

MILITARY LAW REVIEW

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BEYOND R2P: A PROPOSED TEST FOR LEGALIZING UNILATERAL ARMED HUMANITARIAN INTERVENTION

MAJOR JEREMY A. HAUGH*

I. Introduction

Between April and July 1994, approximately 800,000 Rwandan children, women, and men were slaughtered because of their ethnic ties.¹ Their suffering was extreme, and their enemies were persistent: “Families were murdered in their home[s], people hunted down as they fled by soldiers and militia, through farmland and woods as if they were

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¹ JOSHUA JAMES KASSNER, RWANDA AND THE MORAL OBLIGATION OF HUMANITARIAN INTERVENTION 1 (2013).

animals.”² While the suffering continued, the United Nations (UN) Security Council argued about whether the violence in Rwanda actually was genocide.³ A decade later, many of the same acts were repeated—widespread and systematic rape, murder, and destruction of villages⁴—this time in the Darfur region of Sudan.⁵ The UN engaged in the same arguments over the scope of the violence, and whether it was genocide.⁶ In Rwanda and Sudan, the Security Council failed to approve adequate armed interventions in time to alleviate the suffering. The UN framework, in which the only legal armed humanitarian interventions are those approved by the Security Council,⁷ has resulted in substandard protection of vulnerable populations.⁸

In 2001, the International Commission on Intervention and State Sovereignty (ICISS) sought to improve the current international system but ended up changing very little. In a report⁹ entitled *The Responsibility to Protect* (R2P),¹⁰ the ICISS set out a framework for legal armed humanitarian interventions. But the ICISS maintained the status quo regarding authority to intervene by expressing a preference for multilateralism, requiring Security Council approval for interventions.¹¹ The ICISS articulated the belief that it would be “impossible to find consensus . . . around any set of proposals for military intervention which

² President William Jefferson Clinton, Address to Genocide Survivors at the Airport in Kigali, Rwanda (Mar. 25, 1998), available at <http://www.cbsnews.com/news/text-of-clintons-rwanda-speech/>.

³ KASSNER, *supra* note 1, at 3.

⁴ Int’l Comm’n of Inquiry on Darfur, *Report to the United Nations Secretary General*, ¶¶ 301–05, 320–321 (Jan. 25, 2005) [hereinafter *Darfur Inquiry*]; see also Samuel Vincent Jones, *Darfur, The Authority of Law, and Unilateral Humanitarian Intervention*, 39 U. TOL. L. REV. 97 (Fall 2007).

⁵ See *Darfur Inquiry*, *supra* note 4, ¶ II.

⁶ *Id.* The report found crimes against humanity, but not genocide, in Sudan. *Id.*

⁷ U.N. Charter art. 39.

⁸ U.N. Secretary-General, *A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges, and Change*, ¶ 202, U.N. Doc. A/59/565 (2004) [hereinafter *High-level Panel Report*], available at https://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf.

⁹ INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY (ICISS), *THE RESPONSIBILITY TO PROTECT* [hereinafter *RESPONSIBILITY TO PROTECT*], available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (last visited Oct. 2, 2014).

¹⁰ Responsibility to Protect (R2P) is a relatively new formulation for humanitarian intervention proposed in the ICISS report in 2001. The Report is based on the meetings of a commission, appointed by the Government of Canada and a group of major foundations in response to Secretary-General Kofi Annan’s pleas to find a consensus on humanitarian intervention.

¹¹ *RESPONSIBILITY TO PROTECT*, *supra* note 9, ¶ 6.28.

acknowledged the validity of any intervention not authorized by the Security Council or General Assembly.”¹² The Secretary-General’s Report on Implementing R2P reaffirmed the principle of multilateral action and ruled out Unilateral Armed Humanitarian Intervention (UAHI) as a legal use of force.¹³ The UN thus currently holds the view that unilateral interventions—no matter the extent of human suffering—are viewed disfavorably by the majority of the international community. This view ensures, in some cases, that action will not be taken in time to alleviate suffering.¹⁴

As a result, R2P’s significant failing is that it did not create a framework for UAHI when the Security Council fails to act. Instead, the ICISS asked—but did not answer—the question, “where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by[?]”¹⁵

Arthur Leff,¹⁶ a professor at Yale Law School, expressed the idea that when human beings are suffering somewhere in the world, the international community should act to end it, no matter the political or international law restraints. The need to help suffering people, Leff argued, trumps any legal objections that may arise. In 1968, he wrote to the *New York Times* regarding children suffering in Biafra:¹⁷

I don’t know much about the relevant law [of humanitarian interventions] . . . I don’t care much about international law, Biafra or Nigeria. Babies are dying in

¹² *Id.* ¶ 6.37.

¹³ See U.N. Secretary-General, *Implementing the Responsibility to Protect: Report of the Secretary-General*, ¶ 3, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing R2P*], available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/63/677 (“[T]he responsibility to protect . . . reinforces the legal obligations of Member States to refrain from the use of force except in conformity with the Charter.”).

¹⁴ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 6.37.

¹⁵ *Id.*

¹⁶ Professor Leff was a professor at Yale Law School from 1969–1981. *The Modern Era, 1955-Present*, YALE LAW SCHOOL, <http://www.law.yale.edu/cbl/modernera.htm> (last visited Mar. 25, 2014).

¹⁷ Biafra was a secessionist western African state that declared its independence from Nigeria in 1967. Nigerian government forces defeated Biafran forces in 1968. Biafra lost its seaports and became landlocked. Supplies could only be brought in by air. Starvation and disease followed, and estimates of mortality ranged from 500,000 to several million. BIAFRA, *ENCYCLOPEDIA BRITANNICA*, <http://www.britannica.com/EBchecked/topic/64289/Biafra> (last visited Mar. 1, 2014).

Biafra. . . . We still have food for export. Let's get it to them any way we can, dropping it from the skies, unloading it from armed ships, blasting it in with cannons if that will work. I can't believe there is much political cost in feeding babies, but if there is let's pay it; if we are going to be hated, that's the loveliest of grounds. Forget all the blather about international law, sovereignty and self-determination, all that abstract garbage: babies are starving to death¹⁸

Professor Leff's emotional argument is compelling, but it is not the law. Instead, the law is and has been that UAHIs are prohibited by the UN Charter.¹⁹

This article argues that the answer to the question the ICISS left unanswered is that the most harm lies in the damage to the international order when human beings are slaughtered or left to suffer while the Security Council stands by. The article proposes a four-part test to legalize UAHIs when the Security Council fails to act. The test rests on three foundations: just-war theory, presumptions of sovereignty and non-intervention, and the necessity that any intervention be both legal and legitimate. These same principles form the foundations for R2P.²⁰ But this test goes beyond R2P by establishing a framework under which individual states may intervene when the Security Council fails to act.

The elements of the proposed test are:

1. The United Nations Security Council fails to act under Chapter VII of the UN Charter.²¹

¹⁸ Tom J. Farer, *Humanitarian Intervention: The View from Charlottesville*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 151 (Richard B. Lillich ed., 1973) (referring to Professor Leff's letter to the Editor of the *N.Y. Times*, Oct. 4, 1968).

¹⁹ U.N. Charter art. 2, para. 4.

²⁰ RESPONSIBILITY TO PROTECT, *supra* note 9, ch. V, at XII (discussing post-intervention obligations).

²¹ INDEP. INT'L COMM'N ON KOSOVO, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, AND LESSONS LEARNED* 193 (2000) [hereinafter *KOSOVO REPORT*], available at <http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf>. The first element of this article's proposed test is also part of the Danish Institute for International Affairs' criteria for legitimate humanitarian intervention, which is referred to in the Kosovo Report. In the proposed test, this does not give the Security Council a "right of first refusal." The element is met if the Security Council is unable to act due to a veto or veto threat, or fails to act for some other reason.

2. The intervening state must show²² substantial and compelling evidence of extreme human suffering—or imminent extreme human suffering—to rebut the presumptions of sovereignty and non-intervention.
3. The intervening state must have a defined mission.
4. The intervening state must intend to carry out—and actually carry out—*jus post bellum* obligations.

If the international community does not accept this concept, international law will be powerless and thus irrelevant in the face of extreme human suffering when the Security Council fails to act.

This article explores the foundational principles of international law and the legal bases for the use of force, examining R2P and its failure to address the need for UAHl when the Security Council fails to act. The article further defines and sets out the current state of UAHl, discusses issues that make its application problematic, and outlines why a test for legal and legitimate UAHl is necessary. Lastly, the article sets out the elements of a proposed test for UAHl and explains how such actions can be both legal and legitimate.

II. The Foundational Principles of International Law and Legal Bases for the Use of Force

The concept of UAHl is not new, and arguments for its legality have been around from the time of seventeenth-century Dutch jurist Hugo Grotius.²³ Nearly four-hundred years later, humanitarian intervention remains a much-debated concept—primarily because of the foundational principles of the international order, sovereignty and non-intervention. The UN Charter has codified these concepts and prohibited the use of force against the territorial integrity and political independence of any

²² “Show” in this case does not mean the intervening state must formally present its case to the UN or to any other formal panel. Rather, the test proposes the state must have evidence that it deems substantial enough to convince the international community that the intervention is necessary to stop extreme human suffering or to avoid imminent extreme human suffering.

²³ Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT’L L. 107 (2006).

state except in self-defense.²⁴ It is necessary, therefore, to first review these legal foundations and the UN Charter's legal bases for the use of force in the context of the UN's purposes before delving into the specifics of the proposed test.

A. Sovereignty

The Peace of Westphalia of 1648, which concluded the Thirty Years' War, established an international community based on a system of sovereign states in which all states are inherently equal, without regard to size, political stature, or wealth.²⁵ In this system, each sovereign state has the authority within its own territorial boundaries to enact and enforce laws and to exclude other states from acting within its boundaries.²⁶ This authority has long been viewed as absolute.²⁷ Recently, however, sovereignty has been reformulated as a mix of rights and responsibilities. The R2P formulation of sovereignty ensures that a state retains authority within its borders provided it meets the accompanying responsibility to respect and protect the human rights of its citizens.²⁸

Sovereignty is not simply a concept internal to a state; rather, it implies a dual purpose: "Internally, it connotes the exercise of supreme authority by states within their individual territorial boundaries. Externally, it connotes equality of status between states comprising the society of states."²⁹ This second part of sovereignty touches on the companion legal foundation—non-intervention. The two concepts are interrelated; whereas sovereignty deals with national freedoms and self-

²⁴ U.N. Charter art. 2, paras. 4, 7.

²⁵ IAN BROWNIE, *PRINCIPLES OF INTERNATIONAL LAW* 289 (5th ed. 1998); *see also* RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 2.7; MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, *LAW, POWER, AND THE SOVEREIGN STATE* 65 (1995).

²⁶ Dan E. Stigall, *Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law*, 3 NOTRE DAME J. INT'L & COMP. L. 6, 9 (2013).

²⁷ *Id.*; *see also* FOWLER & BUNCK, *supra* note 25, at 65.

²⁸ FOWLER & BUNCK, *supra* note 25, at 12; *see also* RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 2.15.

²⁹ FRANCIS KOFI ABIEW, *THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION* 24–25 (1999).

determination, the principle of non-intervention means that states will respect each other's sovereignty.³⁰

B. Non-Intervention

While sovereignty means the state is empowered with exclusive domestic jurisdiction over matters within its borders,³¹ non-intervention means states have the duty not to intervene in the affairs of another state. In other words, states have a duty not to violate another's sovereignty. If this duty is violated, as for example when a state suffers an armed attack, the victim state has the right to defend its territorial integrity and political independence.³²

Sovereignty and non-intervention have formed the basis for the international legal order since the rise of the nation-state.³³ More recently, the UN Charter codified the concepts as the cornerstones for relations between states following World War II.

C. The UN Charter and the Legal Bases for the Use of Force

The UN Charter codifies the principles of sovereignty and non-intervention in Articles 2(1) and 2(7), respectively.³⁴ Article 2(1) states that the UN is "based on the principle of sovereign equality of all its Members."³⁵

The norm of non-intervention is found in Article 2(7) of the UN Charter, which sets out that every state—and the UN—has the responsibility not to intervene in another state's affairs:

Nothing contained in the present charter shall
authorize the UN to intervene in matters which are

³⁰ INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., LAW OF ARMED CONFLICT DESKBOOK 30 (2013) [hereinafter DESKBOOK].

³¹ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 2.8; *see also* Stigall, *supra* note 26, at 9.

³² U.N. Charter art. 51.

³³ *See* Stanley A. McChrystal, *Memorandum from the Joint Chiefs of Staff, in* HUMANITARIAN INTERVENTION: CRAFTING A WORKABLE DOCTRINE 65 (Alton Frye ed., 2000).

