial?¹⁶⁵ Such decisions have legitimate bases, such as evidentiary concerns, but could clearly be unsatisfactory to Iraqi officials and politicians. Or what if an accused is acquitted, or receives a light sentence?¹⁶⁶ Iraqi outrage could lead to a request to hand the servicemember over to the Iraq criminal system. The possibility of this occurring is increased because the SA requires the United States to “seek to hold the trials of . . . cases [involving a victim who is not a member of the U.S. Forces or of the civilian component] *inside Iraq*.”¹⁶⁷ Thus, not only is the potential visibility of such cases increased, it is also logistically easier for Iraq to seek the turnover of a member since they will still be present in Iraq.¹⁶⁸ As a final added concern, the “due process standards and protections” to which members are entitled under Article 12, paragraph 8 appear to apply only “[w]here Iraq exercises jurisdiction pursuant to paragraph 1”¹⁶⁹ involving its “primary right to exercise

¹⁵⁹ *Id.* art. 12, para. 6.

¹⁶⁰ *Id.* art. 12, para. 8.

¹⁶¹ *Id.* These standards have not yet been established. For a suggestion about a joint or “hybrid” United States-Iraqi court, based in Iraq, to decide the outcome of such cases, see Wexler, *supra* note 140, at 84–85.

¹⁶² Double jeopardy is “the fact of being prosecuted twice for substantially the same offense.” BLACK’S LAW DICTIONARY 506 (7th ed. 1999). If prohibited, this generally only applies to the *same* sovereign. As discussed here, there are two different sovereigns, the United States and the Republic of Iraq.

¹⁶³ Lepper, *supra* note 136, at 177.

¹⁶⁴ North Atlantic Treaty: Status of Forces art. VII, para. 8, June 19, 1951, 4 U.S.T. 1792 [hereinafter NATO SOFA]. The reader should note that even this language has not proven to be trouble-free. When has an accused been “tried” for purposes of this paragraph? If the United States exercises prosecutorial discretion not to prosecute, does that suffice? What about the exercise of military discipline or administrative procedures instead of court-martial? “Unfortunately, none of these questions have simple answers [but] . . . [i]t is generally the United States’ position that when it acquires primary jurisdiction . . . its decision not to proceed to trial is an exercise of jurisdiction sufficient to preclude receiving state prosecution.” Lepper, *supra* note 136, at 178 (citing J. SNEE & K. PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION 68, 71 (1957)).

¹⁶⁵ See UCMJ art. 15 (2008) (regarding nonjudicial punishment).

¹⁶⁶ It is entirely probable this could happen. See Wexler, *supra* note 140, at 45–48 (reviewing how some Iraq combat related killings resulted in court-martial sentences that were correspondingly light, did not make it to trial, or ended in acquittal).

¹⁶⁷ SA, *supra* note 3, art. 12, para. 7 (emphasis added).

¹⁶⁸ Additionally, Article 14 of the SA covers entry and exit procedures for U.S. Forces and of the civilian component, and requires the United States to submit lists of the names of members entering and leaving Iraq. *Id.* art. 14. Personnel should discard any thoughts of slipping a member out of Iraq in the dead of night before charges are filed or before the news breaks.

¹⁶⁹ *Id.* art. 12, para. 8.

jurisdiction . . . for . . . grave premeditated felonies.”¹⁷⁰ Arguably, this does not apply to a case where Iraq exercises subsequent jurisdiction, vice primary.

The worst case scenario seems to be a serious case that begins with the United States exercising *primary* jurisdiction, such as where an on-duty U.S. Soldier is alleged to have negligently killed an Iraqi civilian.¹⁷¹ On that basis, the United States asserts jurisdiction, investigates, and then decides not to prosecute; or exercises nonjudicial punishment; or actually prosecutes at court-martial and the Soldier is acquitted. The GOI, dissatisfied with the case result, then seeks to assert jurisdiction, and at the same time argues that the procedural guarantees promised under Article 12 do not apply. Although GOI refusal to grant procedural guarantees seems unlikely, assertion of secondary jurisdiction is entirely foreseeable. Consider the events in South Korea in 2002 when:

[A] fifty-seven-ton U.S. armored vehicle en route to a U.S. training site ran over and killed two Korean girls near a village in rural South Korea. At the time of the incident, the U.S. asserted that both U.S. service members in the armored vehicle were operating in their “official duty” capacity and not subject to Korean law. Pursuant to the Korea SOFA . . . Korea requested waiver of primary jurisdiction. The request was denied. Both U.S. service members were prosecuted under the UCMJ for negligent homicide and acquitted by military juries.

Both the refusal to waive jurisdiction in favor of the South Korean Government and the subsequent acquittals of the two service members were the focus of violent and prolonged protests against the U.S. military presence in Korea.¹⁷²

The difference between the South Korean incident and the hypothetical posed here is that the Korea SOFA has a double jeopardy provision that is virtually identical to the provision in the NATO SOFA.¹⁷³ Therefore, the acquitted servicemembers were clearly protected.

One possible legal argument against a secondary assertion of jurisdiction by Iraq is that when the United States exercises jurisdiction under SA Article 12, members “shall be entitled to due process standards and protections pursuant to the Constitution and laws of the United States.”¹⁷⁴ Since the Fifth Amendment to the U.S. Constitution provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb,”¹⁷⁵ this *arguably* precludes a subsequent Iraqi exercise of jurisdiction, but not clearly so. The argument is potentially further strengthened by reference to the Iraqi Constitution, which also has a provision concerning “double jeopardy.”¹⁷⁶ But ultimately, the difference between that legalistic argument and an explicit double jeopardy clause within the agreement, is a lack of clarity. In an emotional situation involving Iraqi victims, it is entirely conceivable that constitutional arguments will fail in the face of internal Iraqi politics and domestic pressure.

United States Forces commanders and legal practitioners need to understand that the basic proposition that “there’s only Iraqi jurisdiction if the member is off-base and off-duty” is an over-simplification. Even though an offense has not met the definition of a “grave premeditated felony” under the SA, there is still the potential for Iraq to exercise jurisdiction over a servicemember. In such cases, political and diplomatic solutions may be all that stands between a servicemember and the exercise of Iraqi jurisdiction.

¹⁷⁰ *Id.* art. 12, para. 1.

¹⁷¹ Such a case would result in primary U.S. jurisdiction because of the member’s on-duty status and because the allegation does not imply any premeditation. Therefore, the situation is not a “grave *premeditated* felon[y] . . . committed . . . outside duty status” that would give Iraq the primary right to exercise jurisdiction. *Id.*

¹⁷² Wexler, *supra* note 140, at 62 (citations omitted).

¹⁷³ *See* Facilities and Areas and the Status of United States Armed Forces in Korea U.S.-S. Korea art. XXII, para. 8, July 9, 1966, 17 U.S.T. 1677.

¹⁷⁴ SA, *supra* note 3, art. 12, para. 7.

¹⁷⁵ U.S. CONST. amend. V.

¹⁷⁶ IRAQ CONST. art. 19(5) (2005) (“The accused may not be tried for the same crime for a second time after acquittal unless new evidence is produced.”) The reader will note that this is not an explicit bar, since new evidence can permit another prosecution even after acquittal.

3. Mutual Legal Assistance

One final note on Article 12 is that it provides for mutual legal assistance in paragraph 4: “At the request of either Party, the Parties shall assist each other in the investigation of incidents and the collection and exchange of evidence to ensure the due course of justice.”¹⁷⁷

Such a provision is generally considered to be important to the United States which may need to invoke it as a basis to obtain information for courts-martial.¹⁷⁸ However, this is a two-way street and Iraq has the right to expect U.S. cooperation when it comes to providing support to Iraqi investigations of U.S. personnel.¹⁷⁹

B. U.S. Forces Freedom of Movement

The SA grants U.S. Forces substantial freedom of movement within Iraq.¹⁸⁰ This is a necessity to accomplish all that is required to sustain U.S. Forces and complete the mission. However, because of the new jurisdiction scheme discussed above, there are some recommended precautionary measures that servicemembers should take to avoid situations in which they could be detained by Iraqi authorities:

- Limit non-mission specific travel;
- Only leave the base if performing official duties;
- Always travel with at least one “battle buddy” and preferably more;
- Only leave the FOB in uniform;
- Talk to the chain-of-command before participating in any voluntary events like a community service project or sporting event;
- Do not take liberty/pass, frequent Iraqi shops and restaurants, or conduct any voluntary travel off the base without consulting the chain of command.

Given the amount of convoy driving and other mobility needs, there have been some specific concerns expressed about U.S. personnel following Iraqi traffic laws. Article 18 of the SA requires official vehicles to have a valid registration and to display official Iraqi license plates.¹⁸¹ At the same time it exempts military vehicles from the license and registration requirement. Instead such vehicles must be “clearly marked with numbers.”¹⁸² This exemption does not mean that the U.S. Forces drivers do not have to follow the rules of the road. Pursuant to SA Article 3, it is the duty of U.S. Forces member to “respect Iraqi laws” and this includes Iraqi traffic laws.¹⁸³ These laws can currently be found in CPA Order 86.¹⁸⁴ This CPA Order was written mostly by American’s in 2004. Therefore, a good rule of thumb is if it would be wrong in the United States, it is probably wrong in Iraq. Additionally, U.S. Forces members are advised to:

- Travel at off-peak times such as night or early morning;
- Stop at check points;
- Follow directions given by traffic police unless there is an emergency or specific threat that requires otherwise.

If a situation results where Iraqi authorities or police stop a U.S. convoy, their authority should be respected. It is suggested that servicemembers not show a driver’s license but instead request that the Iraqi authorities file their inquiry with the U.S. chain-of-command. If Iraqi authorities attempt to detain service members, the servicemembers have been provided

¹⁷⁷ SA, *supra* note 3, art. 12, para. 4.

¹⁷⁸ See Lepper, *supra* note 136, at 186.

¹⁷⁹ See *id.*

¹⁸⁰ See, e.g., SA, *supra* note 3, art. 9, para. 1 (“[V]essels and vehicles operated by or at the time exclusively for the United States Forces may enter, exit, and move within the territory of Iraq for the purposes of implementing this Agreement.”).

¹⁸¹ *Id.* art. 18, para. 1. Interestingly, although the SA exempts U.S. Forces from virtually all fees, duties, and taxes, they still must pay the Iraqis for the cost of the plates that official vehicles must display. See *id.*

¹⁸² *Id.* art. 18. Additionally, Iraqi authorities are required to accept valid driver’s licenses issued by U.S. authorities. See *id.* art. 17.

¹⁸³ *Id.* art. 3, para. 1.

¹⁸⁴ COALITION PROVISIONAL AUTHORITY ORDER NO. 86 (20 May 2004) [hereinafter CPA ORDER 86]. As discussed *supra* note 145, CPA orders remain in effect until rescinded or amended by subsequent legislation.

an “Emergency Jurisdiction Card” that should be presented in such a situation. The text of the card is in both English and Arabic. It begins by stating, “DO NOT DETAIN. THIS SOLDIER IS ON DUTY.”¹⁸⁵ The card goes on to say:

Under provision of the Agreement Between the Republic of Iraq and the United States of America the United States has primary jurisdiction over service members in duty status. Accordingly, the United States asserts the following rights:

- That this service member be immediately returned to United States military control
- This service member will provide his name and unit contact information for your report to your chain of command regarding this incident
- You may accompany this service member back to his base of operations and report this incident to his chain of command.¹⁸⁶

Hopefully confrontations between U.S. drivers and Iraqi authorities will be rare. Most likely such a scenario will be related to a traffic accident. Accidents also give rise to claims, which are discussed in the next section.

C. Claims, Civil Jurisdiction and Liability

Claims for damages are common when U.S. Forces deploy.¹⁸⁷ “Absent an agreement to the contrary (or a combat claims exclusion), the United States normally is obligated to pay for damages caused by its forces. As a general rule, the desirable agreement has the State parties waive claims against each other.”¹⁸⁸ Such is the basic arrangement contained in Article 21 of the SA.

[E]ach Party shall waive the right to claim compensation against the other Party for any damage, loss, or destruction of property, or compensation for injuries or deaths that could happen to members of the force or civilian component of either Party arising out of the performance of their official duties in Iraq.¹⁸⁹

In some agreements, Receiving States also “agree to pay third party claims caused by U.S. forces in the performance of official duties, and release [service members] from any form of civil liability resulting from such acts.”¹⁹⁰ However, the SA pushes third party claims on to the United States, which has agreed to:

[P]ay just and reasonable compensation in settlement of meritorious third party claims arising out of acts, omissions, or negligence of members of the United States Forces and of the civilian component done in the performance of their official duties and incident to the non-combat activities of the United States Forces. United States Forces authorities may also settle meritorious claims not arising from the performance of official duties.¹⁹¹

Although Article 21 addresses third party claims, it is silent about the possibility of Iraqi civil judgments against a member of the U.S. Forces or civilian component. As discussed above, the general rule in international law is that “foreign military personnel . . . are fully subject to the law of [the host] country unless expressly or impliedly exempted by the host country through agreement with the sending state.”¹⁹² This includes civil liability.

¹⁸⁵ Assertion of Jurisdictional Rights under Provision of the Agreement Between the Republic of Iraq and the United States of America On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq (n.d.) (U.S.-Iraq Emergency Jurisdiction Card) (on file with author).

¹⁸⁶ *Id.*

¹⁸⁷ OPLAW HANDBOOK, *supra* note 82, ch. 7, pt. IV.B.1.e, at 123.

¹⁸⁸ *Id.*

¹⁸⁹ SA, *supra* note 3, art. 21, para. 1.

¹⁹⁰ OPLAW HANDBOOK, *supra* note 82, ch. 7, pt. IV.B.1.e, at 123.

¹⁹¹ SA, *supra* note 3, art. 21, para. 2. Article 21 also provides that, “All claims in this paragraph shall be settled expeditiously in accordance with the laws and regulations of the United States.” *Id.* This permits payment of claims under the Foreign Claims Act, 10 U.S.C. § 2734, which are not based on legal liability, but on the maintenance of good foreign relations. *See also* OPLAW HANDBOOK, *supra* note 82, ch. 7, pt. IV.B.1.e, at 123.

¹⁹² Erickson, *supra* note 136, at 138; *see supra* Part IV.A (discussing jurisdiction),.

The NATO SOFA addresses civil liability by stating, “The sending State shall not claim immunity from the jurisdiction of the courts of the receiving State for members of a force or civilian component in respect of civil jurisdiction of the courts of the receiving State except”¹⁹³ that “[a] member of a force or civilian component shall not be subject to any proceedings for the enforcement of any judgment given against him in the receiving State in a matter arising from the performance of his official duties.”¹⁹⁴ Thus, persons subject to the NATO SOFA are only subject to civil judgments when they are involved in matters outside the performance of official duties. No such clarifying language is found in the SA.

A cursory reading of Article 12 on jurisdiction may leave the reader with the impression that only criminal jurisdiction is discussed. However, a careful reading of the Article reveals otherwise. The initial Article 12 paragraph states, “Recognizing Iraq’s sovereign right to determine and enforce the rules of criminal and *civil* law in its territory . . . the Parties have agreed as follows”¹⁹⁵ After this initial mention of civil jurisdiction, the topic is never raised in subsequent paragraphs. Instead, only the unmodified word “jurisdiction” is used. Such is the case in paragraph 1 which provides Iraq with the right to “exercise jurisdiction” in certain cases.¹⁹⁶ Thus, for “grave premeditated felonies . . . committed outside agreed facilities and areas and outside duty status,”¹⁹⁷ Iraq could exercise both criminal *and* civil jurisdiction over members of the U.S. Forces and of the civilian component. Beyond such cases, the U.S. position should be that Iraq has waived civil jurisdiction because the United States has the “primary right to exercise jurisdiction over members . . . in circumstances not covered by paragraph 1.”¹⁹⁸

D. Airspace and Frequencies

Part of Iraq’s assertion of sovereignty includes control over Iraqi airspace and frequencies. Under international law, “[E]very State has complete and exclusive sovereignty over the airspace above its territory. Absent permission, military aircraft cannot overfly the territory of another state. . . . Similarly, landing rights must be provided by agreement, usually in the form of a SOFA, basing agreement, mutual defense agreement or access agreement.”¹⁹⁹ Additionally, every State has the sovereign right to regulate its telecommunication and radio frequency spectrum.²⁰⁰ As with other aspects of sovereignty, such rights are suppressed during armed conflict and occupation. Thus, following the 2003 campaign, the coalition forces took control of all of Iraq’s airspace, radio control towers and the nation’s network of airports.²⁰¹ Since the SA reinstated Iraq’s full sovereignty, control of the airspace and frequencies had to be returned. As stated in the agreement: “Surveillance and control over Iraqi airspace shall transfer to Iraqi authority immediately upon entry into force of this agreement,”²⁰² and “[t]he Government of Iraq owns all frequencies.”²⁰³

¹⁹³ NATO SOFA, *supra* note 164, art. VIII, para. 9.

¹⁹⁴ *Id.* art. VIII, para. 5(g).

¹⁹⁵ SA, *supra* note 3, art. 12 (emphasis added).

¹⁹⁶ *Id.* art. 12, para. 1.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* art. 12, para. 3. How the issue on jurisdiction and double jeopardy would affect this argument is beyond the scope of this article. See criminal double jeopardy discussion *supra* Part IV.A.2.

¹⁹⁹ The Judge Advocate General’s Department, United States Air Force, Air Force Operations and the Law: A Guide for Air and Space Forces 193 (2002).

²⁰⁰ See Constitution of the International Telecommunications Union Constitution pmbl. (Dec. 22, 1992) [hereinafter ITU], available at <http://www.itu.int/net/about/basic-texts/constitution/preamble.aspx>.

While fully recognizing the sovereign right of each State to regulate its telecommunication and having regard to the growing importance of telecommunication for the preservation of peace and the economic and social development of all States, the States Parties to this Constitution, as the basic instrument of the International Telecommunication Union, and to the Convention of the International Telecommunication Union (hereinafter referred to as “the Convention”) which complements it, with the object of facilitating peaceful relations, international cooperation among peoples and economic and social development by means of efficient telecommunication services, have agreed as follows:

Id. pmbl. (emphasis added).

²⁰¹ See Agence France-Presse, *Iraq to Take More Control of Airspace*, Dec. 31, 2008, MILITARY.com, available at <http://www.military.com/news/article/iraq-to-take-more-control-of-airspace.html?col=1186032320397>.

²⁰² SA, *supra* note 3, art. 9, para. 3.

²⁰³ *Id.* art. 11, para. 2.

1. Airspace Transition

The return of Iraqi airspace control does not negate the U.S. Forces' need to use the airspace. On the contrary, air operations are very busy. For instance, in January 2009, "about 130 mobility missions were flown every day to restock and resupply the US forces around Iraq."²⁰⁴ Thus, the SA provides U.S. aircraft with the authorization "to over-fly, conduct airborne refueling . . . , and land and take off within, the territory of Iraq."²⁰⁵ U.S. aircraft:

- (1) Will be granted "permission every year to land in and take off from Iraqi territory";²⁰⁶
- (2) "[S]hall not have any party boarding them without the consent of the authorities of the United States Forces";²⁰⁷ and
- (3) "[S]hall not be subject to payment of any taxes, duties, fees, or similar charges, including overflight or navigation fees, landing, and parking fees."²⁰⁸

Also, although the SA transfers control over Iraqi airspace to Iraq, "Iraq may request from the United States Forces temporary support for the Iraqi authorities in the mission of surveillance and control of Iraqi air space."²⁰⁹ This request was made, and a two-phase transition was initiated to transfer airspace sovereignty from the coalition to Iraqi civil and military authorities. In Phase 1, Iraq "requested that the U.S. continue to control airspace at or below 24,000 feet until Iraq's capabilities 'mature'."²¹⁰ However, the day-to-day operations for airspace above 24,000 feet are now run by Iraqis.²¹¹ Coalition air assets using airspace above 24,000 feet must coordinate with Iraqi air traffic controllers to transit that area.²¹² Yet, there should be "no noticeable effect on air operations below 24,000 feet—a key factor in conducting a range of US operations from aeromedical evacuation to close air support for troops in the field."²¹³

As for Phase 2, it "will focus on long-term development of the Iraqi Civil Aviation Authority, to gain compliance with the International Civil Aviation Organization . . . [which] requires work on management and oversight, infrastructure development, improved communication, navigation and surveillance upgrades, and creating a trained workforce of air traffic controllers."²¹⁴

2. Frequencies and Communications

Just as with airspace, the return of Iraqi frequency control does not negate the U.S. Forces' need to use frequencies. As background, the electromagnetic spectrum is made up of all frequencies of electromagnetic waves.²¹⁵ The electromagnetic spectrum is a finite natural resource of each country and should be used rationally, efficiently, and economically.²¹⁶ For this

²⁰⁴ Marc V. Schanz, *In for the Long Haul*, 92 A.F. MAG. No. 3, Mar. 2009, at 38, available at <http://www.airforce-magazine.com/MagazineArchive/Pages/2009/March%202009/0309haul.aspx>.

²⁰⁵ SA, *supra* note 3, art. 9, para. 2. Note that the language removed from the quoted provision above relates to the purpose of such aircraft. Specifically, they must be operating "exclusively for the purposes of implementing" the SA. *Id.* The significance of this language was discussed *supra* Part III.B.1. Also note that the types of aircraft identified by the agreement are "United States Government aircraft and civil aircraft that are at the time operating exclusively under a contract with the United States Department of Defense." *Id.* Aircraft not fitting this description are not covered by the SA.

²⁰⁶ *Id.* art. 9, para. 2.

²⁰⁷ *Id.*

²⁰⁸ *Id.* art. 9, para. 5. However, U.S. Forces "shall pay fees for services requested and received." *Id.* art. 9, para. 6.

²⁰⁹ *Id.* art. 9, para. 4.

²¹⁰ Schanz, *supra* note 204, at 39.

²¹¹ *See id.* Other Phase 1 moves include: "approval of an implementation plan by the Iraqi civil aviation authorities and the IqAF; partial transfer of aeronautical information system functions from the combined force air component commander; and development of an agreement between the CFACC and the Iraqis, defining coordination and delegation of airspace." *Id.*

²¹² *See id.*

²¹³ *Id.* ("Previously established coordination procedures also help ensure that unmanned aerial vehicle operations continue unhindered. The procedures governing air strikes are unchanged, as US air traffic control liaisons are positioned with Iraqi air controllers to ensure airspace is clear before conducting a strike.").

²¹⁴ *Id.*

²¹⁵ *Frequency Asked Questions*, CHIPS MAG., 38, Oct.–Dec. 2006 [hereinafter CHIPS MAG.], available at http://www.chips.navy.mil/archives/06_Oct/web_pages/spectrum.htm.

²¹⁶ *See* ITU, *supra* note 200, FAQ.

reason, governments generally establish a system to manage, protect, and regulate the use of the spectrum within their borders.²¹⁷ How Iraq manages this spectrum is important to U.S. Forces, because “[c]ompeting battlefield demands for radio frequencies have potentially lethal consequences Wireless voice and data communications are an increasingly integral part of military tactics. But as more radio-based capabilities are introduced, so too is the possibility of clashing signals.”²¹⁸ The concern for proper spectrum management goes beyond the communications realm, as discussed in a 2006 Congressional Research Service report about improvised explosive devices (IEDs):

[M]uch of the Radio Frequency (RF) spectrum in the Iraq combat theater is un-managed and can sometimes cause dangerous interference with radio communications on the ground. Sometimes IED radio jammers can lock onto other new electronic combat systems because of a lack of coordination for spectrum usage. Other times, when a jammer is on, a [S]oldier cannot use his radio for communications. The [S]oldier must shut off the jammer to send and receive, thus opening a window of vulnerability for insurgents to use. Also, UAVs [Unmanned Aerial Vehicles] can sometimes lose their RF control links due to interference once they are far away from their control base.²¹⁹

To ensure U.S. Forces maintain the ability to use the electromagnetic spectrum effectively for mission requirements, the SA requires Iraqi authorities to “allocate to the United States Forces such frequencies as coordinated by both Parties.”²²⁰ The United States “shall return frequencies allocated to them at the end of their use not later than the termination” of the SA.²²¹

Although required to provide the United States with appropriate frequencies, the SA also states that the United States “shall operate their own telecommunications systems in a manner that *fully respects* the Constitution and laws of Iraq.”²²² The term “telecommunications” is defined in an extremely broad manner as “[a]ny transmission, emission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, radio, optical or other electromagnetic systems.”²²³ The potential ramifications of this provision are, as yet, unrealized. However, one wonders to what extent a fully sovereign Iraq might seek to subject U.S. communications, to include electronic and signals intelligence, to Iraqi oversight to ensure the Iraqi Constitution and laws are fully respected.

E. Basing

The very first term defined in the SA is “[a]greed facilities and areas” which “are those Iraqi facilities and areas owned by the Government of Iraq that are in use by the United States Forces during the period in which this Agreement is in force.”²²⁴ These are the bases from which the United States will operate while the SA is in effect. As of the time of this writing, the location and nature of the agreed facilities and areas is still in flux. This is because portions of the U.S. Forces are in the process of re-locating. The SA requires that “[a]ll United States combat forces shall withdraw from Iraqi cities, villages, and localities no later than the time at which Iraqi Security Forces assume full responsibility for security in an Iraqi province, provided that such withdrawal is completed no later than June 30, 2009.”²²⁵ The combat forces withdrawn “shall

²¹⁷ CHIPS MAG., *supra* note 215.

²¹⁸ David Perera, *Defense Officials Seek Better Management of Radio Spectrum*, Govexec.com, Dec. 7, 2006, http://www.govexec.com/story_page.cfm?articleid=35625&ref=relink.

²¹⁹ CLAY WILSON, CONG. RESEARCH SERV. REPORT, IMPROVISED EXPLOSIVE DEVICES (IEDS) IN IRAQ AND AFGHANISTAN: EFFECTS AND COUNTERMEASURES, RS22330, at CRS-3 (2006), *available at* <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA454399&Location=U2&doc=GetTRDoc.pdf>.

²²⁰ SA, *supra* note 3, art. 11, para. 2. This coordination will take place through the JMOCC. *Id.*

²²¹ *Id.* The SA also exempts U.S. Forces “from the payment of fees to use transmission airwaves and existing and future frequencies, including any administrative fees or any other related charges.” *Id.* art. 11, para. 4. Also, the U.S. Forces “must obtain the consent of the Government of Iraq regarding any projects of infrastructure for communications that are made outside agreed facilities and areas exclusively for the purposes of this Agreement in accordance with Article 4, except in the case of actual combat operations conducted pursuant to Article 4.” *Id.* art. 11, para. 5. There is no definition provided for “projects of infrastructure for communications.”

²²² *Id.* art. 11, para. 3 (emphasis added).

²²³ ITU, *supra* note 200, annex 1012, *available at* <http://www.itu.int/net/about/basic-texts/constitution/annex.aspx>. The SA, *supra* note 3, art. 11, para. 3, looks to the constitution of the ITU to define “telecommunications.”

²²⁴ SA, *supra* note 3, art. 2, para. 1.