³⁴ U.N. Charter art. 2, paras. 1, 4, 7.

³⁵ *Id.* art. 2, para. 1.

essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.³⁶

“This formulation,” argues Professor Thomas Mertens, “seems to indicate that the Charter makes a clear choice in favor of bilateral unconditional respect between states, except for the provisions of Chapter VII.”³⁷

The UN Charter generally reflects modern *jus ad bellum*, or the law governing when a state may use force,³⁸ under Article 2(4): “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.”³⁹ The Charter authorizes two exceptions to Article 2(4)’s prohibition against the use of force. The first exception is actions authorized by the Security Council under Chapter VII of the UN Charter, while the second exception is actions that constitute a legitimate act of individual or collective self-defense pursuant to Article 51 of the UN Charter or customary international law.⁴⁰ Notably, the UN Charter does not recognize an exception for humanitarian intervention in cases of extreme human suffering.

Chapter VII provides the analytical framework for dealing with threats to the peace, a breach of the peace, or an act of aggression.⁴¹ The analysis starts with Article 39 requiring the Security Council to first determine whether there has been a threat to the peace, a breach of the peace, or an act of aggression.⁴² If the Security Council determines these requirements are not met, it will not proceed to sanctions or military action.⁴³ If, on the other hand, there is a threat to the peace, a breach of

³⁶ *Id.* para. 7.

³⁷ Thomas Mertens, *Humanitarian Intervention: Legal and Moral Arguments*, in *ETHICS OF HUMANITARIAN INTERVENTIONS* 217 (Georg Meggle ed., 2004).

³⁸ *DESKBOOK*, *supra* note 30, at 35.

³⁹ U.N. Charter art. 2, para. 4.

⁴⁰ *Id.* art. 51.

⁴¹ *Id.* art. 39.

⁴² *Id.*

⁴³ *See* U.N. Charter art. 39. A Security Council decision not to impose sanctions may be construed as “acting.” For purposes of this article, the Security Council fails to act if it

the peace, or an act of aggression, the next step under Chapter VII's framework is normally sanctions of the sort authorized by Article 41,⁴⁴ which lists several non-military enforcement measures designed to restore international peace and security. These include "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."⁴⁵ Then, if sanctions are not successful—and the Security Council can agree on a course of action—it is authorized under Article 42 to mandate military action by forces made available to it under "special agreements" with UN member states, as contemplated by Article 43.⁴⁶ However, because no Article 43 special agreement has ever been made, military measures taken pursuant to Chapter VII are permissive.⁴⁷ That is, Chapter VII authorizations permit individual member states or coalitions of member states to act rather than mandate them to take action.⁴⁸

The second exception to the Article 2(4) prohibition is actions taken in individual or collective self-defense under Article 51 or customary international law.⁴⁹ In order to act under Article 51, the action must meet two criteria: (1) it must be necessary—the force must be viewed as a last resort; and (2) it must be proportionate—actions by states must limit any use of force to the level of force reasonably necessary to counter a threat or attack.⁵⁰

decides not to proceed under its Article 41 or Article 42 authority in the face of extreme human suffering.

⁴⁴ This step is not necessary if the circumstances warrant the use of force before sanctions. However, sanctions are generally imposed prior to the Security Council approving actions under Article 42. See U.N. Charter art. 42 ("Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.").

⁴⁵ U.N. Charter art. 41.

⁴⁶ *Id.* art. 43. "All members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining peace and security." *Id.*

⁴⁷ DESKBOOK, *supra* note 30, at 33.

⁴⁸ *Id.*

⁴⁹ U.N. Charter, art. 51; see also DESKBOOK, *supra* note 30, at 31 (discussing customary international law).

⁵⁰ See DESKBOOK, *supra* note 30, at 35; see also YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 230–33 (5th ed. 2011). Dinstein would include a third criterion called immediacy, meaning that the response must not be delayed or the delay will attenuate the immediacy of the threat and the need to use force.

Some states argue a more expansive view of self-defense and believe that the customary international law principle of anticipatory self-defense justifies using force in anticipation of an “imminent” armed attack.⁵¹ Anticipatory self-defense finds its foundation, historically, in the 1837 *Caroline Case*.⁵² During diplomatic exchanges in which the states set out their legal positions, U.S. Secretary of State Daniel Webster posited that a state need not suffer an actual armed attack before taking defensive action, but may engage in anticipatory self-defense, if the circumstances leading to the use of force are “instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation.”⁵³ Anticipatory self-defense is a controversial use of force because the international community remains concerned that it could be used as a pretext for the use of force before a threat has coalesced.⁵⁴

Preemptive self-defense is even more controversial than anticipatory self-defense.⁵⁵ The “Bush Doctrine” used an anticipatory self-defense basis for action in Iraq and for actions against rogue states and terrorists.⁵⁶ The Bush administration articulated a different understanding of “imminence” from that of the majority of states in the international community in the 2006 U.S. National Security Strategy (NSS). The NSS stated, “We must adapt the concept of imminent threat . . . even if uncertainty remains as to the time and place of the enemy’s

⁵¹ See DESKBOOK, *supra* note 30, at 37; see also Ashley Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extra-Territorial Self-Defense, 52 VA. J. INT’L L. 483, 492 (2012) (“Most states and scholars recognize that an imminent threat of armed attack would also trigger a state’s right to self-defense, though there is a debate about what constitutes an ‘imminent’ threat.”) (citations omitted).

⁵² See Deeks, *supra* note 51, at 502 (describing the *Caroline Case* as an international matter where “Canadian rebels were using U.S. territory as a staging ground from which to attack British forces in Canada. The rebels used a steamer called the *Caroline* to transport themselves from the U.S. side of the Niagara River to the Canadian side. British troops set fire to and destroyed the *Caroline*, prompting a strong objection from the United States and a series of diplomatic exchanges setting forth each state’s position.”).

⁵³ DESKBOOK, *supra* note 30, at 37.

⁵⁴ *Id.* at 38; see also DINSTEIN, *supra* note 50, at 195.

⁵⁵ See DINSTEIN, *supra* note 50, at 194–200.

⁵⁶ *Id.* at 195 (“[The] Bush Doctrine (after President G.W. Bush) was intended to ‘adapt the concept of imminent threat’ by allowing ‘anticipatory action’ to ‘forestall or prevent ‘hostile acts.’”) (citation omitted). *But cf. id.* (“[C]ontrary to what many commentators believe, [the Bush Doctrine] was not applied in Iraq in 2003.”).

attack.”⁵⁷ The United States’ policy is that preemptive self-defense is a legitimate use of force.⁵⁸

Anticipatory self-defense and preemptive self-defense remain highly controversial in international legal circles. On one side, states have relied on anticipatory self-defense a number of times, including the 1986 U.S. bombing of Libya dubbed “Operation El Dorado Canyon.”⁵⁹ The day following the operation, U.S. President Ronald Reagan argued the use of force was legal under Article 51 as a “necessary and appropriate action [that] was a preemptive strike.”⁶⁰ On the other side, Yoram Dinstein argues the position held by many in the international community: any interpretation of Article 51 that expands its authorization for the use of force in response to an “armed attack” to anticipatory and preemptive self-defense is “counter-textual, counter-factual, and counter-logical,” maintaining that the Charter drafters never intended for Article 51 to be interpreted expansively.⁶¹ Further, Dinstein argues there must be an armed attack before a state can act in self-defense, and then only until the UN is prepared to act.⁶²

Defense against non-state actors is a related issue under the self-defense basis for the use of force. In this context, examples of non-state actors have included groups such as Al-Qaeda, Chechen rebels in Georgia, and the Palestine Liberation Organization.⁶³ Commentators believe that victim states may respond to attacks by non-state actors if the host nation (for example, Afghanistan under the Taliban) is “unwilling or unable” to address non-state actors who are planning and launching attacks from within the sovereign territory of the host nation.⁶⁴ Some scholars argue that the victim state (the state that has been

⁵⁷ THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006).

⁵⁸ *Id.* at 22. The National Security Strategy (NSS) of 2006 indicates that the Obama Administration has backed off of preemptive use of force some but not completely. The United States continues to maintain that it may act unilaterally to defend itself. *Id.*

⁵⁹ GEOFFREY S. CORN ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 22 (2012).

⁶⁰ *Id.* at 20.

⁶¹ DINSTEIN, *supra* note 50, at 196. *But see id.* (discussing Judge Schwebel’s dissenting opinion in *Nicaragua v. United States*, in which “Judge Schwebel rejected a reading of the text which would imply that the right of self-defense exists ‘if, and only if, an armed attack occurs’”) (citation omitted).

⁶² *Id.* at 196–97.

⁶³ Deeks, *supra* note 51, at 487.

⁶⁴ *Id.* at 485; *see also* DINSTEIN, *supra* note 50, at 244–46.

attacked) must meet a higher burden of proof than is typically required for self-defense actions to establish the legality of the victim state's use of force in self-defense against the host nation.⁶⁵ At the far end of the self-defense spectrum—beyond anticipatory and preemptive self-defense—is a concept called preventive self-defense, meant to be used against non-imminent threats but which is illegal under international law.⁶⁶

Consent is a well-established legal basis for the use of force. It is not an exception to Article 2(4)'s prohibition against the use of force because if the state consents, there is no threat or use of force against a state's territorial integrity or political independence.⁶⁷ Consent must be voluntary, reasonable, and granted by a recognized government, a standard that is difficult to meet if there is no recognized government, such as Afghanistan under the Taliban,⁶⁸ or no government at all, such as Somalia in 1991.⁶⁹

The legal bases for the use of force are interpreted in the context of the purposes of the UN, set out in Article 1 of the Charter.⁷⁰ The UN Charter envisions dual purposes for the international body. The first is to seek international cooperation to solve problems peacefully, without resort to war, and the second purpose is to promote and encourage respect for human rights.⁷¹ The Preamble of the Charter states in part, "Peoples of the United Nations . . . reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."⁷² Moreover, Article 1, paragraph 3 affirms the commitment to human rights:

⁶⁵ Michael Schmitt, *Responding to Transnational Terrorism Under the Jus Ad Bellum: A Normative Framework*, 56 NAVAL L. REV. 1, 40 (2009).

⁶⁶ DESKBOOK, *supra* note 30, at 39. But see CORN ET AL., *supra* note 59, at 23–24 (arguing that "[s]ome have discussed [preventive self-defense] as applying to the last point at which a State can successfully intervene").

⁶⁷ DESKBOOK, *supra* note 30, at 31. See also CORN ET AL., *supra* note 59, at 17 ("If a nation requests the aid of a fellow nation or ally, that fellow nation or ally is free to use force within the boundaries of the requesting nation.").

⁶⁸ Annyssa Bellal, Gilles Giacca & Stuart Casey-Maslen, *International Law and Armed Non-state Actors in Afghanistan*, 93 INT'L REV. OF THE RED CROSS 49 (Mar. 2011) (discussing Pakistan, Saudi Arabia, and the United Arab Emirates as the only three states that recognized the Taliban as the legitimate government in Afghanistan when they were in power until their military defeat by the U.S.-led coalition in 2001).

⁶⁹ NICHOLAS J. WHEELER, *SAVING STRANGERS* 186 (2000).

⁷⁰ U.N. Charter art. 2, para. 4.

⁷¹ *Id.* pmbl.

⁷² *Id.*

The Purposes of the United Nations are . . . [t]o achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion⁷³

The current framework for the use of force under the UN Charter therefore does not recognize the right of a state to unilaterally intervene in another state for humanitarian purposes. This is true despite the UN's clear purpose to protect human rights. After the North Atlantic Treaty Organization's (NATO) intervention in Kosovo in 1999, however, UN Secretary-General Kofi Annan challenged the international community to find a "new consensus on how to approach [humanitarian intervention]."⁷⁴ The result was a report entitled "Responsibility to Protect."

III. The Responsibility to Protect

In 2000, the Canadian government took up the Secretary-General's challenge and appointed the ICISS to study the concepts of intervention and sovereignty and to determine "when, if ever, it is appropriate for states to take coercive—and in particular military—action, against another state for the purpose of protecting people at risk in that other state."⁷⁵ The ICISS report, "The Responsibility to Protect," set out core principles of a state's responsibility to protect its own citizens, and the international community's role in protecting the people of a state should the sovereign fail to do so.⁷⁶ It also set out a framework for multilateral military intervention based on the just-war principles of just cause, right intention, last resort, proportionality, probability of success, proper authority, and *jus post bellum*.⁷⁷

⁷³ *Id.* art. 1, para. 3.

⁷⁴ RESPONSIBILITY TO PROTECT, *supra* note 9, at vii.