²²⁵ *Id.* art. 24, para. 2. At the time of this article’s publication, discussions were ongoing about whether Iraq would extend withdrawal deadlines for U.S. Forces operating in the northern city of Mosul. *See Iraq Rules Out Extension of U.S. Withdrawal Dates*, REUTERS, May 3, 2009, <http://www.reuters.com/article/topNews/idUSTRE5422D320090503?feedType=RSS&feedName=topNews>. However, as noted, “[e]ven after June, U.S.

be stationed in the agreed facilities and areas outside cities, villages, and localities to be designated by the JMOCC.”²²⁶ This designation is still in progress.

One friction point during this process could result from the lack of a definition for cities, villages, and localities. The SA also does not define “combat forces.”²²⁷ The United States may narrowly construe the term to include only those forces which conduct operations which are primarily offensive in nature. All other members of the force might be considered to be engaged in military support operations and activities.²²⁸ The SA contemplates U.S. personnel “training, equipping, supporting, supplying, and establishing and upgrading logistical systems, including transportation, housing, and supplies for Iraqi Security Forces.”²²⁹ These would surely not be considered “combat forces” for the purposes of withdrawing from Iraqi cities, villages, and localities. But there is a wide range of other personnel who should also fall outside the definition of “combat forces,” such as those performing duties as:

- Convoys and convoy escort
- Force protection (including proactive measures)
- Quick reaction forces
- Aerial intelligence, surveillance and reconnaissance (ISR)²³⁰

Ultimately it will fall to the JMOCC to address these ambiguities.

Once U.S. Forces are settled into the agreed facilities and areas, “Iraq authorizes the United States Forces to exercise within the agreed facilities and areas all rights and powers that may be necessary to establish, use, maintain, and secure such agreed facilities and areas.”²³¹ This includes entry control.²³² Additionally, SA Article 19 authorizes U.S. Forces to provide services inside the base such as “military post offices; financial services; shops selling food items, medicine, and other commodities and services; and various areas to provide entertainment and telecommunications services, including radio broadcasts.”²³³ This allows life “inside the wire” to be essentially within the control of U.S. authorities.

The one area that looms as a possible source of tension concerns property ownership. Pursuant to the SA, “Iraq owns all buildings, non-relocatable structures, and assemblies connected to the soil that exist on agreed facilities and areas, including those that are used, constructed, altered, or improved by the United States Forces.”²³⁴ Prior to its withdrawal, the United

forces can conduct combat and other operations within cities if authorized by the Iraqi government. A major base on the outskirts of Mosul, for example, will not be affected.” *Id.*

²²⁶ SA, *supra* note 3, art. 24, para. 3. Additionally, “Upon their withdrawal, the United States Forces shall return to the Government of Iraq all the facilities and areas provided for the use of the combat forces of the United States.” *Id.* art. 5, para. 2.

²²⁷ Only the much broader “United States Forces” is defined. *Id.* art 2, para. 2. “Combat forces” is necessarily a smaller component than United States Forces, but the SA is silent as to what degree.

²²⁸ One of the primary difficulties will be in trying to determine whether combat forces which provide security for Provincial Reconstruction Teams (PRTs) can be kept outside the definition. Otherwise, the combat forces providing movement support would need to travel to the PRTs (normally located in cities) from the outlying bases on an “as required” basis, or the PRTs would need to rely on contractors for force protection and movement. A third alternative, locating the PRTs outside the population centers, would seem to defeat their mission.

The front-line operatives in the campaign to stabilize Iraq are the American and Coalition members who comprise the Provincial Reconstruction Teams, or PRTs. These are relatively small operational units comprised not just of diplomats, but military officers, development policy experts (from the U.S. Agency for International Development, the Department of Agriculture, and the Department of Justice), and other specialists (in fields such as rule of law, engineering, and oil industry operations) who work closely with Iraqi provincial leaders and the Iraqi communities that they serve. While PRTs dispense money for reconstruction projects, the strategic purpose of these civil-military field teams is both political and economic. By building provincial governments’ ability to deliver essential services and other key development projects to local Iraqis, PRTs help to extend the reach of the Iraqi government to all corners of the country and help build the stability necessary to complete the transition to full-Iraqi control.

U.S. Dep’t of State, Provincial Reconstruction Teams (PRTS), <http://www.state.gov/p/nea/ci/iz/c21830.htm> (last visited Apr. 23, 2009).

²²⁹ SA, *supra* note 3, art. 4, para. 4.

²³⁰ This list is not intended to be complete, but instead is offered to highlight the wide range of personnel which could be construed to not be “combat forces.”

²³¹ SA, *supra* note 3, art. 6, para. 2. This includes producing and providing “water, electricity, and other services.” *Id.* art. 11, para. 1.

²³² *Id.* art. 6, para. 3. For joint use facilities and areas adjacent to agreed facilities, the JMOCC will establish mechanisms for entry and use. *See id.* art. 6, paras. 2, 3.

²³³ *Id.* art. 19, para. 1.

²³⁴ *Id.* art. 5, para. 1.

States must hand-over all such property to the GOI “free of any debts and financial burdens.”²³⁵ However, U.S. Forces and U.S. contractors “shall retain title to all equipment, materials, supplies, relocatable structures, and other movable property that was legitimately imported into or legitimately acquired within the territory of Iraq in connection with” the SA.²³⁶ It is foreseeable that opinions may differ over whether a particular piece of property is “movable” or “non-relocatable.” It will be the responsibility of the Joint Committee to create mechanisms to handle any possible dispute.²³⁷

F. U.S. Contractors and their Employees

Thus far, the focus of this article has been on “the United States Forces and of the civilian component.” As previously mentioned, “United States contractors” and “United States contractor employees” were defined separately by the SA.²³⁸ This was done to permit different treatment of contractors, to include a different jurisdictional scheme from that granted members of the U.S. Force and the civilian component. A brief overview of these changes for contractors is set forth below.²³⁹

Iraqi politicians and negotiators were intent on changing the legal regime governing foreign contractors in Iraq. This was due, at least in part, to the controversy surrounding the conduct of security contractors in Iraq, specifically the company Blackwater.²⁴⁰ Now, contractors have significantly fewer privileges and immunities than they enjoyed under CPA Order 17. One significant change is that some contractors formerly included under the CPA Order are no longer included under the new SA.²⁴¹ For instance, Blackwater is actually a contractor for the Department of State and not U.S. Forces. While CPA Order 17 included them in the definition of MNF Personnel, and they received the associated immunities,²⁴² they are now outside the scope of the SA.²⁴³

²³⁵ *Id.* art. 5, para. 6.

²³⁶ *Id.* art. 5, para. 9.

²³⁷ *See id.* art. 5, para. 6. The Joint Committee is separate from the JMOCC. *Id.* Article 23 established the Joint Ministerial Committee, which is responsible for establishing the JMOCC and the Joint Committee. *See id.* art. 23. Additionally, the Joint Committee is authorized to “establish Joint Sub-Committees in different areas to consider the issues arising under this Agreement according to their competencies.” *Id.* art. 23, para. 4.

²³⁸ *See supra* Part IV.A for discussion; SA, *supra* note 3, art. 2, para. 5. It is important to note that the SA only covers contractors who are operating “under a contract or subcontract with or for the United States Forces.” *Id.* art. 2, para. 5. Contractors not fitting the SA definition are not covered.

²³⁹ It is beyond the scope of this article to provide a detailed analysis of the effects the SA has on contracting and contractors.

²⁴⁰ The Iraqis have expressed “outrage over a September 2007 shooting in Baghdad’s Nisoor Square that left 17 Iraqi civilians dead.” *U.S. Drops Blackwater’s Iraq Deal*, FOXNews.com, Jan. 30, 2009, <http://www.foxnews.com/politics/2009/01/30/official-state-department-drops-blackwater-contract-iraq/>.

The Nisoor Square shooting strained relations between Washington and Baghdad and fueled the anti-American insurgency in Iraq, where many Iraqis saw the bloodshed as a demonstration of American brutality and arrogance. Five former Blackwater guards have pleaded not guilty to federal charges in the United States that include 14 counts of manslaughter and 20 counts of attempted manslaughter.

Blackwater maintains the guards opened fire after coming under attack, an argument supported by transcripts of Blackwater radio logs obtained by the AP. They describe a hectic eight minutes in which the guards repeatedly reported incoming gunfire from insurgents and Iraqi police.

Id. Blackwater has abandoned “its brand name as it tries to shake a reputation battered by its work in Iraq, renaming its family of two dozen businesses Xe. The parent company’s new name is pronounced like the letter ‘z.’” Assoc. Press, *Blackwater Worldwide Changes Its Name to Xe*, N.Y. TIMES, Feb. 13, 2009, available at http://www.nytimes.com/2009/02/14/business/14bizbriefs-BLACKWATERWO_BRF.html.

²⁴¹ *See SA, supra* note 3, art. 2, para. 5.

²⁴² Coalition Provisional Authority Order 17 defined Multi-National Personnel as those non-Iraqi military and civilian persons assigned under the command of Multi-National Forces commander operating in Iraq. The definition included civilian contractors accompanying the military force:

“MNF Personnel” means all non-Iraqi military and civilian personnel (a) assigned to or under the command of the Force Commander or MNF contingent commanders, (b) subject to other command authority to aid, protect, complement or sustain the Force Commander, or (c) employed by a Sending State in support of or accompanying the MNF.

CPA ORDER 17, *supra* note 54, sec. 1, para (2).

In addition to immunizing contractors from Iraqi legal process as MNF Personnel under CPA Order 17, sec. 2, para. (1), the Order also provided that:

Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts

Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.

. . . .

As for those contractors covered by the SA, “Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees.”²⁴⁴ Although this is a significant change in the status of U.S. contractors in Iraq, it is not inconsistent with their status in most countries where they are generally subject to host nation laws. This includes Afghanistan.²⁴⁵ The SA does permit the United States to request Iraq “to waive its primary right to jurisdiction in a particular case.”²⁴⁶ The affected person could then, as appropriate, be prosecuted under the Military Extraterritorial Jurisdiction Act²⁴⁷ or Article 2(a)(10) of the UCMJ.²⁴⁸ It is likely that such a waiver request would only occur in a situation where the act in question was committed in connection with a U.S. contract, and had little to no connection to Iraq other than physical location.

Other SA effects on contractors include the lack of SA authority for U.S. contractors and U.S. contractor employees to wear uniforms or carry weapons.²⁴⁹ Thus contractors will have to comply with Iraq’s laws, as well as U.S. directives on personal arming. The SA provides no authority for U.S. contractors or their employees to avoid standard GOI entry and exit requirements.²⁵⁰ There are no SA exemptions for contractor vehicles.²⁵¹ Nor does the waiver of claims pursuant to SA Article 21 apply to contractors or their employees.²⁵²

Certification by the Sending State that its Contractor acted pursuant to the terms and conditions of the Contract shall, in any Iraqi legal process, be conclusive evidence of the facts so certified.

Id. sec. IV, paras. 2, 3, 5.

²⁴³ For this, and other reasons, when the SA entered into force in January, the Government of Iraq took steps to deny Blackwater a license to operate. *See U.S. Drops Blackwater’s Iraq Deal*, FOXNews.com, Jan. 30, 2009, <http://www.foxnews.com/politics/2009/01/30/official-state-department-drops-blackwater-contract-iraq/>; *see also* Ernesto Londoño & Qais Mizher, *Iraq to Deny New License to Blackwater Security Firm*, WASH. POST, Jan. 29, 2009, at A12, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/28/AR2009012803319.html>.

Private security companies working for the U.S. government in Iraq have been required to obtain licenses from the Iraqi Interior Ministry since 2004, but some have operated without licenses, and until this year, there was little the Iraqi government could do to enforce the rule.

The ministry revoked Blackwater’s license in September 2007 and threatened to expel the company’s employees, but U.S. officials ignored the order and renewed the company’s contract the following April.

Id.

²⁴⁴ SA, *supra* note 3, art. 12, para. 2.

²⁴⁵ *See Status of Forces Agreements and UN Mandates: What Authorities and Protections Do They Provide to U.S. Personnel?: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Foreign Affairs Comm.*, 110th Cong. (2008) (statement of Jennifer K. Elsea), available at <http://www.house.gov/delahunt/elseatestimony.pdf>.

The United States and the transitional government of Afghanistan concluded an agreement in 2002 regarding the status of U.S. military and civilian personnel of the U.S. Department of Defense present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities. Such personnel are to be accorded “a status equivalent to that accorded to the administrative and technical staff” of the U.S. Embassy under the Vienna Convention on Diplomatic Relations of 1961. Accordingly, U.S. personnel are immune from criminal prosecution by Afghan authorities, and are immune from civil and administrative jurisdiction except with respect to acts performed outside the course of their duties. The Islamic Transitional Government of Afghanistan explicitly authorized the U.S. government to exercise criminal jurisdiction over U.S. personnel, and the government of Afghanistan is not permitted to surrender U.S. personnel to the custody of another state, international tribunal, or any other entity without consent of the U.S. government. The agreement does not appear to provide immunity for contract personnel.

Id. CRS-3 (citations omitted).

²⁴⁶ SA, *supra* note 3, art. 12, para. 6.

²⁴⁷ *See* MEJA, *supra* note 147.

²⁴⁸ *See* UCMJ art. 2(a)(10) (2008).

²⁴⁹ In contrast, U.S. Forces and the civilian component are granted such authority by SA. SA, *supra* note 3, art. 13. Note that Iraq has existing criminal sanctions prohibiting persons from wrongfully wearing a uniform to which they are not entitled, including uniforms belonging to a foreign country. *See* IRAQI PENAL CODE WITH AMENDMENTS pt. two, ch. 4, sec. 4, para. 261 (3d ed. 1969), available at http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf (providing the Iraqi criminal law requirements to engage in self-defense). One area where this could create friction is with interpreters employed by the U.S. who were previously wearing uniforms.

²⁵⁰ In contrast, U.S. Forces and the civilian component are required to have only identification cards and travel orders pursuant to SA. SA, *supra* note 3, art. 14.

²⁵¹ In contrast, official and military vehicles are exempt from registration fees and military vehicles do not require license plates pursuant to SA. *Id.* art. 18.

²⁵² *See id.* art. 21. This article does not mention contractors at all except to exclude from the claims waiver those claims arising from contracts. *See id.* art. 21, para. 1. *See supra* Part IV.C (discussing about the claims provision).

The SA allows contractors to import and export equipment, supplies, material and technology to the same degree as U.S. Forces.²⁵³ Additionally, there will be no “taxes, duties, or fees . . . imposed on goods and services purchased by or on behalf of the United States Forces in Iraq for official use or on goods and services that have been purchased in Iraq on behalf of the United States Forces.”²⁵⁴ As with U.S. Forces, valid U.S. driver’s licenses and professional licenses issued to contractor employees shall be deemed acceptable and/or valid to Iraqi authorities, and no test or fee is required to operate a personal car or other vehicle, vessel or aircraft belonging to the U.S. Forces in Iraq.²⁵⁵ Lastly, U.S. Forces are permitted to “select contractors and enter into contracts in accordance with United States law for the purchase of materials and services in Iraq.”²⁵⁶ This freedom to contract is qualified, however, by the requirement that U.S. Forces “shall contract with Iraqi suppliers of materials and services to the extent feasible when their bids are competitive and constitute the best value.”²⁵⁷

On 30 December 2008, the Iraqi Ministry of Interior issued an order suspending implementation of certain requirements until the GOI and U.S. Forces reach an agreement within the Joint Committee process.²⁵⁸ This grace period does not, however, provide immunity from criminal prosecution or from other legal process in Iraq. The ministerial order addresses the following areas:

- Issuing of licenses for contractors of security and personnel protection and facilities;
- Registration of firearms and weapons of individuals;
- Registration of vehicles;
- Issuing of licenses for pilots and aircraft related to personnel and security operations;
- Imposition of customs, duties, tariffs, and taxes, and conduct of related inspections;
- Compliance with entry, exit, and in-country transit requirements/procedures.²⁵⁹

One final note on contractors: Although the SA specifically permits U.S. Forces to detain or arrest members of the U.S. Forces and of the civilian component,²⁶⁰ no similar authorization for the detention or arrest of U.S. contractors by U.S. authorities is discussed in the SA. This has the potential to pose problems for maintaining good order and discipline within the agreed facilities and areas. However, as previously discussed, U.S. Forces do have the authority to detain personnel who are witnessed committing a crime.²⁶¹ The SA also authorizes U.S. Forces “within the agreed facilities and areas all rights and powers that may be necessary to establish, use, maintain, and secure such agreed facilities and areas.”²⁶² Therefore, especially within the agreed facilities and areas under exclusive U.S. control, it would seem acceptable for U.S. Forces to engage in regular law enforcement.²⁶³

Part V. Conclusion: The Withdrawal of U.S. Forces and Termination of the SA

It is well known that the SA requires that “[a]ll the United States Forces shall withdraw from all Iraqi territory no later than December 31, 2011.”²⁶⁴ This does not mean that in 2011 the United States will no longer be in Iraq. There will still be

²⁵³ See SA, *supra* note 3, art. 15. The only exception to this relates to “personal effect materials and equipment for consumption or personal use.” *Id.* art. 15, para. 2. Unlike U.S. Forces and the civilian component, contractor employees have no express right to import items for personal consumption free of inspections, licenses, or other restrictions, taxes, customs duties, or any other charges.

²⁵⁴ *Id.* art. 16, para. 1. Note, however, that unlike U.S. Forces and the civilian component, contractor employees are not exempt from “payment of any tax, duty, or fee that has its value determined and imposed in the territory of Iraq, unless in return for services requested and received.” *Id.* art. 16, para. 2.

²⁵⁵ *Id.* art. 17, paras. 1–3.

²⁵⁶ *Id.* art. 10.

²⁵⁷ *Id.* This language is essentially aspirational. Additionally, this provision concludes by stating, “The United States Forces shall respect Iraqi law when contracting with Iraqi suppliers and contractors and shall provide Iraqi authorities with the names of Iraqi suppliers and contractors, and the amounts of relevant contracts.” *Id.*

²⁵⁸ See Republic of Iraq, Ministry of Interior, The Minister’s Office, Order No. D.M. 31034 (Dec. 30, 2008) (on file with author).

²⁵⁹ See *id.*

²⁶⁰ SA, *supra* note 3, art. 22, para. 1; see *supra* Part III.C (providing a discussion of detention authority).

²⁶¹ See discussion *supra* Part III.C.1.

²⁶² SA, *supra* note 3, art. 6, para. 2.

²⁶³ Note that Article 6 also requires the United States and Iraq to “coordinate and cooperate regarding exercising these rights and powers in the agreed facilities and areas of joint use.” *Id.*

²⁶⁴ *Id.* art. 24, para. 1. In addition to the withdrawal of forces, the agreement itself expires: “This Agreement shall be effective for a period of three years, unless terminated sooner by either Party pursuant to paragraph 3 of this Article.” *Id.* art. 30, para. 1. The agreement entered into force on 1 January 2009. *Id.* art. 30, para. 4. Thus, the three year period will expire on 1 January 2012.

American diplomats present, along with other governmental officials. However, with the expiration of the agreement, the United States will not only lose the authority to conduct combat operations, but U.S. Forces will be required to withdraw. The only way for this, or any other provision of the SA, to be amended is through “the official agreement of the Parties in writing and in accordance with the constitutional procedures in effect in both countries.”²⁶⁵

The SA can terminate earlier than 2011. All that is required is written notice from one party to the other, and the agreement will terminate in one year.²⁶⁶ In a similar vein, the United States recognized “the sovereign right of the Government of Iraq to request the departure of the United States Forces from Iraq at any time.”²⁶⁷ The likelihood of such a termination or withdrawal request is greater than many know. There is an Iraqi referendum on the security pact scheduled for some time in the summer of 2009.²⁶⁸ As of the time of this writing, the details of the referendum are still not clear, but the possibility exists that if the referendum on the SA reflects a lack of support by the Iraqi public, then the U.S. exit from Iraq could be much earlier than expected.

There are two clear ways to help ensure the SA is viewed positively by the Iraqis. First, U.S. leaders must make every effort to adhere to the terms. This article has identified various gray areas where friction may occur. These areas must be handled delicately and in cooperation with Iraqi counter-parts. Although the United States must protect its interests, it must not do so in a way that sacrifices the greater objective of maintaining good relations with Iraq. The United States cannot be seen as exploiting its position or strong-arming Iraq. To do so risks public condemnation and loss of public support. The second way to help ensure the SA is viewed positively falls on the shoulders of every Soldier, Sailor, Airman, Marine, Coast Guardsman, and Civilian of the U.S. Forces serving in Iraq. There is no room for any misconduct toward Iraqi citizens, nor can individuals afford to act beyond the scope of their missions. A single failure in this area is potentially catastrophic to the U.S.-Iraq Security Agreement. The U.S. chain of command must continue to impress upon all members of the U.S. Forces in Iraq that mission success can only be achieved through their individual good conduct and their good relations with the Iraqis that they are in Iraq to support and protect.

²⁶⁵ *Id.* art. 30, para. 2.

²⁶⁶ *Id.* art. 30, para. 3.

²⁶⁷ *Id.* art. 24, para. 4. This provision also allows the reverse, that the U.S. can withdraw its forces from Iraq at any time. *See id.* President Obama has indicated that he intends to withdraw most troops from Iraq by August of 2010, 16 months in advance of the 2011 deadline. *See* Dan Lothian & Susan Malyeaux, *Obama: U.S. to Withdraw Most Iraq Troops by August 2010*, CNN.com, Feb. 27, 2009, <http://www.cnn.com/2009/POLITICS/02/27/obama.troops/index.html>.

²⁶⁸ Rania Abouzeid, *Iraq Approves Long-Debated US Security Pact*, Nov. 27, 2008, Time.com, <http://www.time.com/time/world/article/0,8599,1862660.00.html>.

Hostile Outsider or Influential Insider? The United States and the International Criminal Court

Colonel Stuart W. Risch*

As the most powerful nation committed to the rule of law, we have a responsibility to confront these assaults on humankind. . . . Our legacy must demonstrate an unyielding commitment to the pursuit of justice.

—David J. Scheffer
U.S. Ambassador for War Crimes¹

I. Introduction

Genocide.² Ethnic Cleansing.³ Crimes against Humanity.⁴ War Crimes.⁵ The mere mention of these terms evokes chilling images of torture, suffering, and death. Yet beginning in 1899, with atrocities committed during the Anglo-Boer

* Judge Advocate, U.S. Army. Currently assigned as the Staff Judge Advocate, U.S. Army Fires Center of Excellence, Fort Sill, Okla. This article was submitted in partial satisfaction of the requirements for the Master of Strategic Studies Degree at the U.S. Army War College, Carlisle Barracks, Pa.

¹ David J. Scheffer, Ambassador-at-Large for War Crimes Issues, U.S. Dep't of State, Address on the 50th Anniversary of the Universal Declaration of Human Rights: Realizing the Vision of the Universal Declaration of Human Rights (Sept. 16, 1998), available at <http://www.mtholyoke.edu/acad/intrel/scheffer1.htm> [hereinafter Scheffer Address]. Ambassador Scheffer also served as the principal U.S. representative to the 1998 United Nations (UN) conference that was to consider the establishment of an international criminal court.

² Once the full horror of the concentration camps and extermination policies of Nazi Germany became known to the public, Winston Churchill called it “a crime with no name.” ALAIN DESTEXHE, RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY (1995), reprinted in part in FRONTLINE SPECIAL REPORT, THE CRIME OF GENOCIDE, available at <http://www.pbs.org/wgbh/pages/frontline/shows/rwanda/reports/dsetexhe.html>. “History was of little use in finding a recognised word to fit the nature of the crime. . . . There simply were no precedents in regard to either the nature or the degree of the crime.” *Id.* Destexhe refers to Raphael Lemkin, a Polish-born adviser to the U.S. War Department who, in his book, *Axis Rule in Occupied Europe*, actually coined the term “genocide,” which he derived from the Greek word for “race/tribe”—“Genos”—and the Latin suffix “-cide,” which means “to kill.” DESTEXHE, *supra* (citing RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION-ANALYSIS OF GOVERNMENT-PROPOSALS FOR REDRESS* 80 (1944)). Lemkin actually defines the term as “the destruction of a nation or of an ethnic group, through the existence of a coordinated plan, aimed at total extermination, to be put into effect against individuals chosen as victims purely, simply and exclusively because they are members of the target group.” *Id.* at 80–81. The United Nations, dating back to December, 1948, defines genocide as

any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, whether committed in time of peace or time of war:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

U.N. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 11, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]. This same definition has been used in the 1993 Statute of the International Criminal Tribunal for Yugoslavia (ICTY) and the 1994 Statute of the International Criminal Tribunal on Rwanda (ICTR), and is consistent with the definition of genocide contained within the Rome Statute of the International Criminal Court (ICC).

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Despite its recurrence, ethnic cleansing nonetheless defies easy definition. At one end it is virtually indistinguishable from forced emigration and population exchange while at the other it merges with deportation and genocide. At the most general level, however, ethnic cleansing can be understood as the expulsion of an “undesirable” population from a given territory due to religious or ethnic discrimination, political, strategic or ideological considerations, or a combination of these.

Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, FOREIGN AFF., Summer 1993, at 110. Serb attempts to drive Bosnian Muslims out of towns all through the Balkans “have only recently lodged ethnic cleansing in the public mind. But in the annals of history such atrocities are far from new.” *Id.* The U.S. State Department includes the following *systematic* actions within what it considers to be ethnic cleansing:

- Forcible displacement/expulsion of civilians;
- Looting of homes and businesses;
- Widespread burning of homes;

War, and continuing to present day with the bloodshed in Darfur, Sudan, the last century has produced deprivation, persecution, and carnage on an immense scale, incomparable with any other period in time.⁶

The instances of cruelty and mortality are legion. Following the Boer War,⁷ the years 1915 to 1918 witnessed the Armenian Genocide in the early stages of World War I (WW I).⁸ World War II (WW II) ushered in both the Nazi menace,

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- Use of civilians as human shields;
 - Detentions;
 - Summary Executions;
 - Rape;
 - Attacking medical facilities;
 - Identity cleansing.

U.S. DEP'T OF STATE, ETHNIC CLEANSING IN KOSOVO: AN ACCOUNTING 2-3 (Dec. 1999), available at http://www.state.gov/www/global/human_rights/kosovoii/homepage.html. This report was prepared by the U.S. State Department with the express intent of "document[ing] the extent of human rights and humanitarian law violations in Kosovo, and to convey the size and scope of the Kosovo conflict." *Id.*

⁴ The term "crimes against humanity" has been generally described as "[a] collective category of major inhumane acts committed against any (internal or alien) civilian population before or during the war." INT'L MILITARY TRIBUNAL, TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW, NO. 10, at 9-16 (1950) [hereinafter NUREMBERG TRIBUNAL]. The definition of the term first used internationally appeared in Article 6(c) of the 1945 London Charter of the International Military Tribunal (signed by the United States., Union of Soviet Socialist Republics, France and Britain), which was used in the trial of German war criminals in Nuremberg beginning in 1945:

Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Charter of the International Military Tribunal art 6, *annexed to* the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, Aug. 8, 1945, 82 U.N.T.S. 279, 59 Stat. 1544 [hereinafter London Charter-Agreement]. The Charter was the first document establishing crimes against humanity. The International Military Tribunal for the Far East (Tokyo) followed suit, as did the international tribunals for Yugoslavia and Rwanda. The definition has been expanded in those tribunals to cover rape and torture. M. Cherif Bassiouni, *Crimes Against Humanity, in CRIMES OF WAR 2.0: WHAT THE PUBLIC SHOULD KNOW* (Anthony Dworkin et al. eds., rev. ed. 2007), available at <http://www.crimesofwar.org/thebook/crimes-against-humanity.html>. Crimes against humanity actually overlap with the definitions of war crimes and genocide. They are distinguishable from war crimes in that they need not occur in time of war, and from genocide in that there is no requirement for an intent to destroy "in whole or in part" a specific group of people. *Id.*; see also Yoram Dinstein, Address at the Science Center North-Rhine-Westphalia, Germany: Crimes Against Humanity and the Rome Statute of the International Criminal Court (Nov. 27, 2005) [hereinafter Dinstein Address].