⁷⁵ *Id.*

⁷⁶ *Id.* at xi.

⁷⁷ *Id.* at xi–xiii.

A. The Pillars of R2P

United Nations Member states included R2P in the 2005 World Summit Outcome Document, paragraphs 138 and 139, setting out the three pillars of R2P:

1. The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;
2. The international community has a responsibility to encourage and assist States in fulfilling this responsibility;
3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.⁷⁸

These three pillars represent the starkly different view that R2P takes of sovereignty and non-intervention from the traditional formulation. Here, not only does a state incur a responsibility to protect its people, but if it fails in that responsibility, the international community assumes the responsibility in its place. The international community is then authorized to use “appropriate diplomatic, humanitarian *and other means*”⁷⁹ to protect the people of the state, in accordance with the Charter. Presumably, “other means” indicates use of military force, if necessary. According to R2P, the traditional formulation of sovereignty and non-intervention—where a state has absolute authority within its own borders and is free from outside interference no matter the extent of suffering within its borders—is a relic of the past.⁸⁰ Indeed in United

⁷⁸ 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–139, U.N. Doc. A/Res/60/1 (Sept. 16, 2005) [hereinafter World Summit Outcome Document], available at <http://www.un.org/en/preventgenocide/adviser/pdf/World%20Summit%20Outcome%20Document.pdf#page=30>.

⁷⁹ *Id.*

⁸⁰ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 1.33. See generally W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866 (1990) (arguing the modern view of sovereignty is founded in human rights).

Nations Security Council Resolution 1674, the Security Council itself affirmed the pillars of R2P and expressly stated UN support regarding “the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.”⁸¹

Secretary-General Ban Ki-moon issued a report in January 2009 entitled “Implementing the Responsibility to Protect,”⁸² again affirming the UN’s support for R2P and laying out a strategy for operationalizing it.⁸³ In his report, which was based on the three pillars of R2P, the Secretary-General urged the General Assembly to consider his report and the specific proposals therein.⁸⁴ The General Assembly considered the report and held five “dialogues” on it but has yet to act on implementing the proposals.⁸⁵ Nevertheless, R2P is considered to be “an emerging norm” of international law that encompasses the international community’s “right to intervene” collectively and the “responsibility to protect” collectively in circumstances of extreme human suffering.⁸⁶

B. Responsibility to Protect and Multilateral Action

Responsibility to Protect does not alter the current framework in which individual states must refrain from acting unilaterally unless such action is approved by the Security Council.⁸⁷ In his report on implementing R2P, the Secretary-General reinforced the UN position that the Security Council is the only proper authority to approve humanitarian interventions.⁸⁸ Responsibility to Protect, in short, is not an

⁸¹ S.C. Res. 1674, ¶ 4, U.N. Doc. S/Res/1674 (Apr. 28, 2006), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/331/99/PDF/N0633199.pdf?OpenElement>.

⁸² *Implementing R2P*, *supra* note 13.

⁸³ *Id.* ¶ 66.

⁸⁴ *Id.* ¶ 71.

⁸⁵ See *The UN and R2P*, INT’L COAL. FOR THE RESPONSIBILITY TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/about-rtop/the-un-and-rtop#dialogues> (last visited Mar. 7, 2014).

⁸⁶ *High-level Panel Report*, *supra* note 8, ¶¶ 201–02. But see Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm*, AM. J. INT’L L. 99, 120 (2007) (arguing R2P is too uncertain to be considered a legal norm).

⁸⁷ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 6.28; see also *Implementing R2P*, *supra* note 13, ¶ 3.

⁸⁸ See *Implementing R2P*, *supra* note 13, ¶ 3; see also *High-Level Panel Report*, *supra* note 8, ¶ 203; U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, Rep. of the Secretary-General, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *In Larger Freedom*], available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/59/2005.

alternative to Security Council action but a way to make the current system of requiring Security Council approval for humanitarian intervention “work better.”⁸⁹ This limits the efficacy of R2P’s mandate.

If the Security Council fails to act, the ICISS warns, states “may not rule out other means to meet the gravity and urgency”⁹⁰ of different situations. It lists two alternative avenues should the Security Council fail to act: “submitting the matter to the General Assembly for consideration under the ‘Uniting for Peace’ procedure;”⁹¹ or action by regional or sub-regional organizations under Chapter VIII of the UN Charter, subject to seeking subsequent authorization from the Security Council.”⁹² General Assembly actions—including under the Uniting for Peace procedure—are not binding, and are simply recommendations to the members for action.⁹³ Additionally, the Security Council is the sole body responsible for determining a threat to the peace, breach of the peace, or act of aggression under Article 39, which is a pre-requisite finding to binding action under Articles 41 and 42.⁹⁴ The General Assembly is not authorized to make that determination, but may make recommendations for the maintenance of peace and security under Article 11.⁹⁵ Even with General Assembly approval, an action would likely not be recognized as legal because the General Assembly is not a recognized proper authority.⁹⁶ Actions by regional or sub-regional organizations—even with subsequent Security Council approval—would

⁸⁹ See *In Larger Freedom*, *supra* note 88, ¶ 126.

⁹⁰ RESPONSIBILITY TO PROTECT, *supra* note 9, para. 6.39.

⁹¹ Uniting for Peace, G.A. Res. 377 (V), U.N. GAOR, 5th Sess. (Nov. 3, 1950), available at [http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/377\(V\)](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/377(V)). Uniting for Peace provides if the Security Council fails to act in a situation where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly “shall consider the matter immediately” and make recommendations to the members about what can be done collectively. *Id.*

⁹² RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 6.21 (recommending Security Council members agree not to apply their veto power in matters where their vital state interests are not involved, such as purely humanitarian situations).

⁹³ G.A. Res. 377, *supra* note 91, ¶ 1.

⁹⁴ U.N. Charter art. 39.

⁹⁵ *Id.* art. 11.

⁹⁶ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 6.37. The Uniting for Peace procedure has been used “as a basis for operations in Korea [in 1950] and subsequently in Egypt in 1956 and the Congo in 1960.” *Id.* ¶ 6.7. The ICISS stops short of saying that such an action is legal, and instead argues that such an action would have “powerful moral and political support.” *Id.*

not legalize a unilateral action, as the Security Council may find the action legitimate but not legal.⁹⁷

Given the ICISS's expressed preference for—and the Secretary-General's confirmation of—multilateral action to address extreme human suffering, UAHl has not been accepted as a legal basis for the use of force. A clear understanding of what UAHl is and how it is defined is thus necessary to help the reader navigate this difficult area.

IV. UAHl Named and Defined

Humanitarian intervention seems easy to name and define; however, there is little agreement on the concept in the international legal and relations communities.⁹⁸ Arnold Kanter, a former U.S. Under Secretary of State and staff member at the National Security Council, labels it “armed humanitarian intervention”;⁹⁹ Professor Seamus Miller¹⁰⁰ calls it “humanitarian armed intervention”;¹⁰¹ and still others, like Professor of Philosophy Rüdiger Bittner,¹⁰² simply call it “wrong.”¹⁰³ The difficulty in agreeing on one label was most clearly articulated by Professor

⁹⁷ KOSOVO REPORT, *supra* note 21, at 4.

⁹⁸ Rüdiger Bittner, *Humanitarian Interventions are Wrong*, in ETHICS OF HUMANITARIAN INTERVENTION 212 (Georg Meggle ed., 2004); *see also* Tom J. Farer, *Humanitarian Intervention Before and After 9/11: Legality and Legitimacy*, in HUMANITARIAN INTERVENTION: ETHICAL LEGAL AND POLITICAL DILEMMAS 55 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

⁹⁹ Arnold Kanter, *Policy on Armed Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: CRAFTING A WORKABLE DOCTRINE 1 (Alton Frye ed., 2000). In 1997, he participated in a project for the Council on Foreign Relations that resulted in *Humanitarian Intervention, Crafting a Workable Doctrine*. Leslie H. Gelb, *Forward*, in *id.* at v. This project sought views from scholars and practitioners in the international law and relations community and had them draft memos as if they were members of the administration. *Id.* Mr. Kanter's role in the project was to advise as if he were the National Security Advisor. *Id.* at 1.

¹⁰⁰ Professor Miller is a professor of Ethical Issues in Political Violence and State Sovereignty at Charles Sturt University in Australia. *Professor Seumas Miller*, CENTRE FOR APPLIED PHILOSOPHY AND PUBLIC ETHICS, <http://www.cappe.edu.au/staff/seumas-miller.htm> (last visited Mar. 17, 2014).

¹⁰¹ Seamus Miller, *Collective Responsibility and Humanitarian Armed Intervention*, in ETHICS OF HUMANITARIAN INTERVENTION 37 (Georg Meggle ed., 2004).

¹⁰² Professor Bittner is a professor at Institut für Philosophie (Institute for Philosophy), University of Bielefeld, Germany. *Rüdiger Bittner*, UNIVERSITÄT BIELEFELD, <https://www.uni-bielefeld.de/philosophie/personen/personen/bittner/> (last visited Mar. 17, 2014).

¹⁰³ Bittner, *supra* note 98, at 212.

Stephen A. Garrett.¹⁰⁴ “The terms ‘humanitarian’ and ‘intervention’ are typically imbued with such a variety of nuances and differing interpretations,” Garrett argues, “that to join them together into a single concept almost inevitably produces ambiguity and perhaps even tension, especially since both words inherently carry a lot of emotional baggage.”¹⁰⁵

With this difficulty in mind, it is still necessary to identify a label to ensure that the term is understood in the right context for this article. The most widely used term is simply “humanitarian intervention” but that label misses the mark. By adding the term “armed,” the phrase more accurately describes what happens when one state intervenes in another.¹⁰⁶ Even though the missions discussed in this article are humanitarian, they are also armed interventions meant to impose the will of one state on the other, albeit for the purpose of alleviating human suffering.

The difficulty in trying to label UAH I increases exponentially when trying to define it. It seems as though every commentator or scholar who writes on UAH I has to provide his own definition of the concept.¹⁰⁷ These definitions describe, essentially, the same action but are varied enough to cause some consternation with regard to exactly what is meant when arguing for UAH I. In this article, “unilateral armed humanitarian intervention” is defined as “the [unilateral] use of foreign military force within the sovereign territory of a state against that state’s will in an attempt to protect the fundamental interests of (a section of) the

¹⁰⁴ STEPHEN GARRETT, *DOING GOOD AND DOING WELL: AN EXAMINATION OF HUMANITARIAN INTERVENTION* (1999).

¹⁰⁵ KASSNER, *supra* note 1, at 6.

¹⁰⁶ Miller, *supra* note 101, at 37; *see also* Kanter, *supra* note 99, at 15 (characterizing sovereignty as a “substantial presumption against intervening that must be surmounted by the compelling nature of the particular circumstances”).

¹⁰⁷ *See* ABIEW, *supra* note 29, at 31. Professor Abiew sets out a number of definitions of humanitarian intervention, including “the reliance upon force for the justifiable purposes of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice.” *Id.* Also, “proportionate trans-boundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government.” *Id.* The classical concept of humanitarian intervention, Abiew says, “covered any use of force by a state against another state for the purpose of protecting the life and liberty of the nationals of the latter state unable or unwilling to do so itself.” *Id.*

population of that state,¹⁰⁸ with the goal of effectively alleviating human suffering.”¹⁰⁹ “Against a state’s will” means that the intervention is undertaken without the consent of the state. If the legitimate government of the state consented, of course, there would be no issue as to legality under the UN Charter.¹¹⁰

This definition is informed by the four main components of UAHl.¹¹¹ First, the armed humanitarian intervention discussed in this article is unilateral, as opposed to multilateral. This distinction removes UAHl from the R2P framework.¹¹² Unilateral means that the intervention is carried out by one state or an ad hoc collection of states without Security Council approval; while multilateral would mean that the intervention is carried out by a collection of states, usually under a formal international organization.¹¹³ Generally, unilateral actions are those not approved by the Security Council, while multilateral actions are presumed approved by the Security Council.¹¹⁴ “In international legal discourse,” argues Professor Eric Heinze, “unilateral humanitarian intervention is synonymous with an unauthorized or illegal intervention, whereas multilateralism refers to the collective decision-making process used by

¹⁰⁸ Mertens, *supra* note 37, at 217; *see also* ERIC A. HEINZE, *WAGING HUMANITARIAN WAR* 3 (1999). The second part of the definition “with the goal of effectively alleviating human suffering” comes from Heinze’s book *Waging Humanitarian War*; Heinze argues that the goal of all humanitarian interventions should be to “effectively alleviate human suffering.” *Id.* *See also* Guglielmo Verdirame, *The Law and Strategy of Humanitarian Intervention*, EJIL: TALK! (Aug. 30, 2013), <http://www.ejiltalk.org/the-law-and-strategy-of-humanitarian-intervention/> (arguing “[t]he doctrine of humanitarian intervention gives states a right to use force in order to alleviate the humanitarian crisis”).