⁵ War crimes are defined in Article 147 of the Fourth Geneva Convention as the

wilful killing, torture, or inhuman treatment, including . . . wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial . . . taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Geneva Convention Relative to the Protection of Civilians in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. In short, Army Field Manual 27-10 captures the essence of a war crime well: "The term 'war crime' is the technical expression for a violation of the law of war by any person or person, military or civilian. Every violation of the law of war is a war crime." U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 499 (15 July 1976) [hereinafter FM 27-10].

⁶ General estimates indicate that since the end of World War II, in more than 250 conflicts, anywhere from 70 to 170 million people have been killed. See M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights, in POST CONFLICT JUSTICE* 3, 6 (M. Cherif Bassiouni ed., 2002).

⁷ The British Army in South Africa, experiencing significant difficulty in overcoming the guerilla tactics used by the Boers, resorted to a "scorched-earth policy," denying everything of sustenance to the Boers, including woman and children and, in so doing, uprooted a whole nation. Stanford University Libraries and Academic Information Resources (SULAIR), Concentration Camps During the South African/Boer War, 1899-1902, <http://www-sul.stanford.edu/depts/ssrg/africa/boers.html>. Lord Kitchener, Commander-in-Chief of the British Army in South Africa, ordered systematic "sweeps" of the countryside, burning farms, destroying homes, stealing food, and creating tens of thousands of refugees. Kitchener also ordered all Boer women and children into British "concentration camps," where they were greeted with neglect, suffering, and death.

The British Army, unable to defeat the Boers using conventional tactics, adopt many of the Boer methods, and the war degenerates into a devastating and cruel struggle between British righteous might and Boer nationalist desperation. The British criss-cross the countryside . . . to flush the Boers into the open; they burn farms and confiscate foodstuffs . . . [and] they pack off Boer women and children to concentration camps as 'collaborators' . . .

Tim Ice, The Boer War: South Africa, 1899-1902, <http://www.geocities.com/Athens/Acropolis/8141/boerwar.html?20074> (last visited Apr. 20, 2009).

⁸ The "Young Turks" perpetrated the Armenian Genocide in Turkey (what was known as the Ottoman Empire) from late 1914 through the end of World War I. A triumvirate of young military officers, the Young Turks represented a growing discontent in the early 1900s over the direction in which their country

replete with its Holocaust and countless similar atrocities,⁹ and the Japanese Imperial Army, with its horrifying prisoner of war and civilian abuse, in the 1930s and 1940s.¹⁰ The period from 1960 to 1980 saw shocking war crimes in Vietnam¹¹ and

was headed under the absolutist rule of Sultan Abdul-Hamid. At the apex of the Young Turk Revolution was the Committee of Union and Progress, which promoted a Turkish nationalism “xenophobic and exclusionary” in nature. In January 1913, the Union and the triumvirate seized control of Turkey in a coup d’état. Rouben Paul Adalian, Armenian Nat’l Inst., Young Turks and the Armenian Genocide, http://www.armenian-genocide.org/young_turks.html (last visited May 18, 2009).

The advent of World War I, in which this new Turkish government joined with the Central Powers (Germany in particular), provided an opportunity for Turkey to finally solve the “Armenian question.” United Human Rights Council, 20th Century Genocides: Armenian Genocide, http://www.unitedhumanrights.org/Genocide/armenian_genocide.htm (last visited May 18, 2009) [hereinafter Armenian Genocide]. In an effort to seize control of more land, and power, and consolidate Turkish rule, especially in lands held by Iran and Russia, the Union conceived a clandestine program to exterminate the Armenians. Adalian, *supra*. Acting under cover of war preparations, the Young Turks secretly ordered the mass arrest of Armenians throughout Turkey. Armenian Genocide, *supra*. The Armenian men were rousted from their homes, jailed, tortured, and then shot or bayoneted and left for dead on the outskirts of towns and cities. *Id.* The women and children were deported, forced to undertake grueling and horrific “death marches” into the Turkish mountains and Syrian desert, where they were attacked, raped, tortured, and either shot, burned alive, drowned, thrown off cliffs, or simply left for dead. *Id.* What is now known as the Armenian Genocide took the lives of an estimated two million people—men, women, and children. *Id.* This represented almost 80% of the Armenian population. *Id.* The U.S. Ambassador to Turkey in 1918, Henry Morgenthau, reportedly advised the Administration that,

When the Turkish authorities gave the orders for these deportations, they were merely giving the death warrant to a whole race . . . they understood this well, and, in their conversations with me, they made no particular attempt to conceal the fact. . . . I am confident that the whole history of the human race contains no such horrible episode as this. The great massacres and persecutions of the past seem almost insignificant when compared to the sufferings of the Armenian race in 1915.

Id. at 7. At the end of the war, the Young Turks triumvirate escaped to Germany and Italy, countries which granted them asylum. *Id.* Extensive efforts to obtain their return to stand trial for their crimes were to no avail, and ultimately they were assassinated by Armenian activists in 1921 and 1922. *Id.*; Adalian, *supra*.

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It would take many years for the whole story of the moral cost of the war to appear, but one vivid sign of it—and of what had been overcome—became immediately and horrifyingly visible as the allied Armies advanced into Germany and Central Europe. They found themselves overrunning camps where sadistic brutality and callous neglect had gone further than anyone had yet conceived. . . . The majority of those who had suffered were Jews condemned to inhuman treatment and death simply because of their race. The Nazis had made special efforts to wipe out those they deemed genetically undesirable. In the case of the Jews they had spoken glibly of a ‘Final Solution’ to a Jewish ‘problem.’ Rightly, the word ‘Holocaust’ has been given to what they did. Full figures may never accurately be known, but five, six million Jews perished, whether in gas chambers of extermination camps, or in factories and quarries where they died of exhaustion and starvation, or in the field where they were rounded up and shot by special extermination detachments.

J.M. ROBERTS, A SHORT HISTORY OF THE WORLD 462–63 (1993).

World War II also resulted in what is referred to as the “Malmedy Massacre” in 1944, in which German soldiers—Waffen SS, a regiment of the 1st SS Panzer Division, commanded by Lieutenant Colonel Jochen Peiper—operating under a concept called *Kriegsraison* (the doctrine of military necessity that justifies not only what is necessary to win, but also what is necessary to reduce the risks of losing, or simply to reduce losses or the likelihood of losses in war), killed eighty-one unarmed U.S. Prisoners of War (POW) from B Battery, 285th Field Artillery Observation Battalion, near the Belgian village of Malmedy. The History Place, World War II in Europe, The Malmedy Massacre (1997), <http://www.historyplace.com/worldwar2/timeline/malmedy.htm>. Once gathered in an open field, the SS troopers raked the American POW with machine-gun and pistol fire, until all victims fell dead or wounded into the snow. *Id.* Survivors were identified by English speaking SS who walked among the wounded asking if anyone needed medical attention. *Id.* Once identified, the SS murdered the survivors by a pistol shot to the back of the head, at close range. *Id.* Three survivors actually lived to tell of the massacre, and the bodies of the eighty Soldiers killed were subsequently located, identified, and examined. *Id.* All available evidence appeared to substantiate the allegations. *Id.* The German forces contended that such killing was permissible because the Germans were unable to provide food, water, and shelter for the POWs, and retaining them would have jeopardized the German operation. *Id.* Nevertheless, various German soldiers were subsequently tried by a U.S. Military Tribunal at Dachau in 1946, but any sentences obtained were either commuted or reduced, and the SS men were eventually released. *Id.*; see also MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 144 (1977).

¹⁰ The Japanese Imperial Army was implicated in countless instances of war crimes and crimes against humanity in WWII. Robert Barr Smith, *Japanese War Crimes Trials*, WORLD WAR II, at 36 (Sept. 1996), available at http://www.historynet.com/magazines/world_war_2/30.35796.html. The atrocities committed by Japanese troops were widespread, and included almost every type of torture, deprivation, and death imaginable. *Id.* China, Russia, the United States, the United Kingdom, Australia, France, the Philippines, Thailand, Burma, and Vietnam—no country or its personnel escaped the horror, pain, and suffering inflicted by the Japanese Army. *Id.* Names like the Bataan Death March, the Thai-Burma railroad (the “River Kwai”), the bombing of Manila, and the Nanking Massacre or “Rape of Nanking” became synonymous with, and representative of, the Japanese Imperial Army and its treatment of others. *Id.* Members of the *Kempeitai*, the Japanese secret police, known for its violence and cruelty, murdered victims through beatings, beheadings, and poisonings. *Id.* Records from a Japanese entity named Unit 731, a bacteriological and chemical warfare unit, demonstrated that unit members had used POWs and civilians for horrifying medical experiments, such as injecting live patients with bacteria to monitor results, or applying tourniquets to limbs for hours, sending the victims into shock. *Id.* Others engaged in vivisection, where live patients underwent medical experiments while awake and coherent—such as dissecting and removing various organs. *Id.* In the Philippines,

Once the war had ended, details of the last hideous days . . . began to see the light of day. For three weeks, the Commission heard ghastly details of slaughter and rape, of beheadings and of those burned alive, of torture and wanton destruction, of the murders of the helpless—women and babies and priests and American prisoners of war.

the Khmer Rouge's brutal Cambodian Genocide.¹² The century closed with ethnic cleansing in the Balkans,¹³ genocide in Rwanda,¹⁴ and crimes against humanity in Sierra Leone.¹⁵ The horror continues today in Sudan.¹⁶

Id.

Additionally, in what many consider to be the opening of the Second World War in the Pacific in 1937, the Japanese committed what subsequently became known as "The Rape of Nanking." United Human Rights Council, 20th Century Genocides: Nanking Massacre, http://www.unitedhumanrights.org/Genocide/nanking_massacre.htm (last visited Apr. 20, 2009) [hereinafter Nanking Massacre]. In December 1937, after the Imperial Army had resumed its attacks on China, beginning an eight-year struggle—what Japan referred to as "the China incident"—Japanese forces became mired in a fierce battle with Chinese soldiers in Shanghai. ROBERTS, *supra* note 9, at 448–49. Incensed over the difficulties encountered there, the Imperial Army thereafter marched into Nanking looking for revenge. Nanking Massacre, *supra*, at 1. The carnage that followed was later described by Western aid workers as "hell on earth." *Id.* at 4. Both film and photographic evidence produced by the Japanese themselves documented the widespread torture, rape, degradation, and killing by every conceivable means of the soldiers and civilians of Nanking. *Id.* Only the intervention by incredibly courageous American and European aid workers prevented the death toll from doubling. *Id.* Unfortunately, leaders in both America and Britain were becoming so increasingly concerned with Hitler's threats and actions in Europe—rearming and reoccupying the Rhineland—that they failed to adequately inquire about, and respond to, the horrific stories emanating from China. *Id.* Only much later were the stories confirmed by the West. *Id.*; ROBERTS, *supra* note 9, at 455. In the end, over 300,000—half the Nanking population—had been murdered.

¹¹ The incident in a commune named My Lai is commonly regarded as one of the most barbaric and well-publicized war crimes arising out of the Vietnam War.

The villages of central Vietnam known collectively as My Lai have been stamped by history as places of horrific acts of war. More than 500 people, many of them women and children, were slaughtered here by American G.I.s on March 16, 1968. They were ordered out of their homes, lined up in ditches and shot. Soldiers tossed hand grenades into their bunkers and torched their thatched huts.

Tim Larimer, *Echoes of My Lai*, TIME, Mar. 16, 1998, at 10, available at <http://www.time.com/time/magazine/1998/int/980316/vietnam.html>.

A young Army first lieutenant, William Laws Calley Jr., then stood accused of slaying at least 109 Vietnamese civilians in the rural village in South Viet Nam, and at least 25 of his comrades in arms on that day in March 1968 are also being investigated. . . .

. . . [M]en in American uniforms slaughtered the civilians of My Lai, and in so doing humiliated the U.S. and called in question the U.S. mission in Viet Nam in a way that all the antiwar protesters could never have done. . . .

My Lai: An American Tragedy, TIME, Dec. 5, 1969, at 5, available at <http://www.time.com/time/magazine/article/0,9171,901621-1,00.html>. "Two tragedies took place in 1968 in Viet Nam. One was the massacre by United States soldiers of as many as 500 unarmed civilians—old men, women, children—in My Lai on the morning of March 16. The other was the cover-up of that massacre." Douglas Linder, An Introduction to the My Lai Courts-Martial, http://www.law.umkc.edu/faculty/projects/frtrial/mylai/Myl_intro.html (last visited Apr. 20, 2009).

¹² Following the war's end in neighboring Vietnam, from 1975 to 1979 the Khmer Rouge (Red Cambodian) leader Pol Pot sought to build a Communist peasant farming society in Cambodia that resulted in the death of over twenty-five percent of the population—or over two million people—from a combination of starvation, overwork, and executions. United Human Rights Council, 20th Century Genocides: Cambodia Genocide (Pol Pot), http://www.unitedhumanrights.org/Genocide/pol_pot.htm (last visited Apr. 20, 2009). Pol Pot came to power in 1975 when his Khmer Rouge Army seized control of the country after the country's government fell, racked by political corruption and economic destabilization and lacking any military support from the U.S. government. *Id.* Once in control, he put into effect a "radical experiment to create an agrarian utopia inspired in part by Mao Zedong's Cultural Revolution, which he had witnessed first-hand during a visit to Communist China." *Id.* Calling his experiment the "Super Great Leap Forward" (after Mao's "Great Leap Forward"), Pol Pot sought to purify Cambodian society, torturing and purging the "class enemies," and extinguishing any ties to capitalism, Western culture, city life, and foreigners. *Id.* He banned education, health care, and religion, as well as currency, newspapers, radios, and bicycles, and effectively sealed the country from any outside influences. *Id.* He instituted a slave labor program, in which millions of Cambodians were forced to work in his "killing fields," where most died from malnutrition, disease, and overwork. *Id.* Finally, various ethnic groups—primarily Muslims, Chinese and Vietnamese—were targeted and attacked, resulting in the death of over 200,000 Chinese alone. *Id.*

¹³ Once the West recognized an independent Bosnia in 1992—a primarily Muslim country which contained a Serb minority of almost one-third of the population—the Serbian leader, Slobodan Milosevic, responded by attacking the capital city of Sarajevo (site of the 1984 Olympics) with artillery and snipers, killing almost 3500 children. United Human Rights Council, Genocide in Bosnia 1992–1995, http://www.unitedhumanrights.org/Genocide/bosnia_genocide.htm (last visited Apr. 20, 2009). As the Serbs gained territory in Bosnia, they began to methodically persecute and dispose of the Muslim inhabitants, either through mass murder, forced relocations, rape, and/or internment in WWII-style concentration camps. *Id.*

[F]rom 1991 to 1995, the seething cauldron of what the world once knew as Yugoslavia erupted into a conflict of annihilation pitting former friends, neighbors, and even family members against each other along ethnic lines—Bosnian Serbs, Bosnian Muslims (Bosniacs), and Bosnian Croats. . . . Nearly four years of unchecked violence shocked the international communities' conscience and the results were staggering:

- Over 200,000 dead men, women, and children;
- Approximately 2,000,000 people displaced from their homes;
- Over 1,000,000 refugees spread across 25 countries;
- Almost 500,000 homes damaged or destroyed;

Allegations by all sides to the conflict of genocide, crimes against humanity, and other war crimes.

CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCH., U.S. ARMY, AFTER ACTION REPORT, LAW AND MILITARY OPERATIONS IN THE BALKANS, 1995–1998, at 15–16 (11 Dec. 1998) (citing International Crisis Group, *Going Nowhere Fast: Refugees and Internally Displaced Persons in Bosnia and Herzegovina* (1 May 1997), available at <http://www.crisisgroup.org/home/index.cfm?l=1&i=1572>).

Not surprisingly, at the conclusion of what ranks as the bloodiest century in history,¹⁷ the international community met in Rome, Italy to discuss the formation of an independent and permanent International Criminal Court (ICC or Court) capable

In Kosovo, “Today’s conflict . . . is a child of centuries of conflict. Kosovo is a chronicle of refugees fleeing and returning to the area over generations. There have been dozens of wars over hundreds of years. Each generation remembers the wrongs done to the last and passes the bitterness on to the next.” Chicago-Kent College of Law, A Historical View of the Conflict in Kosovo, <http://pbosnia.kentlaw.edu/projects/warcrimes/history.html> (last visited May 18, 2009).

As a result of cultural and religious differences, Kosovo, a microcosm of the Balkan region, has been the stage for scenes of distrust, strife, hatred, and violence among and between its inhabitants and neighbors throughout its existence. It is extremely difficult to accurately portray the magnitude and constancy of the violence that has engulfed the entire region over the past two millennia.

CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S SCH., U.S. ARMY, AFTER ACTION REPORT, LAW AND MILITARY OPERATIONS IN KOSOVO, 1999–2001, at 8, 10 (15 Dec. 2001) [hereinafter KOSOVO AAR]. More recently, in 1998 a full-fledged civil war ensued in Kosovo, pitting the Serbian military and police forces against the Albanian’s Kosovo Liberation Army (KLA), in which thousands died and hundreds of thousands sought refuge elsewhere. *Id.* at 34. Once additional massacres of civilians on both sides occurred, the United Nations Security Council (UNSC) stepped in, adopting UNSC Resolution 1199, which highlighted the “impending human catastrophe,” calling for an immediate cease-fire, an international presence, and immediate withdrawal of Serbian troops from Kosovo. *Id.* at 34–35. Additional civilian massacres would occur before the international community stepped in with military force—in the form of a NATO air campaign against the Serbs—in March 1999. Overall, almost one million Albanians became refugees due to the Serbian atrocities, or threats of them. *Id.* at 37. Among the worst incidents to occur in this conflict were the “Serbs using the Albanians as human shields, raping women, burning and looting homes, devastating crops and livestock, and destroying ethnic Albanians’ citizenship papers, in an effort to suppress their identity, origin, and property ownership.” *Id.* at 39 n.152.

¹⁴ On 6 April 1994, a small plane carrying Rwandan President Juvenal Habyalimana and Burundi President Cyprien Ntaryamira home from a conference in Tanzania, where they had been meeting with Tutsi rebels to discuss peace initiatives, was shot down close to Rwanda’s airport in Kilgali by ground-fired missiles, killing both men. United Human Rights Council, 20th Century Genocides: Genocide in Rwanda, http://www.unitedhumanrights.org/Genocide/genocide_in_rwanda.htm (last visited May, 19, 2009). “Immediately following their deaths, Rwanda plunged into political violence as Hutu extremists began targeting prominent opposition figures on their death lists, including moderate Hutu politicians and Tutsi leaders.” *Id.* What followed was a 100-day period of absolute genocide in which close to 800,000 Tutsis were killed in Rwanda by Hutu militia—using machetes, clubs, guns, and grenades, and typically hacking their victims to death—at a rate of almost 10,000 individuals killed each day. *Id.* Indiscriminate killing occurred, as the Hutu militia “engaged in genocidal mania.” The militia compelled innocent Hutus to kill Tutsi neighbors, and Tutsis to kill their own family members. Survivors in hospitals were attacked, refugees in churches were slaughtered in mass, and bodies floating down the Kigara River became a common site. *Id.*

¹⁵ Since 1991, Sierra Leone has endured over a decade of civil war, fueled by the diamond trade, in which the brutality was of unimaginable proportions. Marguerite Feitlowitz, Crimes of War Project, *UN War Crimes Court Approved for Sierra Leone*, Jan. 8, 2002, <http://www.crimesofwar.org/onnews/news-sierra.html>. Over one million civilians have been displaced, and close to 75,000 innocent individuals were killed in the conflict—not by accident, but as a result of massacres and summary executions. *Id.*; Press Release, Human Rights Watch, *Shocking War Crimes in Sierra Leone: New Testimonies on Mutilation, Rape of Civilians* (June 24, 1999), <http://www.hrw.org/en/news/1999/06/24/shocking-war-crimes-sierra-leone>. Families were slaughtered in broad daylight in the middle of the street, women and children had limbs hacked off with machetes, young women and girls were dragged off, raped or otherwise sexually abused, and then enslaved, and children were abducted for enlistment as soldiers. *Id.* “If there is a hallmark of this war, it is the forced amputation of human limbs, particularly the hands, arms, and legs of women and children.” Feitlowitz, *supra*.

¹⁶ The United Nations claims that since 2003 the Sudanese government, working closely with a Khartoum-backed Arab militia (Janjaweed), committed ethnic cleansing and crimes against humanity in the Darfur region of Sudan (a region roughly the size of France in Western Sudan), displacing more than 2.7 million African villagers and slaughtering almost 300,000 additional civilians. Colum Lynch, *International Criminal Court to Issue Arrest Warrant for Sudan’s Bashir*, WASH. POST, Feb. 12, 2009, at A11, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/02/11/AR2009021103951_pf.html.

The conflict has historical roots, but escalated in February 2003, when two rebel groups, the Sudan Liberation Army/Movement (SLA/M), and the Justice and Equality Movement (JEM) . . . demanded an end to chronic economic marginalization and sought power-sharing within the Arab-ruled Sudanese state. The government responded to this . . . by targeting the civilian populations from which the rebels were drawn. It brazenly engaged in ethnic manipulation by organizing a military and political partnership with some Arab nomads comprising the Janjaweed; armed, trained, and organized them; and provided effective impunity for all crimes committed.

HUMAN RIGHTS WATCH, SUDAN: DARFUR DESTROYED 1–2 (2004), available at <http://hrw.org/reports/2004/sudan0504/2.htm>. The combined Army and Janjaweed forces have driven civilians into camps outside of towns, where the Janjaweed have raped, pillaged, and murdered anyone of their choosing—to include emergency relief personnel and supplies. *Id.* To more accurately portray who is involved in these massacres, it is instructive to note that the literal translation of the term “Janjaweed” is “devil on a horse.”

¹⁷ Due to the atrocities of the Young Turks, Adolf Hitler, Joseph Stalin, Pol Pot, Idi Amin, Augusto Pinochet, the Hutus and Tutsis, Slobodan Milosevic, and the Janjaweed Militia, one could easily see *Time* magazine naming the twentieth century the “Generation of the Madman” or the “Era of Novel Ways to Torture and Kill Your Fellow Man.”

Once a heavyweight boxing champion as well as a soldier in the British colonial army, Idi Amin, the former Ugandan military ruler who rose to power in a coup on 25 January 1971, was blamed for the death or disappearance of anywhere from 300,000 to 500,000 people during his brutal regime. *Idi Amin, “Butcher of Uganda,”* CNN, Aug. 16, 2003, <http://www.cnn.com/2003/WORLD/africa/08/16/amin.obituary/index.html>; Michael T. Kaufman, *Idi Amin, Murderous and Erratic Ruler of Uganda in the 70’s, Dies in Exile*, N.Y. TIMES, Aug. 17, 2003, available at <http://www.nytimes.com/2003/08/17/world/idi-amin-murderous-and-erratic-ruler-of-uganda-in-the-70-s-dies-in-exile.html?scp=1&sq=Idi%20Amin,%20Murderous%20and%20Erratic%20Ruler%20of%20Uganda%20in%20the%2070s,%20Dies%20in%20Exile&st=cse>. The dictator, who overthrew his successor, President Milton Obote, while Obote was out of the country, is alleged to have personally ordered the deaths of specific rival tribal groups in Uganda. *Id.* Some have alleged that he “kept severed heads in his refrigerator, fed corpses to crocodiles and had one of his many wives dismembered . . . [and] practised cannibalism.” Paul Busharizi, *Uganda Dictator Amin Buried in Saudi Arabia*, ASIAN TRIBUNE, Aug. 17, 2003, available at http://www.asiantribune.com/oldsite/show_news.php?id=6065.

of investigating and prosecuting those who commit such heinous crimes.¹⁸ The 1998 Rome Conference was the most recent, and aggressive, effort yet by the world community toward the establishment of a permanent, global criminal tribunal. The conference laid the Court's foundation, producing a treaty establishing the ICC initially adopted by more than two-thirds of the participating nations.¹⁹ Subsequently ratified by more than the required sixty nations, the treaty became effective on 1 July 2002, finally making the Court—and justice for both perpetrators and victims—a reality.²⁰

The United States, after participating significantly in Rome and signing the treaty, later formally renounced all obligations under the treaty based on several perceived “fundamental flaws.” While the United Nations (UN), most democratic and allied nations, and countless human rights entities endorse the ICC,²¹ the United States has strenuously opposed it, at times actively seeking to undermine its capability to perform as intended. As such, considerable discord and resentment has grown among the United States and the Court's many proponents. Having lost substantial international standing due to recent policy decisions—to include those concerning the conflict in Iraq—and a failed strategic communications strategy, the United States has also been subject to harsh criticism over its ICC opposition. Continued resistance only risks greater isolationism and lack of credibility and support, something at present the United States simply cannot afford. Moreover, history clearly demonstrates that absent the ICC's enforcement mechanisms to address individual responsibility, horrific crimes will continue and impunity will reign. Accordingly, the United States, which still has an opportunity to play a significant role with the Court—and regain its reputation for an unyielding commitment to promoting human rights, justice, and the rule of law—should ratify the Rome Statute or, at a minimum, adopt a strategy and policy of conciliation and cooperation instead of obstruction and antagonism.

In Part II, this article chronicles the evolution of the ICC concept from its inception, spanning more than a century.²² Part III details the process by which the ICC operates, highlighting matters considered by the Court since July 2002. With this information as a necessary background, Part IV then identifies and analyzes, in detail, the U.S. objections to the Court's current charter and composition, while Part V examines the U.S. response to the Court's formation. Parts II through V are intended to encourage a greater awareness of the Court's strengths and weaknesses, and stimulate continued study and debate

Slobodan Milosevic, a product of the Yugoslav Communist system, was the former manager of a state-owned gas company when he began his meteoric rise to power after Marshal Tito's death in 1980. Originally a protégé of Ivan Stambolic, who became prime minister after Tito, Milosevic eventually replaced Stambolic and became the president of Yugoslavia. It was in this position, and as the leader of the Serbian Communist Party, that Milosevic was alleged to have committed genocide in Bosnia and Herzegovina, and to have been at least partly responsible for the murder of thousands of civilians, and the ethnic cleansing/expulsion of over 750,000 Albanians from Kosovo and 250,000 non-Serbs from their homes and towns during the Serbs' war with Croatia. KOSOVO AAR, *supra* note 13, at 28, 40 (citing G. RICHARD JANSEN, ALBANIANS AND SERBS IN KOSOVO: AN ABBREVIATED HISTORY (2008), available at <http://lamar.colostate.edu/~grjan/kosovohistory.html>); Press Release, The Hague, President Milosevic and Four Other Senior FRY Officials Indicted for Murder, Persecution, and Deportation in Kosovo (May 27, 1999), available at <http://www.un.org/icty/pressreal/p403-e.htm>; *The Charges Against Milosevic*, BBC NEWS, Mar. 11, 2003, http://newsvote.bbc.co.uk/hi/english/world/europe/newsid_1402000/1402790.stm.

¹⁸ HRW: International Criminal Court, <http://hrw.org/campaigns/icc> (last visited May 18, 2009). The diplomatic conference is commonly referred to as the “Rome Conference.”

¹⁹ Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/9 (2002), available at <http://www.un.org/law/icc/statute/rome.htm> [hereinafter Rome Statute]. Adopted on 17 July 1998, the statute in essence defines the ICC's scope of jurisdiction, operations, and duties, among other matters. *Id.*

²⁰

July 1, 2002, marked the birth of the International Criminal Court . . . meaning that crimes of the appropriate caliber committed after that date could fall under the jurisdiction of the ICC. . . . These include genocide, crimes against humanity, war crimes, and potentially the crime of aggression, if the Assembly of States Parties is able to reach an agreement defining it.

JENNIFER K. ELSEA, CONG. RES. SERV. REP., U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT, RL31495, at 1 (Aug. 29, 2006), available at <http://www.fas.org/sgp/crs/misc/RL31495.pdf>; see *infra* notes 44–71 and accompanying text (providing a detailed discussion of the Rome Treaty and the Court's operations).

²¹ Currently, 108 countries worldwide have become part of the ICC by ratifying the treaty, or statute, which established the Court, to include the United Kingdom, Canada, and France; the remainder of the European Union; and all of NATO save for Turkey. ICC, *Assembly of States Parties* 1, available at <http://www.icc-cpi.int/Menu/ASP/> (last visited May 18, 2009); see *infra* notes 39–42 and accompanying text. “More than 1,000 associations have joined the Coalition for the International Criminal Court, including the [International Committee of the] Red Cross, American Bar Association, Amnesty International, Human Rights Watch, Lawyers Committee for Human Rights, and the International Commission of Jurists,” among others. Kathryn Schiele, *US Ratification of the International Criminal Court*, J. INT'L REL. 63 n.20 (Spring 2004) (citing Robert C. Johansen, *U.S. Opposition to the International Criminal Court: Unfounded Fears* (Joan B. Kroc Inst. for Int'l Peace Stud., No. 7) (June 2001)).

²² “Countries have long sought to establish suitable mechanisms for punishing individuals responsible for violent atrocities during conflict, and in the modern era, gross violations of international humanitarian law. Attempts to limit the behavior of military forces in war can be traced back hundreds of years.” VICTORIA K. HOLT & ELISABETH W. DALLAS, ON TRIAL: THE US MILITARY AND THE INTERNATIONAL CRIMINAL COURT 21 (Henry L. Stimson Ctr. Report No. 55) (Mar. 2006).

of the concerns surrounding this misunderstood yet vital aspect of U.S. national security policy and strategy.²³ Finally, Part VI contains recommendations regarding the United States and the ICC, ultimately proposing that the U.S. policy toward the ICC become that of an influential insider vice hostile outsider.²⁴

II. The Evolution of the International Criminal Court

*For nearly half a century—almost as long as the UN has been in existence—the General Assembly has recognized a need to establish a court to prosecute and punish persons responsible for crimes like genocide. Many thought . . . that the horrors of the Second World War—the camps, the cruelty, the exterminations, the Holocaust—could not happen again. And yet they have. In Cambodia, in Bosnia and Herzegovina, in Rwanda. Our time—this decade even—has shown us that man’s capacity for evil knows no limits. Genocide . . . is now a word of our time, too, a heinous reality that calls for a historic response.*²⁵

That historic response was the Rome Statute of the ICC, adopted on 17 July 1998,²⁶ effectively establishing the Court and capping over a century of efforts on various fronts to create an international criminal court.²⁷ As early as 1872, following the Franco-Prussian War, advocates had appealed for a global court to prosecute grave crimes of significant concern to the worldwide community.²⁸ The pleas echoed again in 1919 following WWI, emanating from those involved in negotiating the

²³ Recent polling supports two arguments: (1) that most Americans know very little about the specifics of the ICC and the U.S. relationship with the Court; and (2) of those who do, the majority are in favor of U.S. ratification of the Statute. “Americans generally support giving international courts broad authority to judge compliance with treaties and seven in ten reject the idea that the United States should receive exceptional treatment under such treaties. . . . Seventy-four percent favored U.S. participation in the ICC.” PROGRAM ON INT’L POLICY ATTITUDES, AMERICANS ON INTERNATIONAL COURTS AND THEIR JURISDICTION OVER THE UNITED STATES 3–4 (May 11, 2006), available at <http://www.amicc.org/docs/PIPA%20Poll%20May%202006.pdf> [hereinafter PIPA Study]. Over 60% of Americans polled indicated that they have not heard anything about the Court; of the 39% that had, only 4% responded that they “know a lot.” Notably, 71% of Americans polled agree that “given the events of September 11, 2001, it is more important for the United States to work in concert with other nations to establish an international criminal court.” HUMAN RIGHTS FIRST, AMERICANS’ ATTITUDES TOWARD AN INTERNATIONAL CRIMINAL COURT, US PUBLIC OPINION AND THE ICC 11–12 (Mar. 2005), available at http://www.globalsolutions.org/programs/law_justice/icc/resources/FINAL_ICC_Comm_Guide.pdf. A significantly large majority (76%) believes in the concept of an international body such as the Court to adjudicate compliance with international law, and an almost equally large majority (69%) believes that the United States should not claim a special exception so that it is not subject to that international body. PIPA Study, *supra*, at 7–10. Typical findings in these polls were that Americans perceived the potential benefits of the ICC as “prevention of atrocities, quicker justice for victims of terrorism, decreasing the likelihood of war, and lessening the global police burden on the [United States].” *Id.* A separate poll found a majority of Americans (60%) in favor of referring cases such as Darfur to the ICC rather than a temporary tribunal, such as the United States had previously proposed. CHI. COUNCIL ON FOREIGN RELATIONS & PROGRAM ON INT’L POLICY ATTITUDES, AMERICANS ON THE DARFUR CRISIS AND THE ICC 1–2 (Mar. 2005), available at <http://www.amicc.org/docs/CCFR%20Darfur%20Referral%203-2005.pdf>.

As a direct result of this lack of knowledge and information about the Court, Holt and Dallas found that the U.S. military was burdened with high anxiety about the Court and what effect it would have on the military, and individual servicemembers. In response, they recommended that the United States work to reduce this anxiety level by developing educational tools that would provide the military with information concerning the Court that, in turn, would clarify how the Court works and how it may affect military personnel. HOLT & DALLAS, *supra* note 22, at 74–75. As such, my primary intent is to add to that educational and informational process through this article.

²⁴ These terms were conceived by Professor Michael P. Scharf and set forth in an article that he penned for a written debate over the permanent international criminal court. See Michael P. Scharf, *The Case for Supporting the International Criminal Court*, in NAT’L SEC. L. 441 (John Norton Moore & Robert F. Turner eds., Carolina Academic Press 2005).

²⁵ Press Release, Secretary-General Kofi Annan, Protecting Human Rights of One Individual Promotes Peace of All Humanity, U.N.Doc. SG/SM/6825, HR/4391 (Dec. 8, 1998), available at <http://www.un.org/News/Press/docs/1998/19981208.sgsm6825.html>.

²⁶ During the fifty-second session of the U.N. General Assembly (UNGA), from 15 June through 17 July 1998, in Rome, Italy, the UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court—commonly referred to as the “Rome Conference”—met to “finalize and adopt a convention on the establishment of an international criminal court.” United Nations, Conference of Plenipotentiaries on the Establishment of an International Criminal Court, <http://www.un.org/icc/index.htm> (follow “Background Info” hyperlink) (last visited May 18, 2009) [hereinafter *ICC Background*]; see also United Nations, Establishment of An International Criminal Court—Overview, <http://untreaty.un.org/cod/icc/general/overview.htm> (last visited May 18, 2009) [hereinafter *ICC Overview*].

²⁷ M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey, in Nuremburg and the Rule of Law: A Fifty-Year Verdict*, 149 MIL. L. REV. 49 nn.1, 2 (Winter 1995). “[T]he world’s major powers . . . progressively have recognized the aspirations of world public opinion for the establishment of an impartial and fair system of international criminal justice.” *Id.* at 53.

²⁸

The “road to Rome” was a long and often contentious one. While efforts to create a global criminal court can be traced back to the early 19th century, the story began in earnest in 1872 with Gustav Moynier—one of the founders of the International Committee of the Red Cross—who proposed a permanent court in response to the crimes of the Franco-Prussian War. The next serious call for an internationalized system of justice came from the drafters of the 1919 Treaty of Versailles, who envisaged an *ad hoc* international

Treaty of Versailles, owing to concern over creating an international body to prosecute German war criminals.²⁹ World War II piqued interest yet again at the prospect of trying both German and Japanese war criminals.³⁰ This time, the international community heard the calls. In 1948, the UN General Assembly (UNGA) adopted the Genocide Convention, which reiterated the now rapidly growing demand for an “international penal tribunal” to investigate and prosecute the most heinous crimes. In Resolution 260, the UNGA indicated that, “[r]ecognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international cooperation is required,” the Assembly would adopt the Convention that characterized genocide as a crime under international law.³¹ Further, the Convention stated that any person charged with such a crime would be “tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction.”³² The Convention “invited” the UN International Law Commission (ILC) to “study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide.”³³ After much scrutiny, the ILC advocated developing a draft statute, which was completed by 1953.³⁴ Unfortunately, the UN then considered the ICC concept only periodically over the next forty years, ultimately delaying deliberation on this draft statute in an effort to first develop agreement on a definition of the “crime of aggression” as well as an international Code of Crimes.³⁵

court to try the Kaiser and German war criminals of World War I. Following World War II, the Allies set up the Nuremberg and Tokyo tribunals to try the Axis war criminals.

Coalition for the International Criminal Court, *About the Court: History of the ICC*, <http://www.iccnw.org/?mod=icchistory> (last visited May 18, 2009) [hereinafter *About the Court*].

²⁹ Treaty of Versailles art. 227, June 28, 1919, T.S. No 4. Articles 227 through 229 called for the trial of Kaiser Wilhelm II for “a supreme offense against international morality and the sanctity of treaties,” and for *ad hoc* tribunals to try “persons accused of having committed acts in violation of the laws and custom of war.” Bassiouni, *supra* note 27, at 53. However, the Allies acquiesced to German resistance to extradition and allowed Germany to conduct national prosecutions instead. These took place in Leipzig, where the accused individuals were treated as heroes, vice criminals, resulting in many acquittals despite strong evidence to the contrary. U.S. DEP’T OF ARMY, PAM. 27-161-2, INTERNATIONAL LAW VOL. II, at 221 (23 Oct. 1962) [hereinafter DA PAM. 27-161-2]. Additionally, the Kellogg-Briand Pact of 1928 banned, for the first time, aggressive war. It was this treaty that both captured the essence of the international move to attempt to prevent war and limit human suffering, and served to create an international legal basis for the post-WW II prosecution of those who had waged aggressive war. *Id.*; Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796.

³⁰ Following WW II, the Allies established the International Military Tribunal (IMT) sitting in Nuremberg (1945), and the IMT for the Far East (IMTFE) sitting in Tokyo (1946). The Allies began an aggressive program to prosecute and punish, as applicable, all war criminals in both theaters. The combined trial of twenty-four German leaders occurred in Nuremberg, and the combined trial of twenty-eight Japanese leaders took place in Tokyo. There were twelve other trials under international authority in Nuremberg, and thousands of other trials before national courts and military commissions worldwide. DA PAM. 27-161-2, *supra* note 29, at 224–35. “[T]he post-WWII experience revealed how effective international justice could be when there is political will to support it and the necessary resources to render it effective. . . . Among all historical precedents, the IMT [Nuremberg], whatever its shortcomings may have been, stands as the epitome of international justice and fairness.” Bassiouni, *supra* note 27, at 55; *see supra* note 4; London Charter-Agreement; International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946, T.I.A.S. 1589, 4 Bevans 27 (amending Charter dtd. Apr. 26, 1946). Importantly, both the IMT and IMTFE only had jurisdiction over individuals, vice states.

³¹ G.A. Res. 260 (III) A, U.N. DOC. A/RES/3/260 (Dec. 9, 1948).

³² *Id.*; Genocide Convention, *supra* note 2, at 277; *ICC Overview*, *supra* note 26, at 1. The 1972 Apartheid Convention also makes reference to an international criminal body that would have jurisdiction to prosecute apartheid crimes. Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243 (entered into force July 18, 1976).

³³ *ICC Overview*, *supra* note 26 (citing G.A. Res. 260 (III) A, *supra* note 31).

³⁴

Following the Commission’s conclusion that the establishment of an international court to try persons charged with genocide or other crimes of similar gravity was both *desirable* and *possible*, the General Assembly established a committee to prepare proposals relating to the establishment of such a court. The committee prepared a draft statute in 1951 and a revised statute in 1953.

Id. (emphasis added).

³⁵ *About the Court*, *supra* note 28. “Although there were trials for aggression at Nuremberg, an acceptable definition for its elements has long eluded the international community, impeding earlier attempts to establish an international court.” JENNIFER K. ELSEA, CONG. RES. SERVICE REP., INTERNATIONAL CRIMINAL COURT: OVERVIEW AND SELECTED LEGAL ISSUES 20 (June 5, 2002). The UNGA had also asked the ILC to develop a “Draft Code of Offenses Against the Peace and Security of Mankind” (later renamed the Draft Code of Crimes), which it completed in 1954. *Id.* The UNGA had asked a separate committee (actually, four committees) to develop a definition of the term “aggression,” which took over twenty years to complete. *Id.* The UNGA finally adopted the definition provided by the committees in 1974, yet it has only been invoked once by the UNSC, in South Africa in 1977. *Id.* This definition was revised twice more in 1991 and 1995, yet the ICC has still not agreed on, nor adopted, a definition. Bassiouni, *supra* note 27, at 58–60. For the current state on the definition of the crime of aggression, see *infra* note 62 and accompanying text.

Following the Nuremberg and Tokyo Tribunals, significant human rights abuses still transpired.³⁶ Yet the world community could not resolve to create a court to address the senseless slaughter until the UN Security Council (UNSC) finally established *ad hoc* tribunals for Yugoslavia and Rwanda in 1993 and 1994—and this only in the face of indisputable evidence of millions being tortured and massacred. In light of the ethnic cleansing in Bosnia and Kosovo and the genocide in Rwanda, the international community placed substantial pressure on the UNSC to take decisive action. Allowing national authorities to conduct investigations and prosecutions had verified that this was a completely unrealistic alternative.³⁷ Somewhat simultaneously, the ILC resumed its work on the ICC.³⁸ In 1993 and 1994, the ILC presented a final draft statute to the UNGA, which then created two separate committees to prepare for an impending forum on the ICC. The UNGA established both an Ad Hoc and Preparatory Committee on the Establishment of an International Criminal Court—the former to study major substantive issues that surfaced out of the final draft statute, and the latter to prepare a “widely acceptable draft text for submission to a diplomatic conference.”³⁹ The committees completed all of their work by 1998.⁴⁰

Finally, in June to July 1998 representatives from 163 nations, to include the United States, came together in Rome as part of a UN Diplomatic Conference on establishing an ICC. Five tedious yet tumultuous weeks of intensive dialogue and debate ensued. What emerged was an overwhelming vote to adopt the Rome Statute, setting the stage for the first enduring global criminal court.⁴¹ Once ratified,⁴² the treaty entered into force on 1 July 2002⁴³—establishing the Court a mere 130 years after the first calls, and over fifty years since the UN formally recognized its necessity. As of that date, the treaty

³⁶ Cambodia saw millions perish, and “[t]housands of civilians, including horrifying numbers of unarmed women and children, lost their lives in armed conflicts in Mozambique, Liberia, El Salvador, and other countries.” Hunt for Justice: The Louise Arbor Story, <http://www.huntforjustice.com/4-icc-en.php> (last visited May 18, 2009). In Mozambique, the people had endured a devastating civil war for over sixteen years, over one million died, three million became refugees or displaced persons, and the country’s infrastructure was destroyed. James L. Woods, *Mozambique, The CIVPOL Operation*, in POLICING THE NEW WORLD DISORDER: PEACE OPERATIONS AND PUBLIC SECURITY 144 (Robert B. Oakley et al. eds., 1998), available at <http://www.ndu.edu/inss/books/books%20-%201998/Policing%20the%20New%20World%20Disorder%20-%20May%2098/PNW.pdf>. “From 1989 to 2003, Liberia was engulfed in two armed conflicts typified by egregious human rights violations.” HUMAN RIGHTS WATCH, WORLD REPORT 2007: LIBERIA COUNTRY STUDY, available at <http://hrw.org/englishwr2k7/docs/2007/01/11/liberi14716.htm>. In El Salvador, a UN Commission on the Truth for El Salvador, which published a report in March 1993 concerning the civil war between an armed insurgency and the military-backed government, determined that Salvadoran armed forces and death squads bore principal responsibility for the murder, disappearance, and torture of countless Salvadoran civilians. HUMAN RIGHTS WATCH, ACCOUNTABILITY AND HUMAN RIGHTS: REPORT OF THE UN COMMISSION ON THE TRUTH FOR EL SALVADOR (Mar. 1993), available at http://hrw.org/doc/?t=americas_pub&c=elsalv.

³⁷ HOLT & DALLAS, *supra* note 22, at 23–24. The “former Yugoslavian and Rwandan conflicts led to one of the most profound developments in international humanitarian law since the end of WW I—the creation of international judicial mechanisms designed to bring to justice those who commit crimes against their own nationals.” *Id.* at 24. On 22 February 1993, the UNSC created the first global war crimes tribunal since the IMT and IMTFE in WW II, establishing the ICTY via UNSCR 808. S.C. Res. 808, U.N. Doc. S/RES/808 (1993). On 8 November 1994, the UNSC created the ICTR via UNSCR 955, adopting all the rules of procedure and evidence from the ICTY, with applicable changes. S.C. Res. 955, U.N. Doc. S/RES/955 (1994). Additionally, and of note, on 14 August 2000, the UNSC established the Special Court for Sierra Leone, via UNSCR 1315, which approved a separate agreement between Sierra Leone and the UN Secretary-General (signed 16 January 2002) to create a hybrid international-domestic court. S.C. Res. 1315, U.N. Doc. S/RES/1315 (2000); Office of Press and Public Affairs, Special Court for Sierra Leone, *Special Court for Sierra Leone: Basic Facts 1–2*, available at www.sc-sl.org (last visited May 18, 2009); *Sierra Leone’s War Crimes Tribunal*, BBC NEWS, AFRICA, Mar. 10, 2004, at 1–2, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/3547345.stm>.

³⁸ In 1989, at the request of Trinidad and Tobago, the UNGA asked the ILC to continue drafting the ICC statute. Trinidad and Tobago asked the UNGA to resurrect the draft statute for the ICC for the purpose of prosecuting individuals involved in drug trafficking. Bassiouni, *supra* note 27, at 61; *ICC Overview*, *supra* note 26.

³⁹ *ICC Overview*, *supra* note 26.

⁴⁰ *Id.* Following the Rome Conference, the Preparatory Committee was tasked with negotiating related, or complementary documents, such as the rules of evidence and procedure, elements of crimes, UN-ICC Relationship Agreement, and other documents of a similar nature. *Id.*

⁴¹ On the last day of the Conference, while 120 member states voted in favor of the treaty, only 7 nations voted against adopting it—the United States, China, Israel, Iraq, Libya, Qatar, and Yemen. ELSEA, *supra* note 34, at 2. Twenty-one other nations abstained from voting. *Id.*

⁴² The Statute set a deadline of 31 December 2000 for signing the treaty. Coalition for the International Criminal Court, *Ratification of the Rome Statute*, <http://www.iccnw.org/?mod=romeratification> (last visited May 18, 2009) [hereinafter *ICC Timeline*]. On the last day, the United States was joined by Israel and Iran in signing the treaty. *Id.* One hundred and thirty-nine states actually signed the treaty by the deadline. *Id.*

⁴³ The trigger for the Statute to enter into force was the sixtieth ratification of the Statute, which occurred on 11 April 2002. The Statute specifically provides in Article 126 that it will “enter into force on the first day of the month after the 60th day following the date on which the 60th nation submits its instrument of ratification to the UN.” Rome Statute, *supra* note 19, art. 126. The first state to ratify the Rome Statute was Senegal, which notified the Secretary-General on 2 February 1999 of its ratification. On 11 April 2002, ten states simultaneously deposited their treaty instruments designating ratification of the treaty in a special ceremony at the UN headquarters in New York: Bosnia and Herzegovina, Bulgaria, Cambodia, Democratic Republic of the Congo, Ireland, Jordan, Mongolia, Niger, Romania, and Slovakia. Sixty-six countries, representing six more than was necessary to establish the Court, ratified the treaty by 11 April 2002. *ICC Timeline*, *supra* note 43. Notably, the sixtieth ratification came many years earlier than anyone had anticipated or predicted.

became binding on all countries that had ratified or acceded to the Rome Statute and for which it had entered into force.⁴⁴ Yet as the ICC at long last became operational, struggling to find its legs, violent storms were already brewing—tempests named Uganda, Congo, and Sudan.

III. The Operation of the International Criminal Court

[F]or vigilance to be eternal, there must be persons who are vigilant.⁴⁵

The ICC is the first permanent, treaty-based world criminal court possessing international jurisdiction. The first standing court of its kind, the ICC is specifically designed to be an international treaty-based institution which allows all member states an opportunity to take part in its development and have an influence on its operations.⁴⁶ It is separate from and independent of the UN, unlike its predecessor international criminal tribunals in Yugoslavia and Rwanda, which were developed within the UN construct.⁴⁷ The Rome Statute established the Court's operations—including its structure, duties, and jurisdiction, as well as rules for limited oversight by the Assembly of States Parties, the Court's governing body.⁴⁸

A. Structure and Duties

The Court is now a functioning judicial institution in its official seat in The Hague, the Netherlands. It is comprised of four organs—the Registry, the Prosecutor, the Presidency, and the Judicial Divisions, or Chambers. The Registry provides all administrative and operational support to the Court per the Presidency. The Prosecutor is responsible for receiving and evaluating referrals, information, evidence, and testimony concerning crimes within the ICC's jurisdiction, initiating investigations, and prosecuting cases before the Court. The Presidency, which is composed of three judges elected from within the Chambers by a simple majority vote, manages the Court's administration and judicial actions, and serves as the Court's primary representative and official voice. Finally, the Judicial Divisions includes six judges in each of three chambers—Pre-Trial, Trial, and Appeals.⁴⁹

⁴⁴ Rome Statute, *supra* note 19, art. 126; *ICC Timeline*, *supra* note 43, at 2. As of 30 March 2009, 139 countries have signed the treaty, and 108 have ratified it. The American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), Ratifications and Declarations, http://www.amicc.org/icc_ratifications.html (last visited Apr. 20, 2009) [hereinafter *Ratifications and Declarations*].

⁴⁵ WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 624 (2000).

⁴⁶ Rome Statute, *supra* note 19, arts. 1, 4–5; ELSEA, *supra* note 34, at 1.

⁴⁷ Although Article 2 of the Rome Statute indicates that the Assembly of States Parties will bring the Court into a “relationship with the United Nations through an agreement to be approved by the Assembly . . . and thereafter concluded by the President of the Court.” Rome Statute, *supra* note 19, art. 2. This was accomplished through a memorandum of agreement between the UN and the ICC signed and entered into force on 4 October 2004. *ICC-UN Agreement Signed*, ICC NEWSLETTER #2 (Pub. Info. & Documentation Section, Int'l Criminal Court, The Hague, Neth.), Oct. 2004, at 2, available at http://www2.icc-cpi.int/NR/rdonlyres/4E898258-B75B-4757-9AFD-47A3674ADBA5/278481/ICCNL2200410_En.pdf. The memorandum identifies the role and mandate of each institution, and is designed to “strengthen[] the cooperation of the two organisations on matters of mutual interest relating to the exchange of information [and representatives], judicial assistance, cooperation on infrastructure and technical matters.” *Id.* Moreover, the ICC is not connected to the International Court of Justice (ICJ or World Court), which is designed to address grievances or disputes between member states. Key Facts About the International Criminal Court (Jan. 29, 2007), <http://www.reuters.com/article/idUSL21683125> [hereinafter *ICC Key Facts*].

⁴⁸ The Assembly, composed of State Parties to the Statute (those states that have ratified the Statute, one vote per state), among many other duties elect and remove both judges and prosecutors, address amendments to the Statute, approve the budget (while financing the budget through mandatory dues for each member state), and oversee all facets of the Court's work. Rome Statute, *supra* note 19, arts. 36, 46, 49, 112, 121; The American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), Basic Facts About the International Criminal Court, http://www.amicc.org/icc_structure.html (last visited Apr. 20, 2009) [hereinafter *ICC Basic Facts*].

⁴⁹ Rome Statute, *supra* note 19, arts. 3, 34. Key functions of the Registry include responsibility for the Court's financial management and for the field offices where investigations are being conducted, such as in Kinshasa, Democratic Republic of Congo, and Kampala, Uganda. *Id.* art. 43; HOLT & DALLAS, *supra* note 22, at 27 (citing UNGA, *Report of the International Criminal Court* 8 (A/60/177) (Aug. 1, 2005)). The first Prosecutor—elected by the Assembly on 21 April 2003 and sworn in on 16 June 2003 for a term of nine years—is Luis Moreno Ocampo of Argentina. His Deputy Prosecutor for Investigations is from Belgium, and his Deputy Prosecutor for Prosecutions is from The Gambia. *ICC Basic Facts*, *supra* note 48, at 1. Initially, Judge Philippe Kirsch of Canada was elected President, and his First Vice-President (VP) hailed from Ghana, while the Second VP was from Bolivia. *Id.* Currently, the President hails from the Republic of Korea, the First VP from Mali, and the Second VP from Germany. ICC: Structure of the Court, <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/> (last visited May 18, 2009) [hereinafter *Court Structure*]. Each of the eighteen judges elected in February 2003 were elected by a two-thirds vote of the Assembly to serve for staggered nine-year terms. *Id.*; Rome Statute, *supra* note 19, art. 36. Six new judges were elected in January 2009. *Court Structure*, *supra*. The Statute requires that judges be selected to represent the international community based on geography, legal systems and specialties, and gender. Judges may be removed by a two-thirds majority vote of the Assembly following a two-thirds majority recommendation from fellow judges that the judge in question be removed for serious misconduct or inability to perform functions of position. Rome Statute, *supra* note 19, arts. 36, 46.