¹⁰⁹ *See* HEINZE, *supra* note 108, at 3. “Fundamental interests” in this case mean the essential human rights of life and freedom.

¹¹⁰ DESKBOOK, *supra* note 30, at 31 (explaining “[c]onsent is not a separate exception to Article 2(4) [of the UN Charter]. If a State is using force with the consent of a host state, then there is no violation of the host state’s territorial integrity or political independence; thus, there is no need for an exception to the rule as it is not being violated”); *see also* Byron F. Burmester, *On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights*, UTAH L. REV. 269, 277 (1994) (arguing the only way a state can unilaterally intervene is when the targeted state requests intervention).

¹¹¹ Kanter, *supra* note 99, at 3. The four components of UAHl are: unilateral, armed, humanitarian, intervention.

¹¹² RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 6.37.

¹¹³ HEINZE, *supra* note 108, at 117. Regional organizations include the North Atlantic Treaty Organization (NATO), the Organization of American States (OAS), the European Union (EU), the African Union (AU), the Organization for Security and Co-operation in Europe (OSCE), the Association of South-East Asian Nations (ASEAN), the Economic Community of West African States (ECOWAS), etc. *Id.*

¹¹⁴ *Id.*

the UN to deem the act of humanitarian intervention permissible (and legal) in a particular situation, regardless of how many states actually take part in carrying it out.”¹¹⁵ Past interventions, such as the United States’ intervention in Haiti, were unilateral actions, even though approved by the Security Council.¹¹⁶ In the case of Haiti, the intervention was viewed as legitimate and legal, based on Security Council approval.¹¹⁷

Second, it is armed, meaning that the military is utilized and there is a threat that the intervening state may lose soldiers’ lives. It is important to include the term “armed” because interventions are tantamount to war,¹¹⁸ and even “no fly zones,” without accompanying ground troops, are acts of war, as they interfere in another’s sovereign airspace.¹¹⁹ These characteristics distinguish armed humanitarian intervention from other humanitarian missions such as providing relief to victims of Typhoon Haiyan in the Philippines¹²⁰ or providing water purification in Africa.¹²¹

Third, it is humanitarian, thus aimed at alleviating human suffering. It is also humanitarian—vice strategic—“because it entails the threat or use of . . . force in situations that do not pose direct, immediate threats to . . . [a state’s] strategic ‘interests.’”¹²² In other words, the main justification for action is a humanitarian one—to alleviate human suffering.¹²³ A humanitarian action is distinct from a government’s

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 15.

¹¹⁹ H.D.S. Greenway, *No-Fly Zone? No*, N.Y. TIMES, Mar. 8, 2011, http://www.nytimes.com/2011/03/09/opinion/09iht-edgreenway09.html?_r=0 (quoting Secretary of Defense Robert Gates that a no-fly zone is an “act of war”).

¹²⁰ Cf. David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 270 (1992) (describing humanitarian intervention as including non-forcible assistance to the targeted state, “[h]umanitarian intervention should be understood to encompass responses to natural calamities like earthquakes, floods, famine, volcanic eruptions, and man-made disasters—like nuclear power plant accidents—when the casualties and the displacement of thousands of people demand an effective international response, with or without the consent of the national government”).

¹²¹ *Id.*

¹²² Kanter, *supra* note 99, at 4.

¹²³ See Burmester, *supra* note 110, at 277 (summarizing and comparing the arguments of “conditionalists” and “realists” who agree that humanitarian intervention must be the predominant motivation for intervention but need not be the only motivation).

intervention to protect its own nationals.¹²⁴ The latter has gained greater acceptance in the international community because it is less likely to have a significant impact on the territorial integrity of the target state.¹²⁵ An action to protect one's own nationals is generally seen as a rescue action that should last for only so long as it takes to ensure the safety of those nationals.¹²⁶ A humanitarian intervention to protect citizens of the target state would likely last significantly longer.

Fourth, it is an intervention. It entails sending military forces into another sovereign's territory—including airspace—without consent.¹²⁷ Even with the good intentions that may justify an armed humanitarian intervention, it is still “an extreme case of interference in the internal affairs of another state.”¹²⁸

V. The Current State of UAH

Because the ICISS left open the question of whether UAH is a legal use of force,¹²⁹ arguments over legality of UAH continue outside the R2P framework. The current state of UAH is exemplified by the textualists,¹³⁰ who advance an argument as simple as the issue is complex. They argue that the Charter forbids military action without Security Council approval. Their position is based on a strict reading of the Charter and is supported by the underlying principles of sovereignty and non-intervention. They further bolster their argument with the position that UAHs must be barred because of the threat of “pretextual wars.”¹³¹

¹²⁴ SEAN D. MURPHY, HUMANITARIAN INTERVENTION: THE UNITED NATIONS IN AN EVOLVING WORLD ORDER 16 (1996).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Kanter, *supra* note 99, at 4.

¹²⁸ *Id.*

¹²⁹ Stahn, *supra* note 86, at 104.

¹³⁰ The term “textualists” is used here to describe the view that the text of the UN Charter clearly forbids unilateral humanitarian intervention. The term was borrowed from U.S. Supreme Court Justice Antonin Scalia, who describes himself as a “textualist” for his plain reading of the U.S. Constitution. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997); *see also* Burmester, *supra* note 110, at 276 (describing the group making this same argument as “Conflict Minimalists”).

¹³¹ *See* Burmester, *supra* note 110, at 278 (explaining that “conflict minimalists,” like the textualists described herein, argue that the threat of pretext is always present in UAH because it is unlikely any nation acts for purely humanitarian reasons).

Russian President Vladimir Putin advanced a textualist argument and took the position that the prohibition is absolute in an op-ed in the *New York Times* during debate over intervention in Syria:

The law is still the law, and we must follow it whether we like it or not. Under current international law, force is permitted only in self-defense or by the decision of the Security Council. Anything else is unacceptable under the United Nations Charter and would constitute an act of aggression.¹³²

The textualists support their view that UAH is forbidden under international law with the argument that states may use humanitarian justifications as a pretext to intervene in another state's affairs for advancement of their own interests. Specifically they argue that states could use humanitarian justifications as a subterfuge to achieve political goals without international repercussions.¹³³

History reveals prominent examples of states using justifications for intervention that were widely viewed as pretext. One, in particular, stands out as a cautionary tale: “[Our people and those of other nations] have been maltreated in the unworthiest manner, tortured . . . [and denied] the right of nations to self-determination,” and “[i]n a few weeks the number of refugees who have been driven out has risen to over 120,000,” and “the security of more than 3,000,000 human beings” is in jeopardy.¹³⁴ These are not the words of Kosovars or Rwandans or Somalis seeking intervention in their homelands. These words were written by German leader Adolf Hitler in a letter to British Prime Minister Chamberlain to justify Germany's military activities in the Sudetenland in 1939.¹³⁵ Hitler further justified the occupation of Bohemia and Moravia in 1939 by referring to “assaults on the life and liberties of minorities, and the purpose of disarming Czech troops and terrorist bands threatening the lives of minorities.”¹³⁶ Hitler's use of the humanitarian justification for intervention in Czechoslovakia in 1939

¹³² Vladimir V. Putin, *A Plea for Caution from Russia*, N.Y. TIMES, Sept. 11, 2013, http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html?_r=0.

¹³³ Goodman, *supra* note 23, at 107.

¹³⁴ *Id.* at 113.

¹³⁵ *Id.*

¹³⁶ ABIEW, *supra* note 29, at 57.

exemplifies the pretext problem.¹³⁷ It also lends historical perspective to why pretext is “the most compelling”¹³⁸ and certainly the “most common”¹³⁹ objection to legalization of UAHI.

More recently, the 2003 U.S.-led intervention in Iraq under the Bush Doctrine¹⁴⁰ led many in the international community to be wary of justifications for wars not approved by the Security Council.¹⁴¹ The invasion of Iraq, which UN Secretary-General Kofi Annan believed was illegal, “heightened the concern over the possible illicit use of the responsibility to protect [justification for UAHI] because members of the coalition employed rhetoric (often post hoc) echoing the language of the responsibility to protect to justify their choice to invade Iraq.”¹⁴²

The issue, in terms of just war theory and under the R2P formulation, is that an intervening state must have “right intentions” to avoid allegations of pretextual war.¹⁴³ That is, the “[p]rimary purpose of the intervention must be to halt or avert human suffering.”¹⁴⁴ Alteration of borders and overthrow of regimes would not be “right intentions” although disabling a regime from inflicting suffering on its people would be considered right intentions under the R2P formulation.¹⁴⁵ Pretext has “figured importantly in the analyses of leading public international law scholars . . . who have argued against legalizing [UAHI].”¹⁴⁶ These

¹³⁷ Michael L. Burton, *Legalizing the Sublegal: A Proposal for Codifying a Doctrine of Humanitarian Intervention*, 85 GEO. L.J. 417, 421–22 (1996).

¹³⁸ Goodman, *supra* note 23, at 113.

¹³⁹ *Id.*

¹⁴⁰ See *supra* note 56 (explaining the Bush Doctrine).

¹⁴¹ See Ewan McCaskill & Julian Borger, *Iraq War Was Illegal and Breached UN Charter, Says Annan*, THE GUARDIAN (Sept. 15, 2004, 9:28 PM), <http://www.theguardian.com/world/2004/sep/16/iraq.iraq> (showing the disagreement that existed among the international community on the legal basis for the Iraq War).

¹⁴² KASSNER, *supra* note 1, at 147; see also Michael Ignatieff, *Why Are We in Iraq?; (And Liberia? And Afghanistan)*, N.Y. TIMES MAG., <http://www.nytimes.com/2003/09/07/magazine/why-are-we-in-iraq-and-liberia-and-afghanistan.html> (arguing that former Under Secretary of Defense Paul Wolfowitz “all but admitted” that “the ‘bureaucratic’ reason for going to war in Iraq—weapons of mass destruction—was not the main one;” instead, the United States wanted to assert influence in the Middle East post 9-11).

¹⁴³ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 4.33.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Goodman, *supra* note 23, at 108–09 nn.8–14 (citations omitted) (discussing scholars who argue why pretext is an important objection to UAHI, including Richard Bilder, Ian Brownlie, Thomas Franck, Louis Henkin, Oscar Schachter, Bruno Simma, and Jane Stromseth).

international law scholars have generally fallen into one of two schools of thought on the pretext problem: one holding that pretext is a prominent issue that can only be overcome by multilateral approval and action,¹⁴⁷ the other insisting that the pretext problem is overstated and not solved by multilateral action.¹⁴⁸

Some scholars insist that multilateral actions include procedural safeguards to ensure states are not acting in their own self-interests. Professor Tom Farer¹⁴⁹ argues that multilateral actions serve the interests of the UN Charter:

In the cases where the UN has authorized humanitarian interventions, the humanitarian case has been strong. Where it has condemned interventions, the case has been weak if not altogether meretricious. Thus for reasons grounded in theory and practice,¹⁵⁰ one needs to conclude that imputing authorizing power to large coalitions of states in a condition of voluntary association offers a very important guarantee that intervention is not designed to serve interests incompatible with the principles and purposes of the Charter.¹⁵¹

Farer may overstate the point with the word “guarantee.” There can be no “guarantee” that an intervening state or group of states are acting on a purely humanitarian impetus. Regional organizations of states are dominated by more powerful states.¹⁵² If a more powerful state wants to intervene for whatever purpose, that state will likely be able to use its

¹⁴⁷ Farer, *supra* note 98, at 75.

¹⁴⁸ MICHAEL WALZER, *JUST AND UNJUST WARS* 107 (1977).

¹⁴⁹ Professor Farer is a University Professor and Former Dean of the Joseph Korbel School of International Studies at the University of Denver. *Tom Farer, Josef Korbel School of International Studies*, UNIV. OF DENV., <http://www.du.edu/korbel/faculty/farer.html> (last visited Mar. 18, 2014). Professor Farer received his law degree from Harvard Law School and is an expert in international law, international politics, U.S. foreign policy, Africa, and Latin America. *Id.*

¹⁵⁰ Farer, *supra* note 98, at 75 (citing NATO’s intervention in Kosovo with approval because it was multilateral in that “sixteen member states approved the intervention through a process of democratic deliberation”).