B. Jurisdiction and Admissibility

The Statute provides three methods, on a two-track system of jurisdiction, for referring potential cases over which the Court may exercise jurisdiction.⁵⁰ The UNSC, acting pursuant to authority under Chapter VII of the UN Charter, may refer a matter to the Prosecutor—the first track. Second, a state party may refer the “relevant circumstances” of a matter, along with supporting documentation, if possible, to the Prosecutor. Third, absent such referral, the Prosecutor may initiate an investigation on the basis of credible information from victims, non-governmental organizations, or any other reliable individuals or sources. The second track comprises these last two methods.

The ICC is prospective in nature, capable only of taking cases involving crimes committed after it entered into force on 1 July 2002.⁵¹ The Court’s jurisdiction is anchored on the “universal jurisdiction” concept. In other words, “any nation may lawfully try any individual accused of such crimes in its domestic court system without regard to the nationality of the alleged perpetrator or the territory where the crime is alleged to have taken place.”⁵² However, Article 12 of the Statute imposes certain preconditions on the Court’s exercise of that jurisdiction when not referred by the UNSC. For matters referred by a state party or the Prosecutor, the Court has jurisdiction if either the state on whose territory the conduct occurred, or the state of nationality of the person accused, is a party to the Statute, or voluntarily consents to the Court’s jurisdiction. As such, the Court has jurisdiction over accused individuals from nations that are *not* parties to the Statute if the crime alleged occurred in the territory of a state that is a party (or consents if a non-party). This is an important point for U.S. interests.

In Track 2 cases where the Prosecutor has initiated the investigation on his own, under Article 15 the Prosecutor must obtain judicial review of his decision by two judges of a three-judge panel in the Pre-Trial Chamber before the Court issues an arrest warrant and continues the investigation.⁵³ If a case is referred by a state party or initiated by the Prosecutor with judicial approval, and the Prosecutor determines that an investigation is warranted, he must then notify all state parties and any other state that could reasonably assert jurisdiction. This notification is confidential, to protect evidence and the identity of those involved.⁵⁴ States with conventional jurisdiction may notify the Prosecutor within thirty days of their intent to investigate, and the Prosecutor must defer to that state or seek redress from the Pre-Trial Chamber.⁵⁵ Moreover, unless the UNSC refers the matter, the Court’s jurisdiction is complementary to that of state (domestic) courts—that is, the Court will find a case admissible and will prosecute *only* if the state is either genuinely unwilling or unable to prosecute. As such, cases are inadmissible if the state with jurisdiction is either investigating or prosecuting the case, has investigated the case and has decided not to prosecute the matter, or has already prosecuted the case (for the subject matter that forms the basis of the complaint), and double jeopardy under Article 20 has attached.⁵⁶ The clear intent is for the ICC to serve as a “court of last resort,” designed to complement national systems of justice, not divest them of authority.⁵⁷

⁵⁰ Articles 13, 14, and 15 set forth in detail the methods by which matters may be referred to the Court for consideration. Rome Statute, *supra* note 19, arts. 13, 14, 15. The Statute also allows the UNSC to defer an investigation for a renewable period of twelve months through a UNSC adopted resolution in accordance with Chapter VII of the UN Charter. *Id.* art. 16.

⁵¹ *Id.* art. 11 (“The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.”).

⁵² ELSEA, *supra* note 35, at 21; Rome Statute, *supra* note 19, pmb1. (“Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”). For an in-depth analysis of the concept of universal jurisdiction, see M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. OF INT’L L. 81 (2001), and Lee A. Casey, *The Case Against the International Criminal Court*, 25 FORDHAM INT’L L. J. 840 (2002).

⁵³ Rome Statute, *supra* note 19, art. 15.

⁵⁴ *Id.* art. 18.

⁵⁵ *Id.*

⁵⁶ *Id.* art. 17 (Issues of Admissibility). To further determine admissibility, the Prosecutor will also consider whether the gravity of the crimes alleged warrants action by the Court, taking into account the number and nature of the crimes, the victim’s interests, and the overall interests of justice. *Id.* art. 53.

⁵⁷ HOLT & DALLAS, *supra* note 22, at 28; ELSEA, *supra* note 35, at 22. This is known as the “Principle of Complementarity.” Again, under the Statute, the Prosecutor has an obligation to “defer to the state’s request to investigate and prosecute at that national level unless the Pre-Trial Chamber determines that the state is unable or unwilling to exercise jurisdiction effectively and decides to authorize the Prosecutor to investigate the claim.” HOLT & DALLAS, *supra* note 22, at 28–29; Rome Statute, *supra* note 19, art. 18. How does the Pre-Trial Chamber determine if a state is *genuinely* unable or unwilling to investigate or prosecute? Article 17 sets forth a three-part test, any one of which will result in a finding of unwillingness:

- The state is attempting to shield the person concerned from criminal responsibility;
- There has been an unjustifiable delay, inconsistent with an intent to bring the person concerned to justice;
- The proceedings are not being conducted independently or impartially.

C. Crimes

With the benefit of hindsight, the Rome Statute has compiled a comprehensive list of crimes. The draft Statute was largely modeled after the statutes from the successful and popular *ad hoc* courts. The drafters were able to consider not only the IMT and IMTFE out of WWII, but the three more modern tribunals arising out of Yugoslavia (ICTY), Rwanda (ICTR), and the Special Court for Sierra Leone.⁵⁸ Each built on the lessons of the previous era and tribunals. The ICTY expanded the definition of war crimes and crimes against humanity to cover rape, persecution, and other inhumane acts (authorizing prosecution for persecution on political grounds); the ICTR focused on genocide and mass killings (again authorizing prosecution for persecution on political grounds); and the Special Court for Sierra Leone concentrated on offenses related to the abuse of girls and the conscription of children under fifteen-years old for military service.⁵⁹ The Rome Statute explicitly provides the Court with jurisdiction over genocide,⁶⁰ crimes against humanity,⁶¹ war crimes,⁶² and crimes of aggression—but as the Conference was unable to agree on the definition of “aggression,” and the matter is yet to be resolved, the Court will not exercise jurisdiction over such crimes until adequately defined. The Statute added the caveat that a definition of aggression, as well as the conditions under which the Court would exercise jurisdiction with respect to the crime consistent with the UN Charter, must first be adopted in accordance with Articles 121 and 123 of the Statute. To date, this has not been accomplished, but a Special Working Group of the Court is currently reviewing the issue and has indicated that its proposals will likely be considered at a Review Conference for the Statute to be held in Kampala, Uganda, in 2010.⁶³

D. Current Operations

As of 30 March 2009, four principal cases have been referred to the ICC since its inception⁶⁴—three by a state party involving war crimes and one by the UNSC involving crimes against humanity in Darfur.⁶⁵ The Democratic Republic of the

Id. art. 17. Such decisions of the Pre-Trial Chamber may be taken up to the Appeals Chamber by either the state involved or the Prosecutor. *Id.* arts. 18, 82.

⁵⁸ See *supra* note 38 and accompanying text (discussing these modern tribunals).

⁵⁹ HOLT & DALLAS, *supra* note 22, at 24; KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 17–27 (2001); see *supra* note 38 and accompanying text.

⁶⁰ Rome Statute, *supra* note 19, art. 6. The definition of genocide adopted by the Court is consistent with the definition contained in the Genocide Convention. Genocide Convention, *supra* note 2. There is no need to tie the crime to an armed conflict to be genocide. It is the *mens rea*, or intent, element of the crime that distinguishes genocide from crimes against humanity. KITTICHAISAREE, *supra* note 59, at 69. Note, too, that “every act of Genocide constitutes a Crime Against Humanity, although not every Crime Against Humanity amounts to Genocide . . . and ethnic cleansing is a Crime Against Humanity, but it is not *per se* Genocide.” See Dinstein Address, *supra* note 4, at 1–2.

⁶¹ Rome Statute, *supra* note 19, art. 7; see Dinstein Address, *supra* note 4, at 1–8; ELSEA, *supra* note 35, at 14–16.

⁶² Rome Statute, *supra* note 19, art. 8. The Court’s jurisdiction over war crimes is limited to those “in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.” *Id.* The drafters intended this language to serve as a jurisdictional threshold to prevent the ICC from taking up relatively insignificant cases. However, a concern exists that if the elements within the Statute are “interpreted within the established framework of the international law of armed conflict,” no proof of the existence of any “plan or policy” to commit a war crime will be required, thus lowering the threshold significantly. ELSEA, *supra* note 35, at 19. As discussed in detail later in this article, initial cases addressed by the Prosecutor make it quite evident that the Court is, in fact, applying a “gravity threshold,” and rejecting cases that do not meet this threshold. Nevertheless, this significant concern over the interpretation of a critical portion of the Statute clearly demonstrates why the United States *must* stay engaged and cooperate with the Court to ensure that it properly carries out its duties to the world community. See *infra* notes 91–97 and accompanying text for a discussion of potentially “politicized” prosecutions and the Court’s response to allegations concerning the United States and coalition forces in Iraq.

⁶³ Press Release, ICC, Special Working Group on the Crime of Aggression 1–3 (Feb. 13, 2009), available at <http://www.icc-cpi.int/Menus/ASP/>; Rome Statute, *supra* note 19, art. 5. Some, to include the United States, fear that the Statute may ultimately divest the UNSC of its prerogative in determining whether an act of aggression has occurred. This ultimately hinges on the interpretation of the “consistent with the UN Charter” language in the Statute. If the Statute definition requires a determination by the UNSC that a crime of aggression has occurred, then the UNSC obviously retains its prerogative—if not, then legitimate acts of self-defense could potentially be prosecuted as crimes of aggression. ELSEA, *supra* note 35, at 20–21. This is yet another reason why the United States *must* participate, to ensure that a final definition of aggression includes a determination by the UNSC that aggression has, in fact, occurred.

⁶⁴ The Court has actually received over 7900 “communications” since July 2002, from more than 170 different nations—with the United States, United Kingdom, Germany, and France submitting the majority—containing allegations regarding potential cases. ICC, Office of the Prosecutor, Communications, Referrals and Preliminary Analysis, <http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/> (last visited Apr. 20, 2009). Of the communications received, 80% were determined to be “manifestly outside” the Court’s jurisdiction once an initial review was complete. *Id.* The Prosecutor has issued two response letters—one concerning allegations stemming from the Iraq conflict, and the other out of Venezuela—both on 9 February 2006. *Id.* The Prosecutor is currently in the process of a preliminary analysis of allegations raised in a number of countries to include Chad, Kenya, Afghanistan, Georgia, Colombia, and Palestine. *Court Structure*, *supra* note 49. The Statute requires the Prosecutor to consider the following when analyzing information provided to the Court to determine if a basis exists to conduct an investigation: “if a *reasonable basis* exists to believe that a crime within the jurisdiction of the Court has been committed [jurisdiction]; the gravity of the crimes [admissibility]; complementarity with national proceedings [admissibility]; and interests of justice.” *Id.* (emphasis added); Rome Statute, *supra* note 19, arts. 5–8, 12–13, 17–18, 53.

Congo (DRC), the Republic of Uganda, and the Central African Republic (CAR) have all referred cases, all of which are still active.⁶⁶ In 2004, the ICC commenced its first investigations, looking into alleged crimes in the DRC and Northern Uganda after the governments of both the DRC and Uganda asked the Court to investigate and confirmed a willingness to assist and support the Court. The ICC then issued its first arrest warrants in July 2005, for five leaders of the Lord's Resistance Army in Uganda, accused of provoking and directing over twenty years of conflict, crimes against humanity, and war crimes, to include enslavement and sexual slavery, rape, murder, enlisting children as soldiers, and intentionally targeting civilians.⁶⁷ Conflict has raged in the DRC for almost as long, giving rise to a pattern of rape, torture, forced displacement, and the use of children as soldiers, among other crimes. From 2006 to 2007, the Court issued arrest warrants for four rebel group leaders in the DRC, to include Thomas Lubanga Dyilo, accused of war crimes and crimes against humanity.⁶⁸ In 2006, the Court opened up an investigation concerning Darfur,⁶⁹ which, given Sudan's status as a non-ICC party and unwillingness to consent to the Court's jurisdiction, would not have happened without the UNSC referral. On 2 May 2007, the Court issued arrest warrants for both the Sudanese Interior Minister and a Janjaweed leader.⁷⁰ Also in 2007, the Court opened up an investigation into the allegations arising primarily during the period of 2002 to 2003 within the CAR, which matter is now in the pre-trial stage, being heard by Pre-Trial Chamber III.⁷¹ On 26 January 2009, the Court commenced its first trial, against

⁶⁶ ICC, Office of the Prosecutor, Situations and Cases, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Apr. 20, 2009) [hereinafter *ICC Situations and Cases*]. In March 2005 the UNSC, in Security Council Resolution 1593, made its first referral to the Court, directing it to investigate the situation in Darfur, Sudan. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005). In October 2004, the UN had established the International Commission of Inquiry on Darfur (Darfur Commission), which found the circumstances in Darfur to pose a threat to international security, and that what had taken place could potentially qualify as crimes against humanity and war crimes. UNITED NATIONS, REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR TO THE UNITED NATIONS SECRETARY-GENERAL (25 Jan. 2005), available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf. The claims allege atrocities against women, extrajudicial executions, and torture, among many other claims. *Id.*

⁶⁷ The Prosecutor initially sent the third case, referred by the CAR government on 22 December 2004 to the Court for investigation, back to the CAR, encouraging it to use its national system to prosecute the case, and vowing to monitor the situation. The Cour de Cassation, the nation's highest judicial entity, then confirmed that the CAR would be unable to carry out such a prosecution—as required by the Statute—and the ICC then opened an investigation into the allegations, which centered, for the first time, on a majority of sex crimes vice murders. Press Release, ICC, Prosecutor Opens Investigation in the Central African Republic (Jan. 22, 2007), available at <http://www.icc-cpi.int/>; AMICC, *The Referral to the ICC by the Government of the Central African Republic* 1–3 (Aug. 30, 2005), available at <http://www.amicc.org/docs/Central%20African%20Republic.pdf>.

⁶⁸ In Uganda, a nine-month investigation revealed that at least 2200 killings and 3200 abductions occurred from July 2002 through June 2004—including men, women, boys, and girls from different localities; the destruction of various villages and camps and the burning/killing of families; and, after abducting children, forcing young boys to kill and young girls to be sex slaves. On 8 July 2005, the ICC indicted five individuals involved in the crimes in Uganda: Joseph Kony, the LRA Leader, who was charged with crimes against humanity and war crimes, and four of his top Lieutenants (one of these four, Raska Lukwiya, was killed on 12 August 2006, and thus the proceedings have been terminated against him). ICC, *Office of the Prosecutor, Prosecutions*, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Prosecutions/> (last visited Apr. 20, 2009) [hereinafter *ICC Prosecutions*] (to include the Warrants of Arrest (Public Redacted Version) for the five LRA Leaders detailing their crimes).

⁶⁹ In the DRC, close to four million individuals have died and almost as many have been forced to flee the conflict, which dates back to the 1990s. On 10 February 2006, the Court issued an arrest warrant for Dyilo, the alleged founder, president, and commander-in-chief of the two rebel groups in the DRC. He was arrested in Kinshasa on 17 March 2006 and transferred to The Hague. On 29 January 2007, Pre-Trial Chamber I confirmed the charges against him for enlisting, conscripting, and using children under fifteen in active hostilities and referred his case to the Trial Chamber for trial. On 26 January 2009, he became the first defendant to stand trial. *ICC Prosecutions*, *supra* note 67, at 1; see also Press Release, ICC, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation (23 June 2004), available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation>. Three other arrest warrants were issued, and two have been executed against Germain Katanga and Mathieu Ngudjolo Chui, both former commanders of rebel forces, whose cases went before the Pre-Trial Chamber, which recently referred them for trial before Trial Chamber II. The trial is scheduled to begin on 24 September 2009. The fourth arrest warrant is for Bosco Ntaganda, a former associate of Dyilo, who remains at large. *ICC Situations and Cases*, *supra* note 65, at 1; Press Release, ICC, Trial of Germain Katanga and Mathieu Ngudjolo Chui to Commence on 24 September 2009 (27 Mar. 2009), available at http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/trial%20of%20germain%20katanga%20and%20mathieu%20ngudjolo%20chui%20to%20commence%20thursday_%2024%20september%202009.

⁷⁰ The Prosecutor, in conducting a thorough preliminary inquiry on Darfur, a severely troubled region in Sudan, reviewed over 2500 documents and a sealed list of fifty-one suspects provided by the Darfur Commission, as well as 3000 documents provided by the African Union, and interviewed over fifty independent experts on the situation. HOLT & DALLAS, *supra* note 22, at 33; see also Press Release, ICC, The Prosecutor of the ICC Opens Investigation in Darfur (6 June 2005), available at <http://www2.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/press%20releases/otp%20the%20prosecutor%20of%20the%20icc%20opens%20investigation%20in%20darfur>.

⁷¹ Colum Lynch, *U.N. Panel Finds No Genocide in Darfur but Urges Tribunals*, WASH. POST, Feb. 1, 2005, at A1. On 27 February 2007, the Office of the Prosecutor formally requested summonses to appear, from Pre-Trial Chamber I, for two individuals—Ahmad Muhammad Harun, former Minister of State for the Interior of the Government of Sudan, and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb), a Janjaweed leader. The Prosecutor indicated that he had found a reasonable basis to believe, on the evidence collected, that the two men were criminally responsible for “51 counts of alleged crimes against humanity and war crimes—including persecution, torture, murder, and rape committed in Darfur in 2003 and 2004.” *ICC Prosecutions*, *supra* note 67. Two months later, the Court issued arrest warrants for both men. *Id.*

⁷¹ *ICC Situations and Cases*, *supra* note 65.

Dyilo, who is accused of committing war crimes.⁷² Finally, on 4 March 2009, the Court issued an arrest warrant for Sudanese President Omar Hassan Ahmad al Bashir, one of the three suspects in the two cases out of Darfur, currently pending before Pre-Trial Chamber III. The Court's action in so doing has unfortunately rekindled the flames of violence in this conflict-ravaged region, and caused the Sudanese government to expel some international humanitarian relief organizations from Darfur.⁷³

IV. The U.S. Objections to the International Court

On the eve of the Rome Conference, President Clinton and many in Congress favored creating the ICC, just as the United States had championed the *ad hoc* war crimes tribunals of the 1990s.⁷⁴ Admittedly, the United States supported the *ad hoc* courts not just because of the lofty goals they served in terms of world justice, but because their jurisdiction was determined by the UNSC, over which the United States had a measure of control, lessening the risk to U.S. personnel.⁷⁵ Although these tribunals worked well, having three of them in operation at one time with others under consideration caused the UNSC to experience "Tribunal Fatigue."⁷⁶ The process of establishing a tribunal was extremely time, money, and resource-intensive and, as such, China and the other Permanent Members of the Security Council "let it be known that this would be the last of the UNSC-established *ad hoc* tribunals."⁷⁷ The lack of a permanent system to investigate and prosecute, coupled with an increase in devastating conflicts, meant the momentum for a permanent court intensified, with near unanimous UN support. This expressway of momentum led straight to Rome.

In Rome, the United States was a vital and energetic participant. Yet by the end of the conference, the United States voted against adopting the treaty. Although President Clinton eventually signed the treaty on 31 December 2000,⁷⁸ he simultaneously declared that the United States had "deep reservations" about the Statute's "fundamental flaws."⁷⁹ President

⁷² *Id.*; Press Release, ICC, Trial of Germain Katanga and Mathieu Ngujdjolo Chui to Commence Thursday, 24 September 2009 (27 Mar. 2009), available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/trial%20of%20germain%20katanga%20and%20mathieu%20ngujdolo%20chui%20to%20commence%20thursday%2024%20september%202009>.

⁷³ *Id.* After a second investigation by the Office of the Prosecutor, and subsequent review by the Pre-Trial Chamber, the Court issued an arrest warrant for President al-Bashir on charges of war crimes and crimes against humanity. *ICC Prosecutions*, *supra* note 67, at 2; *The Newshour with Him Lehrer* (PBS television broadcast Mar. 4, 2009), available at http://www.pbs.org/newshour/bb/africa/jan-june09/sudananalysis_03-04.html (interview with Colum Lynch, Wash. Post columnist). All three cases out of Darfur are currently being heard before Pre-Trial Chamber I, and all three suspects remain at large. See *Catch Me if You Can: The President of Sudan Thumbs His Nose at the International Criminal Court* 1–2, ECONOMIST.COM, Mar. 28, 2009, http://www.economist.com/displaystory.cfm?story_id=13395465&CFID=57153563&CFTOKEN=82284846 (discussing, among other issues, the difficulties experienced by the Court in executing its search warrants); Christophe Fournier, Op-Ed., *Punishment or Aid?*, N.Y. TIMES, Mar. 28, 2009, available at <http://www.nytimes.com/2009/03/28/opinion/28iht-edphelan.html>.

⁷⁴ Scharf, *supra* note 24, at 441. Professor Scharf quotes David Scheffer, then-U.S. Ambassador-at-Large for War Crimes Issues, speaking before the Senate Foreign Relations Committee on 23 July 1998: "Our experience with the establishment and operation of the International Criminal Tribunals for the former Yugoslavia and Rwanda had convinced us all of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost-efficient in its operation." *Id.* The United States clearly understood that an entity like the ICC "could help end impunity, bring about justice to some of the world's worst war criminals and provide a mechanism for encouraging national investigations and prosecutions of such crimes." HOLT & DALLAS, *supra* note 22, at 19 (citing a quote taken from Ambassador David Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. OF INT'L CRIM. JUST. 333, 353 (2005)).

⁷⁵ Scharf, *supra* note 24, at 440.

⁷⁶ HOLT & DALLAS, *supra* note 22, at 24. The UN had established the ICTY, ICTR, and Special Court for Sierra Leone, and there was a push to create *ad hoc* courts for Cambodia and East Timor. *Id.*

⁷⁷ Scharf, *supra* note 24, at 440. Reaching agreement on the statute governing the Court's operations, electing Prosecutors and judges, locating suitable courtrooms, offices, and prisons, and obtaining sufficient funding to finance the tribunal proved to be quite difficult and ultimately exhausting for the UNSC members to conduct on a repeated basis. *Id.*

⁷⁸ Although it voted against the Statute on 17 July 1998, the United States did sign the "Final Act of the Conference," which is essentially a presentation of what transpired during the Rome Conference. By so doing, the United States ensured that it would still serve as a voting member of the Preparatory Committee, which was charged with drafting the rules of procedure and evidence, elements of the crime, UN-ICC Memorandum of Agreement, budget, and more. ELSEA, *supra* note 35, at 6, 7 n.29; see also Final Act of the International Criminal Court, <http://untreaty.un.org/cod/icc/statute/finalfra.htm> (last visited Apr. 20, 2009) (providing copies of the listed documents).

⁷⁹

Nevertheless, President Clinton signed the treaty on December 31, 2000—the last day it was open for signature without simultaneous ratification, at the same time declaring that the treaty contained "significant flaws" and that he would not submit it to the Senate for its advice and consent "until our fundamental concerns are "satisfied."

Bush then echoed those concerns as the United States delivered to the UN both its intention to *not* ratify the Statute and formal renouncement of any obligations under the Statute.⁸⁰ As such, the United States and Turkey are the only NATO members not to join the Court, and the United States is the only democracy in the world to actively oppose it⁸¹—something that does not sit well with European Union countries, all of whom support the ICC, or the many other Court proponents.⁸²

At the core of our opposition is a “fear that other nations will use the ICC as a political forum to challenge actions deemed legitimate by responsible governments.”⁸³ In essence, the United States is concerned that the Court might assert jurisdiction over U.S. servicemembers charged with war crimes arising out of a legitimate use of force, or over U.S. civilian leaders in the course of making policy decisions, regardless of whether the United States is a party to the Statute.⁸⁴ In Rome, the United States sought an exemption from the Court’s jurisdiction over these individuals, “based on the unique position the United States occupies with regard to international peacekeeping.”⁸⁵ What it received was almost everything for which it asked, except what in essence was an “iron-clad veto of jurisdiction over U.S. personnel.”⁸⁶ As such, the United States felt obligated to oppose the Court, and what follows are the major U.S. objections to the Court and an analysis of each.

ELSEA, *supra* note 35, at 3. As is evident, the United States’ concerns over the Statute and its opposition to ratification predated the Bush Administration; this is not purely an issue or concern of those on President Bush’s staff, as some advocacy groups and members of the media have suggested. However, the Bush Administration appears to have increased the level of opposition to the Court.

⁸⁰ “Although some in the media have described the act as an ‘unsigned’ of the treaty, it may be more accurately described as a notification of intent not to ratify.” *Id.* at 1. The 6 May 2002 letter from Under Secretary of State John Bolton to the UN Secretary-General stated:

This is to inform you, in connection with the Rome Statute of the ICC adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists related to this treaty.

Letter from John Bolton, U.S. Under Sec’y of State for Arms Control and Int’l Sec., to Kofi Annan, UN Sec’y-Gen. (May 6, 2002), *available at* <http://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>; *see also* U.S. Dep’t of State, Off. of War Crimes Issues, The Int’l Crim. Ct.: A Fact Sheet (May 6, 2002), *available at* http://www.policyalmanac.org/world/archive/state_international_criminal_court.shtml [hereinafter DOS Fact Sheet] (providing the U.S. decision, background information, a list of the significant problems with the treaty, and some alternate mechanisms to the ICC). Because the United States signed the Statute, it was required under international law to refrain from any activity that would contravene the purpose of the Statute. However, once the United States indicated its intent to not ratify, this requirement terminated. ELSEA, *supra* note 34, at 4 n.17.

⁸¹ Human Rights Watch, Questions and Answers about the International Criminal Court, <http://www.hrw.org/campaigns/icc/qna.htm> (last visited Apr. 20, 2009) [hereinafter HRW *International Justice*]. There are currently nineteen members of NATO, all of which—save for Turkey and the United States—have ratified the Rome Treaty.

⁸² A total of 108 nations have ratified the Statute and 139 are signatories. *Id.*; *About the Court, supra* note 28. One issue that may not sit well with some Americans is that the Court has no competence to impose the death penalty as a lawful sentence. When justified by the nature of the crime—and most crimes tried before the Court will clearly be of a serious nature—the Court may impose sentences ranging up to life imprisonment, as well as fines and forfeiture of proceeds, property, or assets derived from commission of the crime(s). In light of events in Europe, where many former Communist countries have joined the Council of Europe and signed on to the European Human Rights Convention—which requires, as part of becoming a signatory, that the nation abolish the death penalty within its borders—it was extremely unlikely heading into the deliberations and debates in Rome that the United States, or any other pro-death penalty nation, would succeed in convincing the Conference to adopt the death penalty as a permissible punishment. In the end, as with many contested issues regarding the Court, it becomes a balancing test. If the death penalty issue becomes a “red line” for the United States, and the choice becomes a Court with no death penalty, or no Court, the prudent decision is to opt for an operational and effective Court now, with a determination to work cooperatively to change those aspects of the Court that require such change. Note that the number of countries worldwide that have the death penalty as an authorized punishment is now down to 59 and, of those, only 25 actually execute individuals under such authorization. AMNESTY INT’L, CRUEL, DISCRIMINATORY, UNFAIR, AND DEGRADING: THE DEATH PENALTY IN 2008 (Mar. 23, 2009), *available at* <http://www.amnesty.org/en/news-and-updates/cruel-discriminatory-unfair-and-degrading-%E2%80%93-death-penalty-2008-20090323>. As such, it is unlikely that the Assembly of States Parties will ever vote to accept the death penalty as a permissible punishment.