¹⁵¹ *Id.*

¹⁵² HEINZE, *supra* note 108, at 117 (“[T]he United States undeniably plays a preponderant role in NATO—both institutionally and militarily.”)

political influence to obtain approval to do so by its regional partners.¹⁵³ Thus multilateral action does not mean there are no political agendas being advanced in addition to the humanitarian interests.¹⁵⁴

On the other side of the argument, Professor Michael Walzer, citing India's 1971 unilateral invasion of East Pakistan, which was "formally carried to the United Nations but no action followed," argues that multilateral action does not represent a stronger safeguard against pretext than unilateral action: "Nor is it clear to me that action undertaken by the UN, or by a coalition of powers, would necessarily have had a moral quality superior to that of the Indian attack . . . [s]tates don't lose their particularist character merely by acting together."¹⁵⁵ Walzer suggests that governments who have reasons, other than humanitarian impulses, to intervene will have those same reasons whether acting unilaterally or multilaterally. In other words, multilateral action does not provide any more protection from pretext than unilateral action does.

Nevertheless, through practice and the recent R2P formulation, the international community has determined that multilateral action offers safeguards against pretext and is therefore preferable to unilateral action.¹⁵⁶ This article proposes that multilateral action is not the only, or even the most effective, way to address pretext. Unilateral armed humanitarian intervention under the proposed test is another way to address it—by providing more certainty as to when a state may intervene and ensuring the reasons for intervening are predominately humanitarian.

VI. Proposals for the Legality and Legitimacy of UAHl

As the discussion below demonstrates, commentators have posited various approaches and views regarding the legality of UAHl. Despite the UN Charter's prohibition on unilateral action, the debate over UAHl

¹⁵³ See KOSOVO REPORT, *supra* note 21, at 92 (describing the United States as the moving force behind NATO's intervention in Kosovo: "The United States flew over 60% of all sorties, and over 80% of all strike sorties. It played an even more dominant role in carrying out high-tech aspects of the campaign").

¹⁵⁴ WALZER, *supra* note 148, at 107; see also RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 3.17 (discussing shortcomings of regional organizations taking action "not the least of which is that they are often not disinterested in the outcomes of deadly conflicts").

¹⁵⁵ See WALZER, *supra* note 148, at 107.

¹⁵⁶ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 6.28; see also *High-level Panel Report*, *supra* note 8, ¶ 3; World Summit Outcome Document, *supra* note 78, ¶¶ 138–39.

legality continues to stir emotions and legal debate because of the extreme amount of human suffering that continues to happen throughout the world. The difference between proposals to legalize UAHl—referred to here as the legalists and the evolutionaries—is in how that prohibition is interpreted.

A. The Legalist View of UAHl

The legalists acknowledge the textualists' argument that the UN Charter prohibits UAHl but argue that there is an exception to the rule when UAHl is not against the territorial integrity or political independence of the state.¹⁵⁷ They do not go as far as the evolutionaries in finding evidence outside of the Charter to support their argument for legalizing UAHl. Rather, the legalists rely on a technical reading of the Charter to advance their argument.

The legalists believe the language in Article 2(4), which generally prohibits the use of force "against the territorial integrity or political independence of any state,"¹⁵⁸ sufficiently limits the prohibition against unilateral intervention, thus allowing for interventions that are humanitarian and not against the state itself.¹⁵⁹ That is, Article 2(4) does not forbid all unilateral uses of force, just those against the territorial integrity or political independence of the state.¹⁶⁰

This interpretation of the UN Charter "has been largely refuted and the prevailing legal opinion is that the language in Article 2(4) was not meant to create loopholes to the general prohibition of the use of force."¹⁶¹ Furthermore, interventions are, in fact, against a state's territorial integrity and political independence. As Professor Heinze points out, "the reality of most humanitarian interventions is that they rarely achieve their purposes without the removal or at least disablement of an incumbent regime."¹⁶² Interventions aim to stop human suffering within a state's borders and are aimed at a failed government that did not protect its people, either by perpetrating human rights violations on them directly or by allowing others to do so. As a result, UAHl is clearly

¹⁵⁷ HEINZE, *supra* note 108, at 62.

¹⁵⁸ U.N. Charter art. 2, para. 4.

¹⁵⁹ Burmester, *supra* note 110, at 285.

¹⁶⁰ HEINZE, *supra* note 108, at 62 n.12 (citations omitted).

¹⁶¹ *Id.* at 62.

¹⁶² *Id.*

directed at the political independence of a state and the legalists' theory fails as a means to legalize it.¹⁶³

B. The Evolutionary View of UAH

The evolutionaries, like the legalists, acknowledge the textualists' basic argument that the UN Charter prohibits UAH. But the evolutionaries believe that the law has evolved since the inception of the Charter. They cite evidence outside of the Charter to show that the international law has changed, and the context in which it is viewed has changed, thus allowing for an interpretation of the Charter that supports legal UAH.¹⁶⁴

The evolutionaries advance their theory in two ways. First, its proponents argue that it has gained legal acceptance in the international community because recent interventions bear circumstantial proof of legality.¹⁶⁵ Second, proponents rely on a related theory—that UAH is customary international law.¹⁶⁶

1. Circumstantial Proof of Legality

In 1991, UN Secretary-General Perez de Cuellar observed, "We are clearly witnessing what is an irresistible shift in public attitudes towards the belief that the defense of the oppressed in the name of morality should prevail over frontiers and legal documents."¹⁶⁷ The evolution theory is advanced in a number of forums,¹⁶⁸ but is most succinctly expressed by Sir Daniel Bethlehem, the former legal advisor to the

¹⁶³ *Id.*

¹⁶⁴ Sir Daniel Bethlehem, *Stepping Back a Moment: The Legal Basis in Favour of a Principle of Humanitarian Intervention*, EJIL: TALK! BLOG OF THE EUROPEAN J. OF INT'L L. (Sept. 12, 2013), <http://www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/>.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Press Release, Secretary-General's Address at University of Bordeaux, U.N. Press Release SG/SM/4560 (1991).

¹⁶⁸ See generally ABIEW, *supra* note 29; see also Burton, *supra* note 137, at 420 (discussing the "precedential approach" to UAH). Cf. RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 2.24 (discussing the "emerging practice" of intervention based on "state and regional organization practice").

British Foreign Office and now on faculty at Columbia University.¹⁶⁹ Bethlehem believes recent interventions present sufficient circumstantial evidence of legality to overcome the legal hurdles.¹⁷⁰ He maintains the traditional analysis¹⁷¹ fails to consider all of the factors involved in questions of humanitarian intervention:

Legality . . . often falls ultimately to be assessed by reference to a circumstantial appreciation of a range of factors rather than resting simply on some apparently trumping proposition of law. In the case of the law on humanitarian intervention, an analysis that simply relies on the prohibition of the threat or use of force in Article 2(4) of the UN Charter, and its related principles of non-intervention and sovereignty, is overly simplistic.¹⁷²

Bethlehem argues, in the context of the debate on possible intervention in Syria, that there is a “strand” of legal argument that “pull[s] together threads of practice that in isolation may appear fragile and unreliable but which, when knitted together, are more robust and compelling.”¹⁷³ The “threads” that make up the “strand” are expressed in the United Kingdom’s 1998 Kosovo principles and the R2P formulation.¹⁷⁴ More importantly, eight elements compose the “tapestry of [the] argument.”¹⁷⁵ These elements include the humanitarian objectives of the UN, the development of R2P, and the development of international criminal law, including the establishment of ad hoc international, and similar, tribunals to try offenses committed in internal conflicts.¹⁷⁶ Bethlehem also relies upon the no-fly zones in Iraq, circa 1991, and the NATO intervention in Kosovo as examples of armed humanitarian interventions undertaken without Security Council approval that set the precedent for future actions.¹⁷⁷

¹⁶⁹ Sir Daniel Bethlehem, *KCMG QC*, COLUM. L. SCH., http://www.law.columbia.edu/fac/Sir%20Daniel_Bethlehem,%20KCMG%20QC (last visited Mar. 17, 2014).

¹⁷⁰ Bethlehem, *supra* note 164.

¹⁷¹ See discussion *supra* Part V (discussing the textualist approach to the legality of UAH). “Traditional analysis” in this case is the equivalent of the textualist approach).

¹⁷² Bethlehem, *supra* note 164.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ E.g., The International Criminal Tribunal for the Former Yugoslavia (ICTY–TPIY), International Criminal Tribunal for Rwanda, The Special Court for Sierra Leone.

¹⁷⁷ Bethlehem, *supra* note 164.

These arguments are convincing but are not accepted by the international community as a legal basis for UAH. ¹⁷⁸ This is true for several reasons. First, taken individually, the eight elements Bethlehem cites in his article are not sufficient to provide a legal justification for UAH. ¹⁷⁹ Also, with regard to Kosovo, ¹⁸⁰ one of the interventions Bethlehem cites as precedent, the legal justification for the intervention was weak. In that case, the Security Council could not act because Russia agreed with Serbia that Kosovo should be treated as an internal matter. ¹⁸¹ Even though there was agreement that there was extreme human suffering, ¹⁸² the overwhelming international opinion is that the Kosovo intervention was illegal, albeit legitimate. ¹⁸³ James P. Rubin, an Assistant Secretary of State for Public Affairs during President Clinton's administration and currently a Scholar in Residence at Oxford University, ¹⁸⁴ wrote in an op-ed in the *New York Times* that Kosovo is a poor precedent for future UAH, including in Syria:

As a matter of international law, Kosovo is no precedent either. As spokesman for the State Department in 1999, I was asked for a legal justification for the use of force. Frustrated by vague appeals to "the principles of international law," we eventually prepared a statement reciting Serbia's numerous violations of United Nations resolutions, the extreme danger to civilians, the risks to NATO countries of a wider war and the unity of Europe, and then declared that as a result we believed there was "a substantial and legitimate grounds for action internationally." In a court

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ KOSOVO REPORT, *supra* note 21, at 143. Russia is a permanent member of the Security Council and holds a veto. See discussion *infra* Part VIII.A (discussing the permanent members of the Security Council and use of the veto).

¹⁸² KOSOVO REPORT, *supra* note 21, at 2. In a three-month period from March to June 1999, the Kosovo Commission found evidence of ethnic cleansing, including the killing of 10,000 mostly Kosovar-Albanians, 863,000 civilians seeking refuge outside Kosovo and another 590,000 displaced persons. They also found evidence of widespread rape and torture, looting, pillaging, and extortion. The Kosovo Commission found evidence of logistical arrangements made for deportations and attacks by the Yugoslav army, para-military groups, and the police. As a result, they found the huge expulsion of Kosovar-Albanians was systematic and deliberately organized. *Id.*

¹⁸³ *Id.* at 4.

¹⁸⁴ James P. Rubin, *Syria Is Not Kosovo*, N.Y. TIMES, Sept. 4, 2013, <http://www.nytimes.com/2013/09/05/opinion/syria-is-not-kosovo.html>.

of international law, the case for Kosovo was weak. But in the court of international opinion, it was strong. History's verdict on Kosovo has been that it was legitimate but not strictly legal.¹⁸⁵

The United Kingdom was one of only a few states that publicly explained the legal basis of its action in Kosovo.¹⁸⁶ Also, even though the ICISS "acknowledges the fundamental challenge posed by Security Council inaction,"¹⁸⁷ it still "does not endorse the legality of non-UNSC authorized ad hoc humanitarian intervention."¹⁸⁸

Finally, the evolutionaries' theory falls short because their evidence still is not enough to sufficiently address sovereignty, non-intervention, and the pretext problem. These shortfalls were most starkly presented in the argument over intervention in Syria. Despite evidence in June 2013 that nearly 100,000 Syrians—a third civilians—had been killed by the Assad regime during the fighting,¹⁸⁹ many in the international community still held the view that it was a civil war.¹⁹⁰ Thus, the matter was viewed as an internal conflict, which Syria could address free from outside interference. Russia cited pretext as an issue as well, arguing Syria could become another Iraq.¹⁹¹

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Bethlehem, *supra* note 164.

¹⁸⁸ *Id.*

¹⁸⁹ David Jolly, *Death Toll in Syrian Civil War Near 93,000 U.N. Says*, N.Y. TIMES, June 13, 2013, <http://www.nytimes.com/2013/06/14/world/middleeast/un-syria-death-toll.html> (reporting that the UN estimated 92,901 deaths as a result of the Syrian conflict through the end of April 2013, with civilians making up one-third of those killed); *see also* Alan Cowell, *War Deaths in Syria Said to Top 100,000*, N.Y. TIMES, June 26, 2013, http://www.nytimes.com/2013/06/27/world/middleeast/syria.html?_r=0 (reporting that the Syrian Observatory for Human Rights estimated over 100,000 deaths, with over one-third civilians in June 2013 and indicating that both the UN and Syrian Observatory suggested the numbers may, in fact, be much higher). *Cf.* Steve Almasy, *More Than 11,000 Children Killed in Syrian Civil War, Report Says*, CNN (Nov. 24, 2013, 11:16 AM), <http://www.cnn.com/2013/11/24/world/meast/syria-children-deaths/>.

¹⁹⁰ Each of the news reports cited above refer to the conflict in Syria as a "civil war." *See supra* note 189; *see also* Syria: *Weighing the U.S. Response*, U.S. DEP'T OF STATE (Sept. 10, 2013), <http://www.state.gov/secretary/remarks/2013/09/214049.htm> (An interview with U.S. Secretary of State John Kerry, who referred to the situation in Syria as a "civil war.").

¹⁹¹ Kirit Radia, *Russia Compares Syria War Drums to Iraq Invasion, Warns of Consequences of Intervention*, ABC NEWS BLOG (Aug. 25, 2013, 6:04 PM), <http://abcnews.go.com/blogs/headlines/2013/08/russia-compares-syria-war-drums-to->

Former Assistant Secretary of State Rubin pointed out in his op-ed in the *New York Times* that America's case for striking Syria had even less indicia of legality than the Kosovo intervention because there was no Security Council Resolution, the United States would be acting alone (NATO was not going to get involved), and China and Russia both opposed the intervention.¹⁹² Moreover, the United States' most consistent ally—the British—voted to stay out of Syria.¹⁹³

As a result, the proposed action in Syria—even though it appeared to be a good test case for the evolutionaries' theory—bore even fewer indicators of a legal intervention than did Kosovo, making the use of UAH in Syria a difficult, if not impossible, case. The threat of unilateral force was enough to move the Syrian regime to the negotiating table. In the end, though, it was not humanitarian reasons that persuaded the international community to act in Syria. The issue that actually precipitated action in Syria was President Bashir al-Assad's use of chemical weapons in violation of the 1925 Protocol banning the use of poison gas, to which Syria is a party.¹⁹⁴ Ultimately, even though Syria seemed to be an excellent test case for the evolutionaries' theory, the international community was not ready to accept it.

2. UAH Is Not Customary International Law

The evolutionaries also posit that UAH is customary international law.¹⁹⁵ This position is related to the evolutionaries' primary argument because for a course of action or international norm to become customary international law, it first must have evolved over time through

iraq-invasion-warns-of-consequences-of-intervention/ (discussing Russia's concerns about pretext.). Russia's Foreign Ministry Spokesman, Alexander Lukashevich, was quoted as saying the Syrian situation "brings to mind the events of 10 years ago, when, on the pretext of false information about the Iraqi possession of weapons of mass destruction, the United States, outside the UN, went on an adventure, the consequences of which are well known." *Id.*

¹⁹² Rubin, *supra* note 184.

¹⁹³ Rubin, *supra* note 184. Mr. Rubin identifies two of the issues that are addressed by the proposed test: the Security Council failing to act and unilateral v. multilateral actions (which implicates the pretext issue). *Id.*

¹⁹⁴ *Id.* (referring to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction (1925)).

¹⁹⁵ Bethlehem, *supra* note 164.

a persistent pattern of behavior by states.¹⁹⁶ Second, there must be a belief on the part of state actors that the behavior in question is legally required or legally permissible (this is otherwise known as the *opinio juris* requirement).¹⁹⁷ The general opinion is that armed humanitarian intervention does not meet those requirements.¹⁹⁸

In *Nicaragua v. United States*, the International Court of Justice found that UAHl is not customary international law.¹⁹⁹ More recently, the ICISS conceded that UAHl is not customary international law but argued that states and the Security Council have been “giving credence to . . . the emerging guiding principle of the ‘responsibility to protect’, a principle grounded in a miscellany of legal foundations.”²⁰⁰ The ICISS argues that these actions, in places like Somalia and Kosovo, and most recently in Libya, “may eventually [lead to] a new rule of customary international law” but that it “would be quite premature to make any claim about the existence of such a rule.”²⁰¹

The second reason UAHl is not customary international law is there has never been a persistent pattern of behavior by states.²⁰² In fact, the only constant is that there has been no consistency in the way states act with regard to UAHl. This makes sense because interventions are influenced by a number of factors, including facts on the ground, politics, international relations, and national self-interests, among other factors.²⁰³ Moreover, there exists no belief on the part of state actors that the behavior (UAHl) in question is legally required or legally permissible.

¹⁹⁶ Allen Buchanan, *Reforming the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 134 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

¹⁹⁷ *Id.*

¹⁹⁸ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 6.17.

¹⁹⁹ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 181 (June 27), available at <http://www.icj-cij.org/docket/index.php?sum=367&p1=3&p2=3&case=70&p3=5> (“With regard more specifically to alleged violations of human rights relied on by the United States, the Court considers that the use of force by the United States could not be the appropriate method to monitor or ensure respect for such rights, normally provided for in the applicable conventions.”).

²⁰⁰ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 6.17.

²⁰¹ *Id.*

²⁰² *Id.* ¶ 2.24.

²⁰³ Kanter, *supra* note 99, at 16–19 (discussing the points the President of the United States should consider when deciding whether or not to intervene militarily on a humanitarian basis).

On the contrary, the overwhelming majority believe that UAHl is illegal unless approved by the Security Council.²⁰⁴

The legalist and evolutionary theories of UAHl legality have failed to gain the general support of the international community because they fail to address the just war principles of proper authority and *jus post bellum* obligations, or because they fail to adequately address sovereignty, non-intervention, or the pretext problem. What is needed, therefore, is a test—based in just war principles—that adequately addresses the issues of sovereignty, non-intervention, and pretext, and allows for UAHl to be both legal and legitimate.

VII. Three Foundations for the Proposed Test

Given R2P's failure to construct a framework for UAHl and the pressing need to address persistent extreme human suffering, this article proposes a test that, if met, will allow the international community to find a UAHl both legal and legitimate. The proposed test stands on three foundational principles. The first is Just War Theory, which gives the test a historical basis and maintains consistency with R2P, itself based on just war principles.²⁰⁵ The second foundation is the concept of sovereignty and non-intervention as rebuttable presumptions. This approach allows the possibility that states may be able to intervene unilaterally by rebutting the presumptions of sovereignty and non-intervention with substantial evidence of extreme human suffering or imminent extreme human suffering. The third foundation of the proposed test is the need for UAHl to meet the standards of legality and legitimacy.

A. Just War Theory

Like any other war, armed humanitarian interventions can be analyzed under just war tradition to determine if they are moral. Professor Gary J. Bass²⁰⁶ points out that just war tradition is focused on

²⁰⁴ U.N. Charter art. 39.

²⁰⁵ RESPONSIBILITY TO PROTECT, *supra* note 9, at XII.

²⁰⁶ Bass is Professor in the Politics and International Affairs Department at the Woodrow Wilson School of Public and International Affairs at Princeton University. *Woodrow Wilson School—Gary Bass*, PRINCETON UNIV., <https://www.princeton.edu/~gjbass/> (last visited Mar. 25, 2014).

two main points: *jus ad bellum* (justness of war) and *jus in bello* (justness of the way that war is fought).²⁰⁷ These two points have historically determined if a war is moral. In his seminal work on just war, *Just and Unjust Wars*, Professor Michael Walzer writes, “War is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt.”²⁰⁸ Professor Bass, though, includes *jus post bellum* (justness after war) as part of the analysis even though this prong of Just War Theory has largely been neglected.²⁰⁹ He argues that whether a state meets *jus post bellum* obligations is on par with *jus ad bellum* and *jus in bello* in the determination of the morality of a war,²¹⁰ and that this is especially true with regard to genocidal states.²¹¹

Just War Theory was a product of the Just War Period, ranging from 335 B.C. to 1800 A.D.²¹² The theory developed initially as a means to refute Christian pacifists and set out certain, defined grounds under which a resort to warfare was both morally and religiously permissible.²¹³ Six *jus ad bellum* principles—Proper Authority, Last Resort, Just Cause, Right Intention, Probability of Success, and Macro Proportionality—evolved from these historical underpinnings,²¹⁴ as were principles for *jus in bello* and *jus post bellum*.

Responsibility to Protect lists *jus ad bellum* principles as required elements before multilateral military intervention can be authorized under its “responsibility to react” concept, and it also addresses post-intervention obligations.²¹⁵ Likewise, the elements of the proposed test address each *jus ad bellum* principle and *jus post bellum* obligations. These actions stand in contrast to typical UAHIs, which fail to meet the *jus ad bellum* principle of proper authority because the international community recognizes only two proper authorities that can make the decision to wage war.²¹⁶ The first proper authority is those who rule, i.e.,

²⁰⁷ Gary J. Bass, *Jus Post Bellum*, 32 PHIL. & PUB. AFF. 384 (2004).

²⁰⁸ WALZER, *supra* note 148, at 21.

²⁰⁹ Richard P. DiMaggio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, 186 MIL. L. REV. 116, 117 (2005).

²¹⁰ Bass, *supra* note 207, at 384.

²¹¹ *Id.* at 399.

²¹² DESKBOOK, *supra* note 30, at 11.

²¹³ *Id.*

²¹⁴ *Id.* at 12.

²¹⁵ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 6.1; *see also id.* ch. V.

²¹⁶ DESKBOOK, *supra* note 30, at 12.

the sovereign.²¹⁷ The second is the Security Council.²¹⁸ There are no other proper legal authorities recognized in international law. However, this article posits that a state, acting unilaterally, can become a proper authority if it meets each element of the proposed test.

A sovereign state is a proper authority to approve a decision to wage war under both Just War Theory and the UN Charter. Under Just War Theory, a state could wage war in self-defense and in defense of rights.²¹⁹ Professor Walzer notes that “the defense of rights is a reason for fighting . . . it is the only reason Preventive wars, commercial wars, wars of expansion and conquest, religious crusades, revolutionary wars, military interventions—all these are barred and barred absolutely.”²²⁰ A sovereign state may also make the decision to go to war in accordance with Article 51 of the UN Charter in response to an armed attack or based on customary international law.²²¹ Additionally, the sovereign state may approve, by its consent, interventions in its own territory under the UN Charter.²²²

The Security Council, the second authority that may properly wage war, is a proper authority because it has been granted the legitimacy to act by the consent of the parties to the UN Charter and because of past practice.²²³ This is partly because it is a multilateral body, but actions by other multilateral bodies do not automatically confer legality on a humanitarian intervention, as Security Council approval does.²²⁴ The reason the Security Council is a “proper authority” is because it is the only organization of its kind—multilateral, international, and subject to the check of the veto power.

²¹⁷ *Id.*

²¹⁸ U.N. Charter ch. VII.

²¹⁹ WALZER, *supra* note 148, at 72.

²²⁰ *Id.* Walzer describes the general rule with regard to the legal basis for the use of force. *Id.* He goes on to argue that some interventions are justified. *Id.*

²²¹ U.N. Charter art. 51.

²²² DESKBOOK, *supra* note 30, at 31; *see also* CORN ET AL., *supra* note 59, at 17 (“If a nation requests the aid of a fellow nation or ally, that fellow nation or ally is free to use force within the boundaries of the requesting nation.”).

²²³ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 6.17 (indicating that past practice alone does not mean that a course of conduct has become customary international law).

²²⁴ Even a multilateral organization, like NATO, does not confer legality on a humanitarian intervention. *See* KOSOVO REPORT, *supra* note 21, at 4 (finding NATO’s intervention in Kosovo “illegal, but legitimate”).

Provided a proposed intervention meets all of the elements of the proposed test, it too meets all *jus ad bellum* and *jus post bellum* principles, thereby making it a legitimate action, even under the R2P formulation.²²⁵ It will have also adequately addressed sovereignty, non-intervention, and pretext through the elements of the proposed test. The intervention would bear the same—if not more—indicators of legitimacy and legality as either General Assembly approval or regional organization approval. The intervening state would thus inherit “proper authority” or moral authority to intervene under just war theory and, therefore, would have “legitimate authority sanctioned by the society they profess to represent.”²²⁶ In that case, this article argues, the international community should accept the intervening state as a proper authority because its proposed intervention bears all the indicators of a legitimate and legal action aside from Security Council approval. If this is accepted, the intervening state would meet all of the just war requirements and can assume the mantle of proper authority to act under international law.