⁸³ ELLEN GRIGORIAN, CONG. RESEARCH SERV. REP., THE INTERNATIONAL CRIMINAL COURT TREATY: DESCRIPTION, POLICY ISSUES, AND CONGRESSIONAL CONCERNS, RL30020, at 9 (Jan. 6, 1999).

⁸⁴ The United States believes that accountability for such crimes comes from national judicial systems and *ad hoc* international tribunals properly established by the UNSC. DOS Fact Sheet, *supra* note 80. However, this shortsighted and parochial perspective fails to account for the lack of properly functioning national courts in some countries, or an unwillingness to prosecute in rogue regimes, or the “Tribunal Fatigue” suffered by the UN and many member countries when attempting to establish numerous *ad hoc* tribunals. The ICC is a practical and responsible solution to all of these problems. Moreover, should the United States choose to so prosecute in its national courts, the ICC would defer such prosecution to the United States, as discussed at *infra* notes 91, 93–94 and accompanying text.

⁸⁵ ELSEA, *supra* note 20, at 4. The United States contends that the potential for prosecution could negatively affect foreign policy and military operations, which is an infringement of U.S. sovereignty. *Id.* “[A]s the world’s greatest military and economic power, more than any other country the US is expected to intervene to halt humanitarian catastrophes around the world. This unique position renders US personnel uniquely vulnerable to the potential jurisdiction of an international criminal court.” Scharf, *supra* note 24, at 441.

⁸⁶ Professor Scharf believes that the United States played “hard-ball” in Rome and came away with almost all it needed, but weakened the ICC in so doing. Scharf, *supra* note 24, at 442. To support this claim, he quotes Ambassador Scheffer’s testimony before the Senate Foreign Relations Committee following the Rome Conference: “The US delegation certainly reduced exposure to unwarranted prosecutions by the international court through our successful efforts

A. Jurisdiction

The ICC asserts jurisdiction over certain crimes committed in a state party's territory, even if committed by non-party nationals. The impetus for the Court's more expansive reach was to ensure that it could assert jurisdiction over "rogue regimes," which would otherwise protect themselves simply by refusing to ratify the Statute, subverting the Court's primary purpose.⁸⁷ Yet notwithstanding this very reasonable rationale, the United States objects to this exercise of jurisdiction, because in casting this broad net, the Statute caught more than just rogue nations, it caught America.⁸⁸ However, as the United States is a party to treaties from which the Statute derived its definitions of crimes, U.S. nationals are already subject to crimes over which the Court will have jurisdiction.⁸⁹ The United States claims that the ICC's jurisdiction infringes on U.S. sovereignty, as the threat of prosecution may inhibit the conduct of U.S. foreign policy. But as one legal scholar notes, "Sovereignty does not provide a basis for exclusive jurisdiction over crimes committed by a State's nationals in a foreign country. Nor does a foreign indictment of a State's nationals for acts committed in a foreign country constitute an impermissible intervention in the State's internal affairs."⁹⁰ Finally, the Statute clearly intended to address the United States' concern through complementary jurisdiction.

B. Complementarity and "Politicized" Prosecution

Based on the ICC's construct, the United States alleges that some nations may use the Court to refer "trumped-up" charges against the United States, whose exposure is significantly greater than most due to its prominent role in international matters. Yet under the Statute, the Court must defer to national prosecution unless it finds that nation "unwilling or unable" to effect such investigation and prosecution. The United States fears that granting the Court this discretion will allow it to examine and potentially reject a sovereign state's decision not to prosecute, or the state's court's decision not to convict.⁹¹ In response, Court proponents initially bristle at the notion that the United States is more susceptible to political maneuvering, especially when many nations contribute significant forces to peacekeeping operations and willingly subject them to the Court's jurisdiction, unlike the United States.

to build into the treaty a range of safeguards that will benefit not only us but also our friends and allies." *Id.* Yet it is interesting to note that all of these concessions proved to be enough to satisfy 108 nations, to include the United Kingdom, Canada, France, and Russia, but not the United States. *Id.*

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The ICC is intended to resolve the problem of impunity for perpetrators of atrocities, but has led to a different concern, namely, that the ICC may be used by some countries to make trumped-up allegations accusing other states' policymakers, or even implementers of disfavored policies, of engaging in criminal conduct. Probably the most divisive issue at the Rome Conference was the effort to reach a balance between the two extremes—how to bring perpetrators of atrocities to justice while protecting innocent persons from frivolous prosecution

ELSEA, *supra* note 35, at 21–22; Rome Statute, *supra* note 19, pmb1. ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . ." and "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . ." and "[r]ecalling that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes . . .").

⁸⁸ Ambassador Scheffer, testifying before the Senate Foreign Relations Committee, indicated that "the treaty purports to establish an arrangement whereby US armed forces operating overseas could be conceivably prosecuted by the international court even if the US has not agreed to be bound by the treaty. . . . this is contrary to the most fundamental principles of treaty law." *Hearing on the Permanent International Criminal Court Before the Subcomm. on Int'l Operations, S. Comm. on Foreign Rel.*, 105th Cong. 13 (23 July 1998). The Ambassador subsequently indicated that this ability represented the "single most fundamental flaw in the Rome Treaty that makes it impossible for the United States to sign the present text." David J. Scheffer, U.S. Ambassador for War Crimes, Address at the Annual Meeting of the American Society of International Law, International Criminal Court: The Challenge of Jurisdiction (Mar. 26, 1999). However, Professor Scharf contends that this argument "rests on shaky foundations," asserting that "the ICC's jurisdiction over nationals of non-party states . . . [is] . . . well-grounded in international law. The exercise of such jurisdiction can be based both on the universality principle and the territoriality principle." Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 L. & CONTEMP. PROBS. 71, 116 (2001).

⁸⁹ Moreover, the IMT (Nuremberg) and the ICTY (Yugoslavia) serve as precedent for the "collective delegation of universal jurisdiction to an international criminal court without the consent of the State of nationality of the accused." Scharf, *supra* note 24, at 443.

⁹⁰ *Id.* Professor Scharf believes that the argument presented by Court opponents concerning the Court's jurisdiction over non-party nationals, as stated in the treaty—that such jurisdiction violates the Vienna Convention on the Law of Treaties in that a treaty cannot bind a non-party—is actually an argument that the treaty affects the sovereignty interests of the United States. *Id.*

⁹¹ Rome Statute, *supra* note 19, art. 17; ELSEA, *supra* note 20, at 7; DOS Fact Sheet, *supra* note 80, at 2.

Supporters of the ICC also view the claim as greatly exaggerated. With the following procedural protections built into the Statute, the belief is that the Court is not likely to experience success in any “politicized” prosecutions. First, the Prosecutor must receive authorization from the Pre-Trial Chamber to initiate any investigation on a matter not referred by the UNSC or a state party, which decision may be appealed to the Appeals Chamber.⁹² Second, the Prosecutor must notify all states with an interest in prosecuting a case of the Court’s intent to investigate. A state then has one month to notify the Court that it will investigate—a decision to which the Prosecutor must defer, unless he can convince the Pre-Trial Chamber that the state’s actions are not genuine, which decision may again be appealed.⁹³ Third, the Statute raises the threshold for cases the Court may address, giving it jurisdiction over only those “grave” breaches executed as part of a “plan or policy or large scale commission of such crimes.”⁹⁴ Last, the UNSC has authority under the Statute to defer, via a resolution, any investigation or prosecution for twelve months, on a renewable basis.⁹⁵ Additionally, with the benefit of hindsight, the United States may now review and assess the Court’s almost seven years worth of decisions as a gauge of any inclination to make determinations for purposes contrary to the Court’s intent—and it will observe none. Instead, it will see a Prosecutor who declined to investigate allegations concerning the conduct of our personnel in Iraq,⁹⁶ despite multiple submissions by public and private entities forcefully urging him to take action against the United States—the essence of political persuasion.⁹⁷ This obviously bodes well for the credibility of the institution as a whole, and the Prosecutor in particular, as not willing to bow to any pressure, real or perceived, especially when the tide of public opinion—to include that within the United States—had turned significantly against continued U.S. and coalition action in Iraq.

⁹² Rome Statute, *supra* note 19, art. 15; Scharf, *supra* note 24, at 442. As indicated above, both the Prosecutors and Judges are elected by the Assembly, which now comprises over 108 different countries—many allies and friends of the United States and democratic nations. It is indeed quite unlikely that the whole of the Assembly would “lose its good sense” and allow unfounded prosecutions or elect individuals who were anti-American and bent on dragging U.S. personnel before the Court. M. Cherif Bassiouni, *Court Is No Threat to Us*, CHI. TRIB., July 14, 2002, at 1.

⁹³ Rome Statute, *supra* note 19, art. 18. Again, this is the principle of complementarity. Speaking at a press conference in June 2002, former U.S. Secretary of Defense William Cohen admitted that the Court’s limited authority would serve to protect U.S. troops and officials. Cohen indicated that “over the years” the United States has clearly demonstrated that “wherever there is an allegation of abuse on the part of a soldier we have a judicial system that will deal with it very effectively. As long as we have a respected judicial system then there should be some insulation factor.” HRW *International Justice*, *supra* note 81, at 1.

⁹⁴ Rome Statute, *supra* note 19, art. 8.

⁹⁵ *Id.* art. 16. As such, the UNSC has a “collective veto” power over the Court.

⁹⁶ ELSEA, *supra* note 20, at 7.

On February 9, 2006, the Chief Prosecutor issued a letter explaining his reasons for declining to launch an investigation despite multiple submissions by private groups urging action against the United States. In addition to acknowledging the limits of the Court’s jurisdiction, which he noted precluded pursuing charges based on the legality of the decision to invade, the Prosecutor noted that the allegations . . . were “of a different order than the number of victims found in other situations under investigation,” and concluded that the allegations were of insufficient gravity to warrant an investigation.

Id.; Letter from Luis Moreno-Ocampo, Chief Prosecutor, Int’l Criminal Court, The Hague (9 Feb. 2006), available at http://www2.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf [hereinafter *Moreno-Ocampo Letter*] (addressing over 240 communications from individuals and organizations regarding U.S. military operations in Iraq). Moreno-Ocampo explained that the Court does not have personal jurisdiction over non-state party nationals who allegedly committed crimes (the United States), in non-state party territory (Iraq). *Id.* More importantly, he determined that the gravity of the alleged offenses did not rise to the level of either the other crimes currently under investigation, or the threshold established by the Statute. *Id.* The basis of his decision to not investigate further shed significant light on the Court’s method of analysis in reviewing allegations, and should significantly reduce U.S. anxiety over the likelihood of a politicized court with a politicized prosecutor.

⁹⁷ Golzar Kheiltash, *Ocampo Turns Down Iraq Case: Implications for the US*, GLOBAL POL’Y F., Feb. 2006, <http://www.globalpolicy.org/intljustice/icc/2006/02ocampo.htm> (describing the decision and reasoning as “critical to the Court’s credibility” and “demonstrate[ing] to even the staunchest critics that the ICC is truly a Court of last resort,” and that it “undermines the US administration’s position that the ICC is a politicized Court that will be used to unfairly target US service members and personnel”); ELSEA, *supra* note 20, at 7–8. Prosecutor Moreno-Ocampo also appeared content with the United States’ attempts to investigate and prosecute the alleged offenses.

In light of the conclusion reached on gravity, it was unnecessary to reach a conclusion on complementarity. It may be observed, however, that the Office also collected information on national proceedings, including commentaries from various sources, and that national proceedings had been initiated with respect to each of the relevant incidents.

Id. at 7 n.33 (quoting *Moreno-Ocampo Letter*, *supra* note 96, at 1–2). It is critical to note that the system worked as intended in all respects—to include an analysis of jurisdiction, admissibility/gravity of the alleged offenses, and complementarity.

C. Overzealous or “Politicized” Prosecutor

Tied to the prior objection, the United States believes that the Prosecutor, however well-intentioned the individual may be, is ripe for “politicized prosecutions” because his decisions and actions are at his unchecked discretion. However, this argument also holds little sway. As previously detailed, the Prosecutor is bound to seek permission from the Pre-Trial Chamber for any self-initiated investigation, and that decision is subject to an interlocutory appeal to the Appeals Chamber. The Prosecutor is also subject to removal on vote by the Assembly for cause. Clearly, the Conference was attempting to again strike that delicate balance between enough independence and power, absent political (read: UNSC) control—over both Prosecutors and judges—to obtain a fair outcome, with the risk posed by an overzealous Prosecutor. At Rome, the United States attempted to obtain a UNSC check on the Prosecutor. Yet most nations perceived the UNSC as being just as politicized, if not more, such as to cause the typical stalemate and resulting impunity that frequently occurs in these cases. Finally, as set forth above, almost seven years of experience with the Court, and six with this Prosecutor, has demonstrated no evidence whatsoever of any willingness to politicize his, or the Court’s, decisions.⁹⁸

D. Constitutional Concerns and Lack of Due Process

The United States also argues that the Court will not afford U.S. personnel due process rights guaranteed under the U.S. Constitution, such as the right to a jury trial. However, the Statute actually provides a comprehensive array of procedural safeguards—negotiated by Department of Justice (DOJ) representatives in Rome—that track the Bill of Rights.⁹⁹ The DOJ’s Office of Legal Counsel also opined that U.S. ratification of the Statute, and surrender of U.S. nationals for ICC prosecution, would not violate any provisions of the Bill of Rights, nor Article III of the Constitution. Moreover, there are any number of instances in which U.S. nationals do not receive all U.S. procedural protections: overseas trials by foreign governments, military courts-martial (bench trials), and *ad hoc* international tribunals are all good examples.¹⁰⁰ Finally, with the current U.S. policy on military tribunals, such U.S. claims will inevitably lead to accusations that the United States is applying a double standard.¹⁰¹

E. Aggression and Usurping the UNSC’s Role

Finally, the United States contends that the Statute’s grant to the Court of the authority to define and punish “aggression” usurps the UNSC’s role as specified in the United Nations Charter.¹⁰² The United States fears that the Court may ultimately divest the UNSC of its prerogative in determining whether an act of aggression has actually occurred—such as in cases like the US intervention in Iraq. Crimes of aggression—formerly referred to as “crimes against peace”—are within the Court’s

⁹⁸ Rome Statute, *supra* note 19, arts. 15, 46. Philippe Kirsch, the French-Canadian (former) President of the ICC, responded to this objection to the Court as follows: “This business about politically-motivated prosecutions . . . [f]irst of all is extremely difficult to substantiate on the basis of the legal requirements of the statute . . . But also, it has received no substantiation in practice . . . there is not a shred of evidence that the ICC has done anything of a political nature.” Joshua Rozenberg, *The Court That Tries America’s Patience*, GLOBAL POL’Y F., Jan. 12, 2006, available at <http://www.globalpolicy.org/intljustice/icc/2006/0112patience.htm>. “Concerns about a runaway prosecutor are out of place because any indictment has to be confirmed by a panel of three judges, subject to appeal before a different panel of five judges.” Bassiouni, *supra* note 92, at 1. Thus, it would necessitate eight “runaway” judges, from different countries with different perspectives and agendas (if any), to confirm any unsubstantiated prosecution that one runaway prosecutor wanted to set in motion. *Id.*

⁹⁹ “The Procedures of the ICC contain more guarantees than the American criminal justice system. They provide for every right guaranteed in the US Constitution except for a jury trial.” Bassiouni, *supra* note 92, at 1–2. These include rights to a *Miranda*-type warning, defense counsel, reciprocal discovery, speedy trial, presumption of innocence, confrontation of witnesses, exculpatory evidence, protection against double jeopardy, and a right to appeal. ELSEA, *supra* note 35, at 29–39. Some commentators contend that the Statute contains “the most comprehensive list of due process protections which has so far been promulgated.” *Id.* at 29 n.146; Monroe Leigh, Editorial Comment, *The United States and the Statute of Rome*, AM. J. INT’L L. 124, 130–31 (2001). The only significant right not afforded is the right to a trial by jury. The Court will use three-judge panels for bench trials vice a jury, to have trained international law jurists who understand the law and can provide a very detailed, written opinion as to guilt or innocence. Further, a change permits the Prosecutor to appeal if a trial judge happens to misinterpret international law, either in favor of or against the defendant. Scharf, *supra* note 24, at 448.

¹⁰⁰ See Leigh, *supra* note 99, at 130–31; Paul C. Szasz, *The United States Should Join the International Criminal Court*, 9 USAFA J. LEG. STUD. 1, 15 (1999).

¹⁰¹ ELSEA, *supra* note 20, at 9–10.

¹⁰² U.N. Charter art. 39. As an *acceptable* definition of the elements of the term “aggression” has never been achieved, Article 39 of the Charter allows the UNSC to decide if aggression has occurred and, if so, to take action against “any threat to the peace, breach of the peace, or act of aggression.” *Id.*; see also Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court’s Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT’L L. J. 1–4 (2002).

jurisdiction, but are not yet defined. The Statute calls for an amendment to eventually define aggression and specify conditions for the Court's exercise of jurisdiction.¹⁰³ Thus, all state parties will eventually debate and then ultimately vote on the definition. Of course, as the United States is *not* a party, it will *not* have the opportunity to cast such a vote. Moreover, Article 5 requires that any definition and jurisdictional conditions be consistent with the UN Charter's provisions. As a UNSC Permanent Member, the United States has more than ample influence to ensure that the ICC's eventual definition and conditions so comply. As long as the ICC language requires a UNSC determination that a crime of aggression has occurred, then the UNSC obviously retains its prerogative.¹⁰⁴

These five topics comprise the most significant US objections to the Rome Statute and the ICC and, as demonstrated, none are irresolvable. Like any new institution, certain unknowns will only become recognized and understood by the United States through time, experience, effort, and a cooperative working relationship with the Court.

V. The U.S. Response to the International Criminal Court¹⁰⁵

*A person stands a better chance of being tried and judged for killing one human being than for killing
100,000.*¹⁰⁶

Having failed to obtain the "iron-clad veto" of ICC jurisdiction which it sought at Rome, the United States turned to other methods to lessen the Court's impact on U.S. personnel—namely, the American Servicemembers' Protection Act (ASPA), Article 98 Agreements, and restrictions on peacekeeping operations,¹⁰⁷ described and analyzed below.

A. The American Service-Members' Protection Act (ASPA)¹⁰⁸

Once President Clinton signed the Rome Treaty on 31 December 2000, congressional ICC opponents immediately launched into high gear to pass legislation aimed at reducing U.S. cooperation with the Court.¹⁰⁹ The result was the ASPA,

¹⁰³ Rome Statute, *supra* note 19, art. 5; DOS Fact Sheet, *supra* note 80, at 2; *see supra* note 63 and accompanying text.

¹⁰⁴ ELSEA, *supra* note 20, at 8–9; *see also* Marc Grossman, Under Sec'y for Pol. Aff., U.S. Dep't of State, Address at the Center for Strategic and International Studies (May 6, 2002), *available at* <http://www.state.gov/p/9949.htm>.

¹⁰⁵ When considering the U.S. response to the formation and operation of the ICC, we should reflect back on how we as a nation—and a world—felt after we witnessed the horrors perpetrated on our citizens, and those of the world, by "evil men with evil ambitions." For instance, consider this statement issued out of the Potsdam Conference in July, 1945:

There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.

. . . .

. . . [S]tern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners.

Agreements of the Berlin (Potsdam) Conference, July 17–Aug. 2, 1945, Annex II, 3(b)(6), (10), *available at* http://www.pbs.org/wgbh/amex/annex/truman/psources/ps_potsdam.html.

¹⁰⁶ Jose Ayala Lasso, U.N. High Commissioner for Human Rights, Address at the Columbia School of International and Public Affairs, May 14, 1996 (on file with author).

¹⁰⁷

After Rome, US concerns about the extended jurisdiction of the Court remained. Even with the deep involvement of US diplomats and military officials during the negotiations and their effective spearheading of numerous protections, the Rome Statute did not provide the US with an absolute guarantee that American uniformed personnel could not fall under the jurisdiction of the Court. Court critics [such as Senator Jesse Helms] began a heavy campaign opposing the Court, drafting legislation to ensure that the US would always maintain primacy over nationals serving overseas.

HOLT & DALLAS, *supra* note 22, at 58.

¹⁰⁸ 22 U.S.C. §§ 7421–7432 (2006). Congress' clear intent in the ASPA was to protect U.S. forces, and others, from the ICC's jurisdiction.

¹⁰⁹ Senator Jesse Helms, then-Chairman of the powerful Senate Foreign Relations Committee, a staunch treaty opponent, issued a press release following Clinton's signing, stating that,

signed into law just one month after the ICC officially opened. The Act effectively prohibits U.S. cooperation with the ICC by forbidding federal, state, or local assistance to the Court, in terms of support with arrest, extradition, asset forfeiture, service of warrants, searches and seizures, classified information, and other comparable assistance.¹¹⁰ It prohibits certain types of military assistance to nations that are a party to the Statute—except NATO and major non-NATO allies—but have not negotiated a bilateral or executive agreement with the United States to protect U.S. personnel from prosecution by the Court.¹¹¹ The Act regulates U.S. participation in UN peacekeeping operations, by restricting U.S. peacekeeping roles when U.S. forces are at risk of ICC prosecution—such as when the host nation is a party to the Statute, and the United States has not negotiated an agreement with that country to avoid such prosecutions, and the UNSC has not permanently exempted U.S. personnel from prosecution (requiring formal waiver of the restriction by the President).¹¹² Finally, the Act authorizes the President to “use all means necessary to bring about the release” of U.S. and allied personnel detained by the Court.¹¹³ With the ASPA, Congress made its intent to undermine the Court’s efforts abundantly clear, as well as its fear of the threat posed by the Court. While, as argued above, that threat is not well-founded, the Act fails to actually protect U.S. nationals from this perceived threat, because the Act does nothing to influence the mechanisms and procedures of the Court from the *inside*.¹¹⁴ In reality, the Act does more harm than good, as it has been counterproductive to U.S. national security and the fight against terrorism, as discussed below.

B. Article 98 Agreements

Pursuant to the ASPA, the United States also actively promoted agreements with various countries, under Article 98 of the Rome Statute, to protect American personnel from ICC prosecution. Article 98 states,

The Court [ICC] may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.¹¹⁵

Properly translated, the terms of Article 98 prohibit the Court from requiring state parties to act contrary to their obligations under any international agreements concerning the surrender of individuals to the Court for prosecution. As such, the United States sought to enter into these international agreements, preventing countries that sign from aiding in the investigation or prosecution of a U.S. national. These bilateral accords certify that neither signing state will arrest, extradite, or otherwise surrender the other’s personnel to the Court. The clear intent of the agreement is to ensure that these States will not surrender or transfer U.S. personnel to the Court for prosecution. As an example, the agreement between the Philippines and the United States indicates, in essence, that no personnel of one country in the territory of the other country may be

Today’s action is a blatant attempt by a lame-duck President to tie the hands of his successor. . . . This decision will not stand. I will make reversing this decision, and protecting America’s fighting men and women from the jurisdiction of this *international kangaroo court*, one of my highest priorities in the new Congress.

Scharf, *supra* note 24, at 445 (emphasis added). One gets a keen sense of the U.S. willingness to cooperate with the Court in its noble and groundbreaking purpose when a leading U.S. politician—who could dramatically impact the country’s ability to support the Court—refers to the ICC in public, and on the record, as an “international kangaroo court.”

¹¹⁰ 22 U.S.C. § 7423; Lilian V. Faulhaber, *American Servicemembers’ Protection Act of 2002*, 40 HARV. J. LEGIS. 537, 545 (2003).

¹¹¹ These agreements are discussed in detail in Part V.B *infra*. Faulhaber, *supra* note 110, at 547–48; HOLT & DALLAS, *supra* note 22, at 60. Military assistance is defined in Chapters 2 and 5 of the Foreign Assistance Act of 1961, as amended, and the Arms Export Control Act, as covering defense articles and services and international military education and training (IMET) of foreign personnel. The Act highlights the benefit of IMET funding in furthering the goals of “international peace and security, improving the recipient’s self-defense capabilities, and increasing awareness of human rights.” *Id.*; ELSEA, *supra* note 20, at 12–13 nn.57, 58.

¹¹² If the host nation is a non-party, or the President determines that it is in the best interests of the nation to participate, the restriction does not apply. 22 U.S.C. § 7422; Faulhaber, *supra* note 110, at 545–46; *see infra* notes 121–26 and accompanying text for a detailed discussion of peacekeeping operations.

¹¹³ § 7428. This is without question the most compelling provision of an otherwise astonishing piece of legislation, a provision which earned the Act the nickname the “Hague Invasion Act.” *The Hague Invasion Act*, ST. LOUIS POST DISPATCH, Oct. 24, 2001, at B6 (on file with author); *see also* Faulhaber, *supra* note 110, at 546.

¹¹⁴ *See* M. Tia Johnson, *The American Servicemembers’ Protection Act: Protecting Whom?*, 43 VA. J. INT’L LAW 405, 471–84 (2003) (arguing that the Act neither strengthens the United States nor protects U.S. nationals).

¹¹⁵ Rome Statute, *supra* note 19, art. 98.

“surrendered or transferred by any means” to an international court that the UNSC did not establish.¹¹⁶ To sign such “deals” means U.S. restrictions on military assistance under the ASPA no longer apply—obviously, a strong incentive for some states to sign.¹¹⁷ The United States has sought these pacts with both party and non-party nations, and has signed over 100 to date.¹¹⁸ However, many Court supporters view the use of Article 98 in this manner as an inappropriate interpretation and expansion of the provision, primarily intended to cover Status of Forces Agreements (SOFAs) and Status of Mission Agreements (SOMAs).¹¹⁹ The United States responded to this criticism by enacting the Nethercutt Amendment which, like the ASPA, prevented additional funding—direct economic support—to party states that have not signed a bilateral agreement.¹²⁰

C. Restrictions on UN Peacekeeping Operations

One of the primary concerns with the Court’s expansive reach centered on U.S. forces serving in peacekeeping operations.¹²¹ As noted, the ASPA prohibits U.S. participation in these missions unless no risk of prosecution exists.¹²² So significant was this concern, in July 2002 the United States vetoed an extension of the UNSC mandate for the UN mission in Bosnia over the lack of protection from ICC prosecution for U.S. forces. To resolve the crisis and continue the mission, the UNSC relented, granting immunity from prosecution for one year under Article 16, and renewed it for a second.¹²³

¹¹⁶ HOLT & DALLAS, *supra* note 22, at 58 n.144. Court proponents refer to these agreements as “Bilateral Immunity Agreements,” but Ambassador Scheffer indicates that a more appropriate term would be “Bilateral Non-Surrender Agreements,” as they do not provide immunity from prosecution so much as they provide protection from surrender for prosecution. *Id.* at 59–60. Note that the Congressional Research Service raises an interesting issue on this point, concerning how the United States can use Article 98 of the Statute as a basis for these agreements and the non-surrender of individuals, when it has formally notified the UN that it will “not be bound by any” of the terms and obligations of the Rome Statute. ELSEA, *supra* note 20, at 11, 12 n.52.

¹¹⁷ Faulhaber, *supra* note 110, at 547–48. The President may also waive the restriction for certain countries if he finds doing so in the national interest.

¹¹⁸ The United States has entered into bilateral agreements with 102 countries. Only 21 have been ratified by that nation’s Parliament (or equivalent), and 18 qualify as executive agreements, which do not require ratification. As such, only 30 of the 102 agreements actually have the force and effect to protect U.S. personnel from being surrendered by that nation to the Court. Conversely, 63 do not have force and effect, and another 54 countries have publicly declared that they will not enter into any such agreement with the United States. Of the 108 nations to have ratified the Statute so as to become a state-party, more than half have not signed agreements with the United States. Coalition for the International Criminal Court (CICC), Status of US Bilateral Immunity Agreements (BIAs) I (11 Dec. 2006), available at http://www.iccnw.org/documents/CICCFS_BIAstatus_current.pdf. Accordingly, assuming that the “non-surrender” agreements actually provide a modicum of protection for U.S. personnel, state-parties as well as non-state parties are not lining up to sign these agreements, notwithstanding the heavy-handed tactics of the United States in threatening to deny, and actually denying, aid to those countries (twenty-four states-parties lost all aid and assistance because they would not sign an agreement). *Id.*

¹¹⁹

There is an argument within the international community about the use of Article 98 agreements, as negotiated by the US since Rome, and whether they should be recognized as having precedent over the Court’s authority. This provision when originally included in the Statute was intended to cover Status of Forces Agreements (SOFAs) and Status of Mission Agreements (SOMAs), which establish the responsibilities of a nation sending troops to another country, as well as where jurisdiction lies between the US and the host government over criminal and civil issues involving the deployed personnel.”

HOLT & DALLAS, *supra* note 22, at 59 (SOFAs typically cover armed forces and civilians in an official capacity, while SOMAs cover peacekeeping forces.).

¹²⁰ Consolidated Appropriations Act, 2005, Pub. L. No 108-447, 118 Stat. 2809. This Act was termed the Nethercutt Amendment because it was introduced by Representative George Nethercutt, a Republican Congressman from the State of Washington. *Id.* He added a provision into the State Department foreign appropriations bill requiring that countries that cooperate with the ICC, but who fail to sign BIAs with the United States, would lose Economic Support Funds (ESFs). Coalition for the International Criminal Court, Nethercutt Amendment, <http://www.iccnw.org/?mod=nethercutt> (last visited May 12, 2009).

¹²¹ One commentator notes, however, that notwithstanding the substantial concern it expressed, the United States has not had, since the Court’s inception, more than a small contribution to any UN mission. In June 2002, the United States had only 756 personnel on such missions, 33 of who were unarmed observers, 722 of who were police officers in Kosovo, and 1 who was a Soldier. By January 2006, that number had dropped to 370, with only 6 Soldiers. HOLT & DALLAS, *supra* note 22, at 63. “As of November 2008, 120 countries contribute a total of 90 thousand military personnel to UN Peacekeeping missions around the world. The US gave just 212 personnel, 190 of whom are police. . . . In the absence of personnel, the US tends to give cash and infrastructure support.” Kristen Cordell, *Combating Sexual and Gender-based Violence: A Key Role for US Women Peacekeepers*, OPEN DEMOCRACY 1 (Mar. 3, 2009), available at <http://www.yfp.org/content/key-role-us-women-peacekeepers>.

¹²² The President must report to Congress and certify that U.S. personnel are not at risk because either the UN has granted them immunity while participating in that particular mission, or there exists some type of agreement that the United States has negotiated with the host government, and other participating nations, protecting U.S. personnel. Faulhaber, *supra* note 110, at 545–56.

¹²³ In UN Resolution 1422, adopted 12 July 2002, the UNSC created a “blanket deferral of prosecution” by the Court, for a one-year period, for those forces from non-party states. S.C. Res. 1422, ¶ 1, U.N. Doc. S/RES/1422 (July 12, 2002). The Council contended that such immunity was permissible under Article 16 of the Rome Statute, which allows the UNSC to defer any investigation or prosecution for a period of up to twelve months via UNSC resolution, on a renewable basis. As such, UNSC Resolution 1487 thereafter renewed the immunity for an additional year. S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003). However, the Council, under significant pressure from many directions for wilting under the United States pressure, failed to renew the resolution beyond 2004. ELSEA, *supra* note 20, at 23–24; Rome Statute, *supra* note 19, art. 16.

Subsequent UN missions have created the same concern. United States forces participated in the UN Mission in Liberia in 2003 because the UNSC granted all personnel from non-party states permanent immunity from the Court regarding acts tied to the mission.¹²⁴ Similarly, in Haiti U.S. forces participated in the UN Stabilization Mission in 2004 based on a U.S.-Haiti Article 98 Agreement.¹²⁵ Not surprisingly, the international community became frustrated with, and opposed to, U.S. actions in threatening to impede peacekeeping missions, broadening the intent of Article 16, and circumventing the Court's purpose at every turn. Then-UN Assistant Secretary-General John Ruggie captured this sentiment best in stating: "The problem here is not US opposition to the ICC, but that UN peacekeeping has been hijacked as a tool to express America's opposition to the ICC."¹²⁶

D. An Analysis of the U.S. Response

The U.S. response, with its harsh restrictions on assistance, participation, and cooperation, clearly added a "coercive element" to the U.S. policy toward, and relationship—or lack thereof—with, the Court. United States efforts, while successful (to U.S. ICC critics) only in minor respects, have created significant worldwide resistance.¹²⁷ Moreover, they have had many unintended consequences for the United States with very little benefit. First, the prohibition on military and economic assistance to state parties lacking a bilateral agreement has negatively affected U.S. Theater Security Cooperation (TSC) Programs—that is, its engagement strategies focused on alliances and partnerships through education, training, military sales and service, and direct aid.¹²⁸ Second, the insensitive and oppressive bilateral agreements are not a failsafe—they do not completely foreclose all prosecutions and cover only a limited number of nations. These agreements do not provide complete immunity from prosecution, but only prevent that particular nation from surrendering U.S. forces and officials to the ICC. If the Court obtains custody of the Americans through other means, the agreement does not prevent the ICC from prosecuting—that is, the Bilateral Immunity Agreements (BIAs) do *not* bind the ICC in any way. Moreover, the accords obviously cover only those nations with which the United States has negotiated an agreement, so unless the United States gets every nation to sign, it is not completely protected from the reach of the Court. Finally, the agreements have required a significant level of effort, energy which it could better focus on working with the Court to enact changes that would enhance the Court's overall effectiveness and relationship with the United States. Additionally, revoking U.S. cooperation and assistance does little to impact the Court's affect on America, but greatly impacts the overall perception, if not reality, of the ICC's ability to operate effectively.¹²⁹ Simultaneously, the *negative* perception of the United States created

¹²⁴ In July 2003, fighting between government forces and a number of warring factions grew increasingly more violent, threatening a humanitarian tragedy. The UN Mission in Liberia (UNMIL), which began in September 2003, was formed to "support the implementation of the ceasefire and peace agreements, support humanitarian and human rights efforts, and protect UN staff, facilities, and civilians in Liberia." U.N. Dep't of Peacekeeping Operations, U.N. Mission in Liberia (23 Mar. 2007), available at <http://www.un.org/depts/dpko/missions/unmil/>.

¹²⁵ "Having determined that the situation in Haiti continued to constitute a threat to international peace and security in the region," as the result of armed insurgents taking over the northern portion of the country, forcing President Aristide to resign, the UNSC, pursuant to Chapter VII of the UN Charter, established the UN Stabilization Mission in Haiti (MINUSTAH) in April 2004. U.N. Dep't of Peacekeeping Operations, U.N. Stabilization Mission in Haiti, (23 Mar. 2007), available at <http://www.un.org/depts/dpko/missions/minustah/>.

¹²⁶ HOLT & DALLAS, *supra* note 22, at 63. Ruggie also happens to be an American advisor to the Secretary-General, and now serves as the UN Special Representative on Business and Human Rights.

¹²⁷ The U.S. European allies found the ASPA provision authorizing the President to "use all means necessary" to bring about the release of U.S. and allied personnel detained or tried by the Court to be particularly distasteful. The European Union initially opposed Article 98 Agreements for its members, but relented when it received concessions from the United States. Nevertheless, U.S. attempts to obtain immunity from the Court are seen as either unnecessary or an unwarranted attempt to diminish the Court's efforts. ELSEA, *supra* note 20, at 26–27. With regard to peacekeeping missions, the UN Secretary-General, UNSC, and many in the UNGA strenuously opposed the extension of U.S. immunity for the UN Mission in Bosnia because they believed that the United States had "hijacked" UN peacekeeping efforts for its own national interests. Human rights groups and many other non-governmental organizations (NGOs) vehemently objected to all US efforts to circumvent the Court's aims. *Id.* at i, 27 n.119; HOLT & DALLAS, *supra* note 22, at 61, 63; *see also id.* at 63 n.162 (citing Juan Forero, *Bush's Aid Cuts on Court Issue Roil Neighbors*, N.Y. TIMES, at A1 (Aug. 19, 2005)).

¹²⁸ The U.S. military, and other agencies and institutions, have been frustrated over the consequences of the U.S. policy. General Bantz Craddock, then-Commander of U.S. Southern Command, testified before Congress that "there are negative unintended consequences that impact one half of the 92 countries in Europe and Africa through lost opportunities to provide professional military training." *Testimony of General Bantz Craddock Before the H. Comm. on the Armed Serv.*, 109th Cong. 1–3 (16 Mar. 2006). He also testified that "using IMET to encourage ICC Article 98 Agreements may have negative effects on long-term US security interests in the Western Hemisphere, a region where effective security cooperation via face-to-face contact is absolutely vital to US interests. . . . Extra-hemispheric actors [read: China] are filling the void left by restricted US military engagement with partner nations." *Id.* Others, such as former U.S. Secretary of State Condoleezza Rice and General James Jones, former NATO Supreme Allied Commander, have made statements that mirrored those of General Craddock.

¹²⁹ Some scholars believe that continued U.S. opposition to the Court will "bring about its demise," just as its failure to join the League of Nations resulted in that body's termination. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 392 (2000).

by its failure to ratify the Statute—and strenuous opposition to, and efforts to undermine, the Court—is significant, and demonstrates that the United States has yet to adequately enhance and refine its strategic communications capabilities,¹³⁰ preventing it from effectively utilizing the global information environment to its advantage.¹³¹

The perception of the United States internationally is negative, at best. Aptly stated, America has a “serious image problem.”¹³² World opinion of the United States has declined substantially in recent years,¹³³ as evidenced by violent anti-U.S. protests in Latin America and the Middle East, Russian President Vladimir Putin’s condemnation of America, and the new view that the United States is somehow responsible for the global economic crisis.¹³⁴ The United States is viewed as the “neighborhood bully”¹³⁵—“arrogant, hypocritical, self-absorbed, and contemptuous of others”¹³⁶—with whom other nations

¹³⁰ Strategic communications

constitute focused U.S. Government efforts to understand and engage key audiences in order to create, strengthen, or preserve conditions favorable to the advancement of US Government interests, policies, and objectives through use of coordinated programs, plans, themes, messages, and products synchronized with the actions of all elements of national power.

JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, INFORMATION OPERATIONS I-10 (13 Feb. 2006) [hereinafter JOINT PUB. 3-13].

¹³¹ “Strategic communications will play an increasingly important role in a unified approach to national security. . . . However, we should recognize that this is a weakness across the US Government” U.S. DEP’T OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 19 (June 2008) [hereinafter NAT’L DEFENSE STRATEGY]. Former U.S. Secretary of Defense Donald Rumsfeld, in a lecture given at the U.S. Army War College, was quoted as saying, “If I were grading, I would say that we probably deserve a ‘D’ or ‘D-plus’ as a country as to how we are doing in the battle of ideas that’s taking place in the world today.” Then-Secretary of Defense Donald Rumsfeld, Address at the U.S. Army War College, Carlisle Barracks, Pa. (Mar. 27, 2006) (remarks on file with author).

¹³² Colonel Jeryl C. Ludowese, U.S. Army, *Strategic Communications: Who Should Lead the Long War of Ideas?*, in INFORMATION AS POWER 5 (2007) (a publication of the Center for Strategic Leadership, an education center for strategic communications, research, and the experiential education of strategic leaders, located on Carlisle Barracks, Pa.).

¹³³ PROGRAM ON INT’L POLICY ATTITUDES, WORLD PUBLICS REJECT US ROLE AS WORLD LEADER (Apr. 17, 2008), available at http://www.worldpublicopinion.org/pipa/pdf/apr07/CCGA+_ViewsUS_article.pdf. “A multinational poll finds that publics around the world reject the idea that the US should play the role of preeminent world leader” and that the United States “plays the role of world policeman more than it should, fails to take their country’s interests into account, and cannot be trusted to act responsibly.” *Id.* at 1. This poll reinforces the conclusions of many other recent global surveys, which found that the US image abroad is bad and growing worse. See *id.* “The global view of the United States’ role in world affairs has significantly deteriorated over the last year according to a BBC World Service poll of more than 26,000 people across 25 different countries.” PROGRAM ON INT’L POLICY ATTITUDES, WORLD VIEW OF US ROLE GOES FROM BAD TO WORSE (2007), available at http://www.worldpublicopinion.org/pipa/articles/international_security_bt/306.php?nid=&id=&pnt=306.

[A]n Arab American Institute/Zogby International poll released in December 2007 of Arabs in Saudi Arabia, Egypt, Morocco, Jordan and Lebanon found a majority in every country polled—with the exception of Lebanon (47%)—reported that their opinion of the US was worse than the year before. When asked how US Iraq policy shapes their overall opinion of the US, a majority in each of the countries said it had a negative impact.

Zogby Polling Shows Declining Support for Iraq War and President Bush, BBS News, Jan. 10, 2007, available at <http://bbsnews.net/article.php/20070110141714940> [hereinafter *Zogby Polling*].

¹³⁴ Just two short years ago, scenes of violent clashes in protest of President Bush’s visit to Latin America flashed across the television screen—scores of individuals willing to subject themselves to “rough treatment,” and even beatings, at the hands of the police, just to have their voices heard in opposition to the United States. “[President Bush’s] real challenge, however, is that there is an enormous rejection of US foreign policy in the world, and America,” said Arturo Valenzuela, Director of the Center for Latin American Studies at Georgetown University. Juan Carlos Lopez, *Bush Faces Widespread Opposition in Latin America*, CNN.com, Mar. 9, 2007, available at <http://edition.cnn.com/2007/WORLD/americas/03/08/bush.latinamerica/index.html>. “In other words, there is very little affinity for the president’s policies in Iraq and the ways in which the US has conducted international relations over these years.” *Id.* Russian President Vladimir Putin, in a speech to an international security conference in Munich, condemned the United States for a “unilateral, militaristic approach” that had made the world a more dangerous place. Thomas E. Ricks & Craig Whitlock, *Putin Hits US Over Unilateral Approach*, WASH. POST, Feb. 11, 2007, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/10/AR2007021000524.html>. Putin indicated, “Nobody feels secure anymore, because nobody can take safety behind the stone wall of international law,” a reference to claims that the United States violated the law when invading Iraq. *Id.* He concluded by alleging that the “almost uncontained hyper-use of force in international relations” was forcing countries opposed to Washington to seek to build up nuclear arsenals. *Id.* “It is a world of one master, one sovereign . . . it has nothing to do with democracy.” *Id.*

Five years after the start of the war in Iraq, the image of the US abroad remains far less positive than it was before the war and at the beginning of the century. However, the latest survey by the *Pew Global Attitudes Project* finds some encouraging signs for America’s global image for the first time this decade. . . . However, around the world, people have a new concern: slumping economic conditions. And they have a familiar complaint—most think the US is having a considerable influence on their economy, and it is largely seen as a negative one.

Pew Global Attitudes Project, Overview, Global Economic Gloom (June 12, 2008), <http://pewglobal.org/reports/display.php?ReportID=260> (providing overview of PEW GLOBAL ATTITUDES PROJECT, GLOBAL ECONOMIC GLOOM—CHINA AND INDIA NOTABLE EXCEPTIONS 1–2 (June 12, 2008), available at <http://pewglobal.org/reports/pdf/260.pdf>).

¹³⁵ Ludowese, *supra* note 132, at 5.

¹³⁶ Ricks & Whitlock, *supra* note 134, at A1.

frequently choose not to work, partner, or associate. The result is an inability to foster accord and form the necessary coalitions to address regional and international issues. This leaves the United States to essentially “go it alone,” as we did in Iraq, making it difficult to claim legitimacy for the use of U.S. military force and more challenging to maintain support for operations abroad—domestic or international.¹³⁷ In 2007, American public and congressional support for operations in Iraq slipped to an all-time low.¹³⁸ International support, never particularly strong, was whittled down to a few staunch allies,¹³⁹ and even these allies now look for cover. The bottom line is that “if [U.S.] strategic communications . . . don’t improve . . . disastrous consequences will follow.”¹⁴⁰ The United States’ ICC position is certainly not aiding the strategic communications cause.

Knowing all this, the United States must focus on selecting proper “audiences, messages, and means” to have “direct strategic implications.”¹⁴¹ In short, what message or image will the United States convey to the world regarding the Court?

¹³⁷ “In the disparate literature on the meaning and sources of legitimacy, two characteristics stand out: first, that legitimacy is a subjective condition, a product of one’s perceptions; second, that legitimacy matters.” Edward C. Luck, *The United States, International Organizations, and the Quest for Legitimacy*, in MULTILATERALISM AND US FOREIGN POL’Y 47–48 (Steward Patrick & Shepard Forman eds., 2000).

In public and scholarly discourse on US relations with international institutions, few terms are employed with greater frequency or less precision than “legitimacy.” Everyone wants to have it, but there is little agreement on where it comes from, what it looks like, or how more of it can be acquired. Internationalists assert that US interventions abroad are seen, domestically and internationally, as more legitimate if they have been authorized by the UN Security Council or by a well-established regional agreement. Others, more skeptical of the utility and wisdom of international institutions, stress that legitimacy flows from domestic sources, that is, from the US constitutional structures and democratic principles.

Id. at 47.

One indicator of . . . [legitimacy’s] perceived value is the frequency with which leaders of nations and international organizations assert the legitimacy of their actions and of the processes that produced them. Nowhere has the struggle for legitimacy been more pointed than in debates over US relations with international organizations.

Id. at 48. This is true of both recent U.S. interventions concerning Iraq in 1990 and 2003. President George H.W. Bush worked tirelessly to construct a coalition of the willing, which coalition thereafter obtained a UN Resolution mandating that action be taken against Iraq. These actions conferred legitimacy to the use of force to expel Iraq from Kuwait, both internationally and domestically. Conversely, President George W. Bush attempted to do the same for Operation Iraqi Freedom in 2003, but was unable to form the type of coalition that the elder Bush had developed. His administration’s significant attempts to provide a sound basis for the use of force in Iraq to depose Saddam never appeared to take root in either the international or domestic arena. As such, the second Bush Administration’s use of force in Iraq never appeared to obtain the necessary legitimacy and, consequently, was never able to generate the type of support that was present in 1990 and 1991.

¹³⁸ Polls in 2007 showed that

Bush’s performance on the Iraq War shows . . . a majority of American’s polled in December (74%) give Bush negative marks—the greatest level of dissatisfaction our polling has found since we began tracking Bush’s performance on the war in 2003. Overall, the majority (54%) say Bush has performed poorly on the war and 20% say he has had fair performance—only 19% grade his performance as good and 5% as excellent.”

Zogby Polling, supra note 133.

¹³⁹ “[T]here has been a striking change in opinion on this issue in Great Britain, the most important US ally in the conflict. Just 43% of the British believe their country made the right decision to use military force against Iraq, down sharply from 61% last May.” THE PEW RESEARCH CENTER, THE IRAQ WAR: MISTRUST OF AMERICA IN EUROPE EVER HIGHER, MUSLIM ANGER PERSISTS 11 (Mar. 16, 2004), available at <http://people-press.org/reports/pdf/206.pdf>. In light of the United Kingdom’s decision in late February 2007 to begin a phased withdrawal of all forces from Iraq, the United States had lost its strongest, and final, ally in the struggle for Iraq. Notwithstanding the arguments that the reasons behind the withdrawal were based on the improving security situation within the British sector in southern Iraq, and their need to divert these forces to Afghanistan to support the United Kingdom’s NATO mission, the decision appeared to have more to do with the untenable situation within Iraq in general. And the Brits were not the only one leaving.

President Bush’s “coalition of the willing,” long seen by much of the world as a shell for a largely US operation in Iraq, is quickly becoming a coalition of the unwilling. Even as Bush sends more American forces to Baghdad, longtime war ally Tony Blair is pulling out British troops. Denmark is leaving. Lithuania says it may withdraw its tiny 53 troop contingent.

Tom Raum, *British Pullout in Iraq Could Signal Final Breakup of ‘Coalition of the Willing,’* SAN DIEGO UNION-TRIB., Feb. 21, 2007, at 1.

¹⁴⁰ This quote is from a former Bush Administration official responsible for stability operations, who clearly understands what it takes to compete and win in the contemporary information domain, and he acknowledged the bottom line in Iraq—a forecast that applies equally as well to the ICC. Lieutenant General Thomas F. Metz, U.S. Army, et al., *Massing Effects in the Information Domain: A Case Study in Aggressive Information Operations*, MIL. REV., May-June 2005, at 4 (citing to an open letter to President Bush, published in the January 2006 issue of *Armed Forces Journal*, written by Joseph Collins, a former Deputy Assistant Secretary of Defense for Stability Operations in the Bush Administration).

¹⁴¹ JOINT PUB. 3-13, *supra* note 130, at I-10 to I-11; Ludowese, *supra* note 132, at 7. The Defense Science Board, an advisory committee that provides independent advice to the Secretary of Defense, described strategic communications as the method by which governments “understand global audiences and cultures, engage in a dialogue between people and institutions, advise policymakers, diplomats and military leaders on the *public implications of policy choices*, and *influence attitudes and behavior through communication strategies.*” *Id.* at 8 (citing DEFENSE SCI. BOARD, REPORT OF THE DEFENSE SCI.

That the United States is an “isolated, parochial, and hypocritical tyrant,” reluctant to be held accountable to the standard established for the rest of the world?¹⁴² Will it risk losing the moral high ground and damaging its influence worldwide, even more than it has? The answer, I believe, is clear. The United States is, and has always been, a world leader on human rights, justice, and the rule of law. Yet its current ICC position—advocating a clear double standard—runs counter to all that America represents, harming its reputation even further.¹⁴³ This position is inconsistent with U.S. values, interests, and institutions; its commitment to end impunity; and the many principles and policies set forth in U.S. national security and defense strategies concerning effective cooperative action, alliances, and partnerships—all focused on “establishing conditions conducive to a favorable international system.”¹⁴⁴ The United States must reverse its ICC policy to send the proper strategic message to the world and regain its status as the vanguard in the quest for international justice. Our National Defense Strategy demands no less:

Beyond our shores, America shoulders additional responsibilities on behalf of the world. For those struggling for a better life, there is and must be no stronger advocate than the United States. We remain a beacon of light for those in dark places, and for this reason we should remember that our actions and words signal the depth of our strength and resolve. For our friends and allies, as well as our enemies and potential adversaries, our commitment to democratic values must be matched by our deeds. The spread of liberty both manifests our ideals and protects our interests.¹⁴⁵

Accordingly, the proper message is that U.S. actions *are* consistent with U.S. words; that is, that the United States “practices what it preaches,” and in reality lives by the standards that it sets for the international community as a world leader.

VI. Recommendations

There can be no peace without justice, no justice without law, and no meaningful law without a Court to decide what is just and lawful under any given circumstance.

—Benjamin B. Ferencz
Former Nuremberg Prosecutor¹⁴⁶

BOARD TASK FORCE ON STRATEGIC COMMUNICATIONS 11 (Off. of the Under Sec’y of Defense for Acquisition, Technology, and Logistics 2004) (emphasis added)).

¹⁴² “Detractors of the US position depict the objection as reluctance on the part of the US to be held accountable for gross human rights violations or to the standard established for the rest of the world.” ELSEA, *supra* note 20, at 5.

¹⁴³ “The U.S. has enjoyed a long reputation for leadership in the struggle against impunity and the quest for universal human rights and the rule of law.” *Id.* at 22. Some commentators believe that U.S. actions regarding the ICC may very well harm, over the long-term, the United States’ reputation and its ability to influence the development of international law. *Id.*; see, e.g., Major Eric S. Kraus & Major Michael O. Lacey, *Utilitarian vs. Humanitarian: The Battle over the Law of War*, 32 PARAMETERS 73 (1 July 2002) (arguing that the United States’ refusal to ratify the Rome Statute, the Ottawa Treaty, and Protocol I to the Geneva Conventions diminishes future U.S. influence on the development of customary international law).

¹⁴⁴ Colonel Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, ARMY LAW., Sept. 2006, at 11 (arguing that “[t]he authority and necessity to use preemptive or preventive war to defend the US does not negate the inconsistency between the national strategies and the current US policy towards the ICC”); OFF. OF THE PRESIDENT OF THE UNITED STATES., NAT’L SEC. STRATEGY OF THE UNITED STATES OF AMERICA 4–7 (Mar. 2006) (calling U.S. network of “alliances and partnerships” a “principle source of strength”). “Shared principles . . . and commitment to cooperation provide far greater security than we could achieve on our own.” *Id.*; NAT’L DEFENSE STRATEGY, *supra* note 131, foreword at 1, 6 (emphasizing the “critical role that our partners play . . . in achieving our common goals” and recognizing that, “[t]o succeed, we must harness and integrate all aspects of national power and work closely with a wide range of allies, friends, and partners. We cannot prevail if we act alone,” and the

security of the US is tightly bound up with the security of the broader international system. As a result, our strategy seeks to build the capacity of fragile or vulnerable partners while improving the capacity of the international system itself to withstand the challenge posed by rogue states and would-be hegemony.

Id.

¹⁴⁵ NAT’L DEFENSE STRATEGY, *supra* note 131, at 1.

¹⁴⁶ *ICC Overview*, *supra* note 26, at 3. Professor Ferencz was the Chief Prosecutor at Nuremberg for the “Einsatzgruppen” case, and ultimately taught the International Law of Peace. See Ferencz Biography, UN Audiovisual Library of International Law 1, available at http://untreaty.un.org/cod/avl/pdf/l/ferencz_bio.pdf (last visited May 18, 2009).

It is common sense to take a method and try it. If it fails, admit it frankly and try another. But above all, try something.