B. Sovereignty and Non-intervention as Presumptions

The second foundation for the proposed test is that sovereignty and non-intervention are not absolutes and, instead, are rebuttable presumptions. The most vigorous adherents to the concepts of sovereignty and non-intervention are weaker states, mostly third world states, apprehensive of limitations on their sovereign rights by more powerful states.²²⁷ Conversely, these concepts have been employed by the more powerful states (permanent members of the Security Council) as a means to frustrate intervention when it might save lives.²²⁸ The most telling example is Rwanda in 1994. At the time of the genocide within its borders, Rwanda held one of the rotating seats on the Security

²²⁵ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶¶ 4.18, 4.32–.48 (indicating that if the requirements are met of right intention, last resort, proportional means, reasonable prospects, and just cause—all of the *jus ad bellum* principles except for proper authority—then an intervention is “justified”); *see also High-Level Panel Report, supra* note 8, ¶ 207 (identifying five criteria for legitimacy for intervention based on R2P—“seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences”).

²²⁶ Jimmy Carter, *Just War—or Just a War?*, N.Y. TIMES, Mar. 9, 2003, <http://www.nytimes.com/2003/03/09/opinion/just-war-or-a-just-war.html>.

²²⁷ ABIEW, *supra* note 29, at 66.

²²⁸ KASSNER, *supra* note 1, at 3.

Council.²²⁹ The Hutu-led government employed the sovereignty doctrine to shield itself from intervention while Tutsis and Tutsi sympathizers were being slaughtered.²³⁰ Permanent members of the Security Council were hesitant to support new peacekeeping operations after Somalia,²³¹ which led to a weak mandate for the United Nations' Assistance Mission for Rwanda (UNAMIR) and severely limited UNAMIR's ability to alleviate the suffering.²³²

Because the two concepts of sovereignty and non-intervention are prominent parts of any decision regarding an armed humanitarian intervention, any discussion regarding the use of foreign military force in another state must begin with these two concepts. If these concepts were inviolable, this article and further inquiry into the idea of intervention must end here. Recent history has shown they are not inviolable.²³³ The dual principles of sovereignty and non-intervention remain the cornerstones of the international legal order.²³⁴ But as the two concepts have developed, both have come to be understood in a more modern context—that they are not inviolable principles and do not absolutely bar intervention.²³⁵ Sovereignty has come to be understood as a bundle of rights and responsibilities²³⁶ to the people of the state and the minimum content of good international citizenship.²³⁷ According to the ICISS in

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See COLIN POWELL & JOSEPH E. PERSICO, MY AMERICAN JOURNEY 588 (2003) (stating that eighteen U.S. Soldiers were killed and dragged through the streets in Mogadishu, Somalia, in 1993).

²³² Rep. of Ind. Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, transmitted by letter dated Dec. 16, 1999 from the U.N. Secretary-General addressed to the President of the Security Council, at 32, S/1999/1257 (1999).

²³³ The interventions in Somalia and Kosovo, to name two, suggested that sovereignty was less than absolute. Recent interventions in Libya and Mali have continued that trend.

²³⁴ BROWNIE, *supra* note 25, at 289.

²³⁵ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 2.14; see also Reisman, *supra* note 80, at 871 (arguing that interventions should not be seen as violations of sovereignty if the intervention was to replace a “usurper” with “the people who were freely elected”).

²³⁶ See RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 1.35 (explaining that “sovereignty implies a dual responsibility: externally—to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state”); see also Reisman, *supra* note 80, at 867 (explaining that “the sovereignty of the sovereign became the sovereignty of the people: popular sovereignty,” meaning the state derives its legitimacy from the people and that the rights of the people must be respected for that state to protect its sovereignty).

²³⁷ See RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 1.35; see also Farer, *supra* note 98, at 55 (arguing “[l]ike private property owners in Anglo-American common law, they

the R2P report, the bundle of rights is partially made up of a dual responsibility to respect the rights of other states and the rights of the people: “externally—to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state.”²³⁸

Some scholars go even further. Professor W. Michael Reisman²³⁹ argues that sovereignty rests with the people (a concept he calls “popular sovereignty”) and the “old” concept of sovereignty resting with the government is anachronistic:

International law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors.²⁴⁰

Professor Reisman argues that UAHl may be justified, in part, by suppression of popular sovereignty, “[n]ot a justification per se but a *conditio sine qua non*.”²⁴¹ He also suggests that sovereignty may be forfeited if the state is suppressing popular sovereignty.²⁴² This modern view of sovereignty has found high-profile supporters within the UN power structure. Former UN Secretaries-General Javier Perez de Cuellar and Boutros Boutros-Ghali have both acknowledged that absolute state sovereignty is increasingly a legal fiction, while popular sovereignty’s role within the international legal system is on the rise.²⁴³ Even so, Mr. de Cuellar believes that sovereignty and the norm of non-intervention remain “indubitably strong” and “would only be weakened if it were to

[sovereign states] enjoyed bundles of rights in relation to their space and obligations to other sovereigns”).

²³⁸ See RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 1.35; see also ABIEW, *supra* note 29, at 25.

²³⁹ Reisman is the Myres S. McDougal Professor of International Law at Yale Law School. W. Michael Reisman, YALE L. SCH., <http://www.law.yale.edu/news/WReisman.htm> (last visited Mar. 25, 2014).

²⁴⁰ Reisman, *supra* note 80, at 872.

²⁴¹ *Id.* “*Conditio sine qua non*” means an indispensable condition.

²⁴² *Id.* at 867.

²⁴³ Burton, *supra* note 137, at 435. Current U.N. Secretary General Ban Ki-moon shares this view of sovereignty. See generally *High-level Panel Report*, *supra* note 8.

carry the implication that sovereignty . . . includes the right of mass slaughter or of launching systematic campaigns of decimation or forced exodus of civilian populations in the name of controlling civil strife or insurrection.”²⁴⁴ That is, a state will remain sovereign and free to carry out actions within its own borders without international interference—provided they do not cause, or allow to happen, extreme suffering within those borders.

Professor Walzer presents a similar, more nuanced, view of sovereignty. He argues that sovereignty allows people to live their lives without foreign interference except in certain circumstances, such as when the government is directly involved in widespread massacre or enslavement of its people.²⁴⁵ Otherwise, intervention violates a state’s rights because it is violating the right of the people to live undisturbed by foreigners in a political community of their own.²⁴⁶ Walzer’s presumption is that the existence of a political community (even one the international community finds repugnant) within a state means there is a fit between that community and its government.²⁴⁷ In other words, people of a state have a right to have the government they want, and the government then has the right to treat its subjects the way it wants.²⁴⁸ These rights are not inviolable, according to Walzer; and in that way, he presents a more modern view of sovereignty.²⁴⁹

Some scholars are willing to carry the modern formulation of sovereignty even further under the “moral forfeiture theory.”²⁵⁰ The moral forfeiture theory holds that a state may lose sovereignty and be rendered an international non-entity if it fails to sustain some minimum standard for treatment of its citizens.²⁵¹ Professor Fernando Tesón,²⁵² the primary proponent of the theory, argues:

²⁴⁴ *Id.* at 434 n.110 (citations omitted).

²⁴⁵ WALZER, *supra* note 148, at 90.

²⁴⁶ HEINZE, *supra* note 108, at 20.

²⁴⁷ *Id.* at 21.

²⁴⁸ *Id.*

²⁴⁹ WALZER, *supra* note 148, at 89.

²⁵⁰ Burton, *supra* note 137, at 435.

²⁵¹ *Id.*

²⁵² Professor Tesón is the Tobias Simon Eminent Scholar at The Florida State University College of Law and is “[k]nown for his scholarship relating political philosophy to international law (in particular his defense of humanitarian intervention).” *Fernando Tesón*, FL. STATE UNIV. C. OF L., <http://www.law.fsu.edu/faculty/fteson.html> (last visited Mar. 17, 2014).

[B]ecause the ultimate justification of the existence of states is the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but its international legitimacy as well.²⁵³

Under Professor Tesón's formulation, such forfeiture is complete. It renders the offending state a non-entity and the government illegitimate.²⁵⁴ Without legitimacy, the state loses international standing to challenge an intervention. As the state forfeits its sovereignty, the international community assumes the responsibility to protect the people of the state.²⁵⁵

This view was adopted, in part, by ICISS in the R2P report, but it did not go quite as far as Professor Tesón in arguing complete moral and political forfeiture. The ICISS does support a framework where a state may lose the presumption of sovereignty based on its acts or omissions relative to the human rights of its citizens.²⁵⁶ Although the formulation of the moral forfeiture theory is a fairly new construct, the idea that a state may forfeit its sovereignty because it is not protecting the rights of its citizens is not new. In *Just and Unjust Wars*, Professor Walzer wrote of the relationship between sovereignty and intervention in 1977.²⁵⁷ He argued that sovereignty is not absolute and is subject to "unilateral suspension" in certain instances, including "when the violation of human rights within a set of boundaries is so terrible that it makes talk of community or self-determination or 'arduous struggle' seem cynical and irrelevant, that is, in cases of enslavement or massacre."²⁵⁸

²⁵³ Burton, *supra* note 137, at 435 (citations omitted).

²⁵⁴ *Id.*

²⁵⁵ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 2.31 ("While the state whose people are directly affected has the default responsibility to protect, a residual responsibility also lies with the broader community of states. This fallback responsibility is activated when a particular state is clearly either unwilling or unable to fulfill its responsibility to protect or is itself the actual perpetrator of the crimes or atrocities . . .").

²⁵⁶ *Id.*

²⁵⁷ WALZER, *supra* note 148, at 90. Walzer characterizes sovereignty and non-intervention as a "ban on border crossings." *Id.*

²⁵⁸ *Id.*

This view that sovereignty and non-intervention are rebuttable presumptions is not accepted universally for two main reasons. First, small states fear that more powerful states will use this modern view of sovereignty to invade and take over.²⁵⁹ The small states “are particularly apprehensive about any emerging right of humanitarian intervention for fear that they will be targets of an invasion intended to serve the geopolitical interests of the intervener, though under the pretext of humanitarianism.”²⁶⁰ Some large states also resist the evolution of sovereignty as a check against the United States or any other superpower that may emerge.²⁶¹ These defenses of state sovereignty, however, do not include the claim of the unlimited power of the state to do what it wants with its people.²⁶²

Even the strongest supporters of sovereignty acknowledge that it implies a dual responsibility to respect the sovereignty of other states and the dignity and basic rights of all the people within the state.²⁶³ This modern formulation of sovereignty means that if a state fails in either of its dual responsibilities the international community has an obligation to intervene.²⁶⁴ In other words, sovereignty has evolved from an inviolable principle to a presumption that can be overcome by evidence that the state has failed in an extreme way to meet its human rights obligations to its people.

Likewise, non-intervention has developed from an inviolable principle to a presumption. Professor David J. Scheffer²⁶⁵ wrote in his piece *Toward a Modern Doctrine of Humanitarian Intervention*, “the norm of non-intervention would appear to shield nation-states from international inquiry and action about almost all activities occurring strictly within national borders.”²⁶⁶ The articulation of non-intervention

²⁵⁹ ABIEW, *supra* note 29, at 66.

²⁶⁰ HEINZE, *supra* note 108, at 118.

²⁶¹ Cf. FOWLER & BUNCK, *supra* note 25, at 144 (describing the “Sovereign Equality Defense” in which all states are viewed as having the same sovereign power, “no matter how powerful or weak, rich or poor, large or small”).

²⁶² RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 1.35.

²⁶³ *Id.*; see also ABIEW, *supra* note 29, at 25.

²⁶⁴ See RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 4.37.

²⁶⁵ Professor Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern, a professor at Northwestern Law School and former U.S. Ambassador at Large for War Crimes Issues. David J. Scheffer, NW. L., <https://www.law.northwestern.edu:443/faculty/profiles/DavidScheffer/> (last visited Mar. 17, 2014).

²⁶⁶ Scheffer, *supra* note 120, at 261.

in Article 2(7) of the UN Charter confirms this understanding. But this rule has been qualified as nations commit to treaties and other international laws and principles that encroach on sovereignty. According to Professor Scheffer, “the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity.”²⁶⁷ Further, non-intervention has been qualified by the actions of individual states in signing onto a “larger and more intrusive regime of international treaties and conventions”²⁶⁸ and by “growing regional organization and state practice.”²⁶⁹ That is, as states allow more intrusion into their affairs by international governmental and non-governmental organizations, non-intervention’s use as a shield is weakened. In sum, both sovereignty and non-intervention are considered to be presumptions—rather than absolutes—and can be rebutted by evidence of extreme human suffering.

C. Legality and Legitimacy of UAHl

The third foundation for the proposed test is made up of the related, but distinct, concepts of legality and legitimacy.²⁷⁰ Legality of UAHl, in its current construct, refers to interventions approved by the Security Council in conformity with the UN Charter—meaning that the Security Council has first determined “the existence of [a] threat to the peace, breach of the peace, or act of aggression”²⁷¹—or the target state has consented to the intervention.²⁷²

Under R2P, a legitimate intervention is a just war without meeting the *jus ad bellum* requirement of proper authority. The ICISS identified five criteria for legitimate interventions that are meant to apply to the Security Council and to member states under R2P: just cause, right intention, last resort, proportionality of means, and reasonable prospect of success.²⁷³ Thus, a legitimate intervention meets each of the *jus ad*

²⁶⁷ *Id.* at 262.