—Franklin Delano Roosevelt¹⁴⁷

The United States' approach to dealing with the ICC—that of hostile outsider—is not succeeding. In the seven years since Rome, this method has engendered only ill-will toward the United States, with absolutely no statutory compromises, designed to protect the Nation's interests, achieved. Accordingly, I recommend that the United States follow FDR's wise counsel to admit failure frankly and try another method. Alternatively, it must now become an *influential insider*—that is, ratify the Statute or, at a minimum, constructively engage and cooperate with the Court to resolve any differences and to move forward in the greater context of enhancing the Court's overall effectiveness, and achieving Professor Ferencz's ideal of a Court providing meaningful law that ensures justice and brings peace. Contrary to America's initial belief, the Court is now a *fait accompli* and, as such, it must "get on board." Ratifying the Statute should not be viewed as capitulation but, instead, as a recognition that the United States will actually gain more by working with the Court than against it. More importantly, the United States will achieve these significant gains, outlined above and below, even while substantially limiting the exposure of U.S. nationals, which is its primary stated concern.

A. A Seat at the Table

As the Statute grants the Court jurisdiction over a state's nationals regardless of whether the state is a party to the Statute, the United States actually gains little benefit, but suffers significant loss, by remaining a non-party. As U.S. personnel are extremely unlikely to engage in genocide or crimes against humanity, our primary concern involves war crimes allegations and the potential prosecution of our civilian leaders or military personnel based on such allegations.¹⁴⁸ Under Article 124 of the Statute, however, a ratifying state may "opt out" of the Court's jurisdiction for war crimes for a period of seven years after such ratification.¹⁴⁹ The United States can use that period to engage the Assembly of State Parties over any potential amendments to the Statute, making the Court more palatable to the United States, while its personnel will not be subject to the risks they are now as a non-party. After six years, if the United States is unable to obtain satisfactory compromises to the "flaws" it perceives in the Court, under Article 127 it may withdraw from the Statute.¹⁵⁰ Additionally, ratification gives the United States the right to participate completely in the Assembly and to vote on *all* critical issues, such as electing—or removing—Judges and Prosecutors, referring crimes to the Prosecutor for investigation, and defining potential crimes, such as the crime of aggression¹⁵¹—all critical elements of influence and control. In the end, it gains a "seat at the table," which is the only position from which it may effect the type of change, or assurances, it desires.

¹⁴⁷ Franklin D. Roosevelt, *Address at Oglethorpe University*, in BARTLETT'S FAMILIAR QUOTATIONS 970 (Little Brown & Co. 14th ed. 1968).

¹⁴⁸ Note that early indications demonstrate that the Court will interpret the Statute's Article 8 provisions dealing with war crimes quite narrowly, requiring evidence that the crimes were "committed as a part of a plan or policy or as part of a large scale commission of such crimes." Rome Statute, *supra* note 19, art. 8; *see supra* notes 62, 91–97 (discussing Article 8 in greater detail), 94 (noting that the Prosecutor's decision concerning allegations against the United States arising out of its involvement in Iraq held that the allegations were not of such gravity, under Article 8, to be admissible before the Court).

¹⁴⁹ Rome Statute, *supra* note 19, art. 124. Known as the "Transitional Provision," this article permits states at the time of ratification to make a declaration that they do not accept the Court's jurisdiction over war crimes for a seven-year period, from the moment the Statute enters into force for that state. *Id.* Article 126 indicates that the Statute "enters into force" for a ratifying state "on the first day of the month of the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval, or accession." *Id.* art. 126. This seven-year period was included in the Statute to give state-parties the necessary time to modify their domestic laws to comport with those in the Statute, so strengthening the principle of complementarity. HOLT & DALLAS, *supra* note 22, at 39.

¹⁵⁰ Rome Statute, *supra* note 19, art. 127 ("A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.").

¹⁵¹ Ratification allows the United States to "opt out" of any new crimes that the Assembly may add by Amendment to the Statute in the coming years as well. *Id.* art 121.

B. Human Rights, Justice, and the Rule of Law

The Court represents justice for victims and perpetrators alike. It is a “forum for honoring the memory of those lost, as well as punishing those responsible,”¹⁵² and signifies a moral commitment to human rights, justice, liberty and peace—all substantial U.S. interests that our nation should be pursuing in concert with the Court and the international community. Victims and families confront abusers, accused are justly tried and criminals punished, and societies re-establish the rule of law—all through the Court—while it also serves to deter potential war criminals.¹⁵³ Additionally, by supporting the Court and all for which it stands, the United States also begins the process of regaining the moral high ground that it so desperately seeks, and the concomitant legitimacy that this higher ground brings.

C. Mutual Need for Legitimacy and Support

Because the Court advances unquestionable American interests in promoting and developing international law and justice, the Court deserves U.S. support. While the United States can significantly assist the Court—offering increased authority, prestige, personnel, intelligence, funding, and more¹⁵⁴—the Court will provide the United States with moral legitimacy, enhancing its damaged reputation. The ICC, short on resources, clearly needs the significant assets that the United States can provide, along with the legitimacy that it will lend to the Court through ratification of the Statute, substantial cooperation, or both. Doing so will gain the United States such legitimacy in kind. Accordingly, the United States needs the Court as much as the Court needs the United States. Ultimately, a balancing test applies, in which America attempts to strike that equilibrium between national interests and global concerns. How much perceived sovereignty will the United States sacrifice to strengthen the global rule of law? Will it place the needs of the many over the desires of the few?¹⁵⁵ As one noted scholar comments:

While the world is grateful for the US role in the preservation of peace and will not target it with unwarranted efforts to prosecute its personnel, neither will it give it carte blanche to conduct military operations without submitting to the same standards to which the US holds all others accountable. *The problem is not with the Court, but with the US double standard.*¹⁵⁶

Fortunately, it appears that the United States is at last beginning to acknowledge that it will not lead the world through military power alone; our actions on ASPA, Article 98 Agreements, Darfur and more in recent years provide optimism for our future posture and response.¹⁵⁷ Instead of military power alone, we must provide moral leadership and support to the

¹⁵² Chris McMorran, *International War Crimes Tribunals*, BEYOND INTRACTABILITY 1–3 (July 2003), available at http://www.beyondintractability.org/essay/int_war_crime_tribunals/?nid=1238.

¹⁵³ *Id.* at 2. Victims and their families will have a chance to face those responsible for such crimes, with the hope that they will be able to then let go of the horrors of what transpired. *Id.* at 1. Such Courts often help nations, attempting to move from a repressive regime that committed war crimes to a democratic one—such as in Germany—make the transition to “stable diplomatic relations and the road to peace.” *Id.* Finally, such Courts, it is believed, act as a deterrent through trial and punishment, as well as through education on what transpired and why. *Id.* at 1–2. “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” Judgment of the International Military Tribunal for the Trial of Major German War Criminals, 6 F.D.R. 69, 110 (1946); NORMAN E. TUTOROW, WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK 6 (1986).

¹⁵⁴ Ruth Wedgewood, *Improve the International Criminal Court*, in TOWARD AN INTERNATIONAL CRIMINAL COURT 57 (Council on Foreign Relations 1999) (indicating that the United States has substantially supported the ICTY with over \$15 million per year, as well as lending “top-ranking investigators and lawyers from the federal government, the support of NATO ground forces . . . and even the provision of U-2 surveillance” assets).

¹⁵⁵ One look at the “few” with whom the United States is currently aligned should answer this question: Libya, Iraq (Saddam-era), Yemen, and China—certainly not the type of company that the United States ordinarily wants to keep. See David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47 (2000) (arguing that the best policy for the United States is one of cooperation rather than obstruction).

¹⁵⁶ Bassouini, *supra* note 92, at 2–3 (emphasis added).

¹⁵⁷ *Id.* In light of U.S. actions concerning Darfur, Sudan, and changes to the ASPA, some believed in recent years that a “fresh assessment of the court seems to be underway.” Nora Boustany, *A Shift in the Debate on the International Court: Some US Officials Seem to Ease Disfavor*, WASH. POST FOREIGN SERV., Nov. 7, 2006, at A16. As to Darfur, the United States abstained from the UNSC vote on referring the case to the ICC. The United States sent a clear message in doing so—that although it could not vote in favor of referring a case to an institution that it publicly opposed, it supported what the Court had done so far and believed that it was appropriate to have the UNSC refer the case to the Court for resolution. *Id.*; Jess Bravin, *US Warms to Hague Tribunal*, WALL ST. J., June 14, 2006, at A4. On 26 March 2008, the President certified that U.S. peacekeeping and peace enforcement forces could participate in the United Nations-African Union Mission in Darfur (UNAMID) without risk of criminal prosecution. Press Release, Office of the Press Secretary, The White House, Memorandum for Secretary of State (Mar. 27, 2008), available at <http://www.whitehouse.gov/news/releases/2008/03/200803/20080327-1.html>. As to the ASPA and Article 98 Agreements, on 29 September 2006 and 27 November 2006 the President waived the prohibition on International Military Education and Training (IMET) funding to twenty-one nations and on Economic Support Funds (ESF) to fourteen nations. See Presidential Determination

newly-formed global justice structure that is the ICC. The Obama Administration's initial comments concerning the ICC, namely that "[t]he ICC, which has started its first trial this week, looks to become an important and credible instrument for trying to hold accountable the senior leadership responsible for atrocities committed in the Congo, Uganda, and Darfur," demonstrate a change in attitude toward the Court that will hopefully chart the path for our future.¹⁵⁸

Finally, regardless of whether the United States ratifies the Statute or adopts a policy of conciliation and cooperation, it must ensure that it both appropriately strengthens U.S. law and establishes policies that require investigations into, and possible prosecution of, all potential war crimes violations, such that the ICC never has a basis to even consider prosecuting U.S. nationals.

1. Strengthen U.S. Law

The United States must identify any disparity between crimes within the Court's jurisdiction and existing U.S. law and immediately seek to eliminate these differences through legislation designed to expand U.S. federal court jurisdiction to cover all relevant offenses, to better shield U.S. personnel from the ICC's reach. Again, revisions to existing U.S. law to enlarge U.S. federal courts' jurisdiction to "cover all crimes over which the ICC might assert jurisdiction could enhance the implementation of complementarity by precluding a finding by the ICC that the US is 'unable' to prosecute one of its citizens."¹⁵⁹

2. Investigate All Allegations

The United States should initiate procedures through policy changes that mandate a thorough investigation of all credible war crimes allegations and, if justified, prosecution of all crimes that fall within the ICC's jurisdiction. Current Department of Defense policy is that all reportable incidents—that is, possible, suspected, or alleged violations of the law of war—will be "reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action."¹⁶⁰ The United States must broaden this requirement, making it national policy to comprehensively investigate all allegations concerning all crimes within the ICC's jurisdiction. Although it should be the uncommon and, in fact, truly extraordinary circumstance where an American national is acting in his own capacity to commit a crime within such jurisdiction, the United States can protect that individual by investigating and, if appropriate and warranted, prosecuting him. Coupled with the recommendation above to implement changes to the law to cover all ICC crimes, the United States will effectively preempt the Court's jurisdiction based on the Statute's complementarity.¹⁶¹

The converse of U.S. cooperation and engagement is the status quo of hostility, unilateralism, and isolationism. This translates into the potential for continued restrictions on peacekeeping missions and repeated denial of aid to allies and partners, which engenders a corresponding harm to relationships, Theater Security Cooperation strategy, military operations,

No. 2006-27 of Sept. 29, 2006, 71 Fed. Reg. 65,367 (Nov. 8, 2006); Presidential Determination No. 2007-5 of Nov. 27, 2006, 71 Fed. Reg. 74,453 (Dec. 12, 2006). On 20 June 2008 and 16 January 2009 President Bush again waived the prohibition on ESF to fourteen and seventeen nations, respectively. Presidential Determination No. 2008-21 of June 20, 2008, 73 Fed. Reg. 36,403 (June 26, 2008); Presidential Determination No. 2009-14 of Jan. 16, 2009, 74 Fed. Reg. 5099 (Jan. 29, 2009). Congress, in the National Defense Authorization Act for Fiscal Year 2007, removed the IMET restrictions for all nations. See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083.

¹⁵⁸ *U.S. Envoy to UN Calls on Israel to Investigate Gaza War Crimes Claims*, REUTERS, Jan. 30, 2009, at 1, available at <http://www.haaretz.com/hasen/spages/1060074.html> (citing comments made by Ambassador Susan Rice, the new US Envoy to the United Nations, who hinted that the President had a different attitude toward the Court than did his predecessors). The Administration indicated that its long-term goals include, among others, enhancing global peace and security, and improving respect for human rights worldwide. *Id.*

¹⁵⁹ HOLT & DALLAS, *supra* note 22, at 18, 75 (citing Chief Judge Robinson O. Everett, *American Servicemembers and the ICC*, U.S. & THE INT'L CRIM. CT. 137, 142 (Sarah B. Sewall & Carl Kaysen eds., 2000)). The War Crimes Act of 1996 covers most of the crimes within the Statute. 18 U.S.C. § 2441 (2006). Moreover, "[s]ome observers have suggested that Congress should pass legislation to close jurisdictional gaps in US criminal law in order to ensure US territory does not become a safe haven for those accused of genocide, war crimes, and crimes against humanity." ELSEA, *supra* note 20, at 18. Again, the War Crimes Act of 1996 alleviated some of this concern by establishing U.S. federal jurisdiction to punish war crimes, but only against U.S. personnel. *Id.*; see also Douglass Cassel, *Empowering US Courts to Hear Crimes Within the Jurisdiction of the International Court*, 35 NEW ENG. L. REV. 421, 429 (2001).

¹⁶⁰ U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM paras. 3.2, 4 (9 May 2006).

¹⁶¹ Rome Statute, *supra* note 19, art. 17. The need here is for a consistent policy which demonstrates that U.S. efforts to investigate and, if necessary, prosecute are undeniably genuine. The Iraq referrals pertaining to the United States—rejected by the ICC Prosecutor—demonstrate that a thorough investigation and, if warranted, subsequent prosecution will assuredly result in a finding by the Court that U.S. efforts were, in fact, genuine. See *supra* notes 96–97 and accompanying text.

the overall security environment, and ultimately U.S. foreign policy and strategy. The United States must thoroughly contemplate these consequences when evaluating its vital relationship with the Court.

VII. Conclusion

*Who still talks today about the Armenians?*¹⁶²

Hitler, noting well the world's tepid response to the Turk's genocidal campaign at the dawn of WWI, spoke these words as he launched his "Death's Head Units" into Poland in 1939 to "kill without pity or mercy all men, women, and children of Polish race or language."¹⁶³ The world needs no better proof that, left unchecked, men whose "capacity for evil knows no limits" will continue to inflict suffering and death on the weak and defenseless until the world community intercedes to end these assaults on mankind. These crimes, as Kofi Annan reminds us, are no longer remnants of the past, but are "of our time . . . heinous realities that call for a historic response."¹⁶⁴

Today, the world finally has that historic response—found in the united efforts of the international community to hold the guilty accountable—through the effective operation of the ICC. The Court—even with its perceived imperfections—is an institution that clearly advances U.S. interests and affirms U.S. ideals in promoting international justice, universal human rights, and the global rule of law. As such, strenuous U.S. opposition to the Court is at times mystifying, and contradicts all U.S. duties, responsibilities, and moral obligations. Ambassador Scheffer accurately portrayed the responsibility of the most powerful nation committed to the rule of law to confront such deadly and destructive crimes against mankind:

One response mechanism is accountability, namely to help bring the perpetrators of genocide, crimes against humanity, and war crimes to justice. If we allow them to act with impunity, then we will only be inviting a perpetuation of these crimes far into the next millennium. *Our legacy must demonstrate an unyielding commitment to the pursuit of justice.*¹⁶⁵

These are powerful words from a nation long dedicated to the preservation of humanity through the rule of law. But are these just words on paper, or do they have real meaning? They ring hollow when taken in the context of the Nation's initial response to the ICC's formation. Yet should the United States now ratify the Statute and become an integral member of the Court, it will once again begin to demonstrate that unyielding commitment to the pursuit of justice. The world seeks a permanent, effective, and politically uncompromised system of international accountability. With U.S. cooperation and support—as an *influential insider*—this system can become a reality, and "only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished accordingly."¹⁶⁶

¹⁶² Vigen Guroian, *Post-Holocaust Political Morality: The Litmus of Bitburg and the Armenian Genocide Resolution*, 3 OXFORD JOURNALS—HOLOCAUST AND GENOCIDE STUDS. 305–22 (1988).

¹⁶³ Armenian Genocide, *supra* note 8, at 9–10. Hitler's words and actions reflect the essence of the genocidal intent. He provided greater insight into his thought processes in ordering the slaughter of countless innocent Polish women and children when he told his officers that "Genghis Khan had millions of women and children killed by his own will and with a gay heart. History sees in him only a great state builder . . ." CHRISTOPHER SIMPSON, *THE SPLENDID BLOND BEAST* (1995). Hitler's "Death's Head Units" were actually SS units initially formed to guard concentration camps, who later became elite combat troops. Shoah Resource Ctr., Int'l Sch. for Holocaust Studies, *Death's Head Units* 1, 1 (n.d.), available at http://www1.yadvashem.org/odot_pdf/Microsoft%20Word%20-%206261.pdf. Founded at Dachau and named for the skull-and-crossbones insignia worn on their uniforms, they were trained to be extraordinarily disciplined, but ruthless and cruel. *Id.* Taught to view POWs as enemies to be vanquished and destroyed, they became known for their extreme brutality. *Id.* In 1938, obviously impressed with their ferocity and malice, Hitler pulled them from guard duty and sent them off as combat units in Poland. *Id.* Acting on the field as they had in the camps with the POWs, they became known for being absolutely "cruel and vicious warriors." *Id.* For their part in the war, they were later identified as criminals and subjected to war crimes trials. *Id.*

¹⁶⁴ Press Release, United Nations, SG/SM/6257, International Criminal Court Promises Universal Justice, Secretary-General Tells International Bar Association (June 12, 2007) (quoting Secretary-General Kofi Annan remarks to the International Bar Association, in New York (June 11, 2007)), available at <http://www.ngos.net/un/icc.html>.

¹⁶⁵ Scheffer Address, *supra* note 1, at 1 (emphasis added). It is compelling, yet somewhat ironic, that these comments come from the U.S. Ambassador for War Crimes and the primary U.S. representative to the Rome Conference, spoken at a celebration of the Universal Declaration of Human Rights. The words certainly represent all for which America stands and, presumably, they represent the U.S. position concerning the ICC and all for which the Court stands.

¹⁶⁶ Press Release, Secretary-General, International Criminal Court Promises Universal Justice, Secretary-General Tells International Bar Association, U.N. Doc. SG/SM/6257 (June 12, 1997).

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATRRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (2008—September 2009) (<http://www.jagenet.army.mil/JAGCNETINTER/NET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
GENERAL		
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C20	179th JAOBC/BOLC III (Ph 2)	17 Jul – 30 Sep 09
5F-F1	207th Senior Officer Legal Orientation Course	8 – 12 Jun 09
5F-F52	39th Staff Judge Advocate Course	1 – 5 Jun 09
5F-F52S	12th SJA Team Leadership Course	1 – 3 Jun 09
600-BNCOC	5th BNCOC Common Core (Ph 1)	12 – 29 May 09
600-BNCOC	6th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	1 Jun – 8 Jul 09
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D40	3d Paralegal Specialist ANCOC (Ph 2)	1 Jun – 8 Jul 09

512-27D40	4th Paralegal Specialist ANCOG (Ph 2)	26 Aug – 30 Sep 09
WARRANT OFFICER COURSES		
7A-270A1	20th Legal Administrators Course	15 – 19 Jun 09
7A-270A2	10th JA Warrant Officer Advanced Course	6 – 31 Jul 09
ENLISTED COURSES		
512-27D/DCSP	18th Senior Paralegal Course	22 – 26 Jun 09
512-27DC5	29th Court Reporter Course	20 Apr – 19 Jun 09
512-27DC5	30th Court Reporter Course	27 Jul – 25 Sep 09
512-27DC6	9th Senior Court Reporter Course	14 – 18 Jul 09
ADMINISTRATIVE AND CIVIL LAW		
5F-F21	7th Advanced Law of Federal Employment Course	26 – 28 Aug 09
5F-F22	62d Law of Federal Employment Course	24 – 28 Aug 09
5F-F28H	2009 Hawaii Income Tax CLE Course	12 – 16 Jan 09
5F-F29	27th Federal Litigation Course	3 – 7 Aug 09
CONTRACT AND FISCAL LAW		
5F-F10	162d Contract Attorneys Course	20 – 31 Jul 09
5F-F12	80th Fiscal Law Course	11 – 15 May 09
5F-DL12	3d Distance Learning Fiscal Law Course	19 – 22 May 09
CRIMINAL LAW		
5F-F301	12th Advanced Advocacy Training Course	27 – 29 May 09
5F-F31	15th Military Justice Managers Course	24 – 28 Aug 09
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	5th Intelligence Law Course	22 – 26 Jun 09
5F-F43	5th Advanced Intelligence Law Course	24 – 26 Jun 09
5F-F44	4th Legal Issues Across the IO Spectrum	13 – 17 Jul 09
5F-F47	52d Operational Law of War Course	27 Jul – 7 Aug 09
5F-F47E	2009 USAREUR Operational Law CLE	10 – 14 Aug 09
5F-F48	2d Rule of Law	6 – 10 Jul 09

3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	Course Title	Dates
0257	Lawyer Course (030) Lawyer Course (040)	26 May – 24 Jul 09 3 Aug – 2 Oct 09
0258	Senior Officer (050) (Newport) Senior Officer (060) (Newport) Senior Officer (070) (Newport) Senior Officer (080) (Newport)	15 – 19 Jun 09 (Newport) 27 – 31 Jul 08 (Newport) 24 – 28 Aug 09 (Newport) 21 – 25 Sep 09 (Newport)
2622	Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	8 – 12 Jun 09 (Pensacola) 15 – 19 Jun 09 (Quantico) 22 – 26 Jun 09 (Camp Lejeune) 27 – 31 Jul 09 (Pensacola) 21 – 25 Sep 09 (Pensacola)
BOLT	BOLT (040) BOLT (040)	27 – 31 Jul 09 (USMC) 27 – 31 Jul 09 (USN)
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	22 – 26 Jun 09 21 – 25 Sep 09
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	11 – 22 May 09 20 – 31 Jul 09
4044	Joint Operational Law Training (010)	27 – 30 Jul 09
4046	SJA Legalman (020)	11 – 22 May 09 (Norfolk)
627S	Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160)	26 – 28 May 09 (Norfolk) 26 – 28 May 09 (San Diego) 30 Jun – 2 Jul 09 (San Diego) 10 – 12 Aug 09 (Millington) 9 – 11 Sep 09 (Norfolk) 14 – 16 Sep 09 (Pendleton)
748A	Law of Naval Operations (010)	14 – 18 Sep 09
748B	Naval Legal Service Command Senior Officer Leadership (010)	6 – 19 Jul 09
748K	USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	18 – 22 May 09 (Pearl Harbor) 14 – 18 Sep 09 (San Diego)
846L	Senior Legalman Leadership Course (010)	20 – 24 Jul 09
846M	Reserve Legalman Course (Ph III) (010)	4 – 15 May 09
850V	Law of Military Operations (010)	1 – 12 Jun 09

932V	Coast Guard Legal Technician Course (010)	3 – 14 Aug 09
525N	Prosecuting Complex Cases (010)	18 – 22 May 09
03RF	Legalman Accession Course (030)	11 May – 24 Jul 09
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020)	15 – 26 Jun 09 (Norfolk) 13 – 24 Jul 09 (San Diego)
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Oct 09 5 – 8 Jan 10 6 – 9 Apr 10 6 – 9 Jul 10
NA	Legal Specialist Course (030) Legal Specialist Course (040)	30 Mar – 29 May 09 26 Jun – 21 Aug 09
NA	Speech Recognition Court Reporter (030)	25 Aug – 31 Oct 09
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	1 – 19 Jun 09 13 – 31 Jul 09 17 Aug – 4 Sep 09
0379	Legal Clerk Course (060) Legal Clerk Course (070))	13 – 24 Jul 09 17 – 28 Aug 09
3760	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	18 – 22 May 09 10 – 14 Aug 09 14 – 18 Sep 09
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	4 – 22 May 09 8 – 26 Jun 09 20 Jul – 7 Aug 09 17 Aug – 4 Sep 09
947J	Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	8 – 19 Jun 09 27 Jul – 7 Aug 09 17 Aug – 4 Sep 08
3759	Senior Officer Course (070) Senior Officer Course (080)	1 – 5 Jun 09 (San Diego) 14 – 18 Sep 09 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	Dates
Paralegal Apprentice Course, Class 09-04	28 Apr – 10 Jun 09
Negotiation and Appropriate Dispute Resolution Course, Class 09-A	18 – 22 May 09
Environmental Law Update Course (DL), Class 09-A	27 – 29 May 09
Reserve Forces Paralegal Course, Class 09-A	1 – 12 Jun 09
Staff Judge Advocate Course, Class 09-A	15 – 26 Jun 09
Law Office Management Course, Class 09-A	15 – 26 Jun 09
Paralegal Apprentice Course, Class 09-05	23 Jun – 5 Aug 09
Judge Advocate Staff Officer Course, Class 09-C	13 Jul – 11 Sep 09
Paralegal Craftsman Course, Class 09-03	20 Jul – 27 Aug 09
Paralegal Apprentice Course, Class 09-06	11 Aug – 23 Sep 09
Trial & Defense Advocacy Course, Class 09-B	14 – 25 Sep 09

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

APRI: American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510
Alexandria, VA 22313
(703) 549-9222

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of South Carolina
1600 Hampton Street, Suite 414
Columbia, SC 29208
(803) 705-5095

NDAA: National District Attorneys Association
National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(703) 549-9222

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2010

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) requirements is ***NLT 2400, 1 November 2009***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2010. This requirement includes submission of all writing exercises

This requirement is particularly critical for some officers. The 2010 JAOAC will be held in January 2010, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

A Judge Advocate who is required to retake any subcourse examinations or “re-do” any writing exercises must submit the examination or writing exercise to the Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2009). If the student receives notice of the need to re-do any examination or exercise after 1 October 2009, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to submit Phase I Non-Resident courses and writing exercises by 1 November 2009 will not be cleared to attend the 2010 JAOAC resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Judge Advocate General's Fiscal Year 2009 On-Site Continuing Legal Education Training.

Date	Region	Location	Units	ATRRS Number	POC
15-19 Jun 09	Midwest Functional Exercise	Ft. McCoy, WI	7th LSO	TBD	TBD

2. The Judge Advocate General's School, U.S. Army (TJAGSA) Materials Available Through the Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to Judge Advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the DTIC. An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95.

AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95.

AD A265777 Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333 Servicemembers Civil Relief Act Guide, JA-260 (2006).

AD A333321 Real Property Guide—Legal Assistance, JA-261 (1997).

AD A326002 Wills Guide, JA-262 (1997).

AD A346757 Family Law Guide, JA 263 (1998).

AD A384376 Consumer Law Deskbook, JA 265 (2004).

AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).

AD A360700 Tax Information Series, JA 269 (2002).

AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook,
JA-422 (2005).

* Indicates new publication or revised edition.

** Indicates new publication or revised edition pending inclusion in the DTIC database.

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and

“Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

5. TJAGSA Legal Technology Management Office (LTMO)

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

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For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

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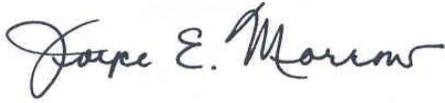
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