²⁶⁸ *Id.*

²⁶⁹ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 2.24.

²⁷⁰ JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? 19 (2006).

²⁷¹ U.N. Charter art. 39.

²⁷² DESKBOOK, *supra* note 30, at 31.

²⁷³ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶¶ 4.18, 4.32–48.

bellum requirements except for proper authority.²⁷⁴ As a result, an intervention—like NATO’s in Kosovo—may be viewed as legitimate even if it is not approved by the Security Council. The Kosovo intervention was not approved by the Security Council; thus, it lacked approval by a “proper authority.”²⁷⁵ The Kosovo Report described how an intervention could be “legitimate” while at the same time be “illegal”²⁷⁶ and the ICISS adopted the same formulation for R2P.²⁷⁷

Legality and legitimacy are distinguishable in other ways as well. For example, success can have a direct effect on the legitimacy of an action but has only an indirect effect on the legality of an action.²⁷⁸ An intervention, like the one in Kosovo, is viewed as legitimate in retrospect because it is generally viewed as being successful, implicating the *jus ad bellum* requirement of probability of success.²⁷⁹ But there are two main problems with basing a finding of legitimacy on “success” of a UAH alone. First, success or failure can only be judged after the intervention, and second, success is a term that escapes precise definition. For example, some commentators label the NATO intervention in Kosovo a “success.”²⁸⁰ The Kosovo Report, authored by a commission of experts in international law and relations from around the world, found it to be “neither a success nor a failure; it was in fact, both.”²⁸¹ Kosovo is but one example of how difficult it is to define success. The United States’ intervention in Iraq provides a good example of how difficult it is to define “success” in any type of armed intervention.²⁸² Success, like

²⁷⁴ DESKBOOK, *supra* note 30, at 13; *see also High-Level Panel Report, supra* note 8, ¶ 207 (identifying five criteria for legitimacy for intervention based on R2P—“seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences”).

²⁷⁵ *See KOSOVO REPORT, supra* note 21, at 4.

²⁷⁶ *Id.*

²⁷⁷ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 6.28–40.

²⁷⁸ STROMSETH ET AL., *supra* note 270, at 19. Probability of success may have an effect on whether a Security Council member approves or disapproves (or vetoes or withholds a veto on) an intervention. For example, success was more probable in Libya and the intervention was approved with Russia and China abstaining. Success is a less likely outcome in Syria and a vote on intervention did not occur. *Id.* It appears there is an indirect effect on legalizing an intervention through a Security Council vote.

²⁷⁹ *Id.* *But cf.* KASSNER, *supra* note 1, at 148 (discussing the U.S.-led invasion of Iraq). *But see KOSOVO REPORT, supra* note 21, at 5.

²⁸⁰ *See STROMSETH ET AL., supra* note 270, at 19.

²⁸¹ KOSOVO REPORT, *supra* note 21, at 5.

²⁸² *See Ignatief, supra* note 142 (arguing “[i]nterventions don’t end when the last big battle is won . . . containing rather than defeating the enemy is the most you can hope for”). The current uprisings in Iraq led by the Islamic State of Iraq and Syria (ISIS)

beauty, is in the eye of the beholder and is a poor way to judge legitimacy, and in any event, it has no effect on legality of an intervention.²⁸³

Both legality and legitimacy can be judged pre-intervention. Legality is judged by whether the intervention is approved by a proper authority and whether that proper authority (the Security Council) has determined the existence of a threat to the peace, a breach of the peace, or an act of aggression.²⁸⁴ Legitimacy, on the other hand, is judged by reference to just-war principles. If a UAH meets the other *jus ad bellum* principles, it can be judged legitimate even if it has not been approved by a “proper authority.” In this way, legitimacy of UAH would reside on a continuum just to the left of legality. Legality is judged at the outset of an intervention, while intervening states will likely face questions about legitimacy throughout the intervention, but most prominently in the post-intervention phase. Professor Jane Stromseth²⁸⁵ asserts “whatever factors trigger states to intervene in the first place, they increasingly face international pressure to help build governance structures and institutions that advance self-determination and protect the basic international human rights of the local population.”²⁸⁶ Therefore, for an intervention to be approved and supported by the international community, there must be legitimacy throughout the intervention, from basing the action on *jus ad bellum* principles, to following *jus in bello* principles during the conflict, and finally meeting *jus post bellum* obligations (building governance structures and institutions).²⁸⁷

further shows how difficult it is to measure success in modern conflicts, whether in the short-term or long-term.

²⁸³ Probability of success may, however, have an effect on the willingness of the international community to intervene. If an intervention is likely to be successful, it is more likely to have proponents.

²⁸⁴ U.N. Charter art. 39.

²⁸⁵ Professor Stromseth teaches and writes in the fields of constitutional law, human rights, international security, and post-conflict resolution. *Profile Jane Stromseth*, GEO. L., <https://www.law.georgetown.edu/faculty/stromseth-jane-e.cfm> (last visited Mar. 17, 2014).

²⁸⁶ STROMSETH ET AL., *supra* note 270, at 19.

²⁸⁷ DESKBOOK, *supra* note 30, at 9–10. *Jus ad bellum* is the law dealing with conflict management and how states initiate armed conflict (i.e., under what circumstances the use of military power is legally and morally justified). *Jus in bello* is the law governing the actions of states once conflict has started (i.e., what legal and moral restraints apply to the conduct of waging war). *Jus post bellum* focuses on the issues regulating the end of warfare and the return from war to peace (i.e., what a just peace should look like). *Id.*

It is essential for UAHIs to be both legal and legitimate. Legality and legitimacy are the tools the international community uses to support the intervention before and after it happens. They have a direct bearing on both participation by the international community and its willingness to view the intervention in a favorable light.²⁸⁸ “Without question, the presence of clear legal authority to intervene will also be highly significant in convincing other states that military action is legitimate.”²⁸⁹ If an intervention is viewed as legitimate, it is more likely states will contribute to the intervention and support it.²⁹⁰ Not only is the international community more likely to support the intervention in theory when it is viewed as legal and legitimate, individual states are more likely to support the intervention in reality through financial and political means.²⁹¹ This article argues that a state can gain legality and legitimacy for its action by meeting the elements of the proposed test based on these three foundational principles.

VIII. The Proposed Test

A. Element 1: The UN Security Council Fails to Act

The first element presupposes that the targeted state is complicit in the crimes against its citizens or, at least, is unable to stop those who are committing the crimes.²⁹² Under the Pillars of R2P, the international community, acting through the Security Council, thus assumes the responsibility to act.²⁹³ If the Security Council fails to act (whether by choice or by simple inability) under these circumstances, an intervening state would meet this element of the test and would also meet the just-war requirement that military intervention be a last resort.

The Security Council has essentially unlimited authority to determine a threat to international peace and security and to approve interventions for humanitarian purposes based on its obligation “to ensure prompt and effective action by the United Nations” and its “responsibility for the maintenance of international peace and

²⁸⁸ STROMSETH ET AL., *supra* note 270, at 18.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Cf.* Deeks, *supra* note 51, at 485 (explaining the “unwilling or unable” standard with regard to a state’s inability to deal with non-state actors).

²⁹³ World Summit Outcome Document, *supra* note 78, ¶¶ 138–39.

security.”²⁹⁴ Even so, the Security Council’s power to act is not unlimited. It may be unable to act due to a veto or threat of veto, or states may disagree about the scope of the approval, thereby calling into question the legality and legitimacy of its action.

The veto or threat of veto may be exercised by one of the permanent members of the Security Council.²⁹⁵ The Security Council is made up of five permanent members and ten temporary members elected by the General Assembly.²⁹⁶ Non-permanent members are elected for a term of two years.²⁹⁷ Each member of the Security Council has one vote.²⁹⁸ Decisions of the Security Council on all non-procedural matters “shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.”²⁹⁹ Thus if one permanent member does not concur, the action cannot be approved. Historically, the underlying basis for a veto is either international politics or domestic politics.³⁰⁰ The vetoes are typically not based on whether the intervention meets the vetoing state’s understanding of the legal requirements.³⁰¹ The ICISS posits that in cases where action should be taken to avert a humanitarian crisis, the domestic politics of Security Council members must be deemed less important than the extreme human suffering of the citizens of the targeted state.³⁰² To that end, the ICISS recommends permanent members refrain from using their veto with respect to actions that need to be taken “to stop or avert a significant

²⁹⁴ U.N. Charter art. 24; *see also* RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 6.3.

²⁹⁵ U.N. Charter art. 27, para. 3 (requiring concurring votes of the permanent members on all non-procedural matters); *see also id.* art. 23, para. 1 (naming the United States, China, France, Russia, and the United Kingdom as the permanent members of the Security Council).

²⁹⁶ *Id.* art. 23, para. 1.

²⁹⁷ *Id.* art. 23, para. 2.

²⁹⁸ *Id.* art. 27, para. 1.

²⁹⁹ *Id.* art. 27, para. 3.

³⁰⁰ *See, e.g.* WHEELER, *supra* note 69, at 179 (describing the George H.W. Bush Administration’s decision to act in Somalia: “The Democratic challenger in the election campaign, Bill Clinton, was criticizing Bush for his alleged foreign-policy failures over both Bosnia and Somalia, and this coupled with Bush’s personal reactions to the stories of suffering Somalis galvanized the President to act decisively on the Somali issue”); *see also* Max Fisher, *The Four Reasons Russia Won’t Give up Syria, No Matter What Obama Does*, WASH. POST WORLD VIEWS BLOG (Sept. 5, 2013, 11:28 AM), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/09/05/the-four-reasons-russia-wont-give-up-syria-no-matter-what-obama-does/> (describing Russia’s national interests in backing Syria).

³⁰¹ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 6.20. In the humanitarian intervention context, the veto has been used to protect the interests of particular states or their allies.

³⁰² *Id.* para. 6.21.

humanitarian crisis” in matters where their “vital national interests were not claimed to be involved” and the veto would “obstruct the passage of what would otherwise be a majority resolution.”³⁰³ This recommendation is unlikely to be implemented. Due to the interconnectedness of the world today, it would be difficult to find a situation where a state’s national interests would not in some way be implicated. Also, states will continue to act in their own interests even when vital national interests are not at stake.

Even when the Security Council does act, states understand the actions differently.³⁰⁴ This is because, as the ICISS points out, “multilateral decision-making bodies require consensus to succeed, and vagueness and incrementalism, rather than specificity, are inevitable outcomes of multilateral deliberations.”³⁰⁵ Recently, China and Russia abstained from voting on the intervention in Libya and issued a double-veto of a resolution condemning the violence in Syria.³⁰⁶ In the case of Libya, the abstentions allowed the intervention to be approved.³⁰⁷ In some cases, such as Libya, there is a great amount of debate about the scope of the approved actions even after approval, leading to questions about whether the “armed” part of the intervention was actually legal under Chapter VII if there was no agreement on the scope of the intervention.

For example, the scope of UN Security Council Resolution (UNSCR) 1973 authorizing intervention in Libya has been interpreted to mean one thing in the United States and quite another in Russia.³⁰⁸ National security scholars, such as Professor Robert Chesney,³⁰⁹ saw UNSCR 1973 as “surprisingly broad” including provisions authorizing a

³⁰³ *Id.*

³⁰⁴ *Id.* para. 7.13.

³⁰⁵ *Id.*

³⁰⁶ Mick B. Krever, *Why Won't the U.N. Security Council Intervene in Syria?*, CNN (Jan. 13, 2012, 7:14 PM), <http://www.cnn.com/2012/01/13/world/meast/un-security-council-syria/index.html>.

³⁰⁷ *Id.*

³⁰⁸ Robert Chesney, *The Surprisingly Broad Scope of UN Security Council Resolution 1973: Not Just a No Fly Zone, at Least So Long as Gaddafi is on Offense*, THE LAWFARE BLOG (Mar. 17, 2011, 11:01PM), <http://www.lawfareblog.com/2011/03/the-surprisingly-broad-scope-of-un-security-council-1973-not-just-a-no-fly-zone-at-least-so-long-as-gaddafi-is-on-offense/>.

³⁰⁹ Professor Chesney is a professor at the University of Texas School of Law and a founding editor of the Lawfare National Security Blog. Robert M. Chesney, UNIV. OF TEX., <http://www.utexas.edu/law/faculty/rmc2289/> (last visited Oct. 30, 2014).

“no fly zone”³¹⁰ and the use of force to protect civilians and civilian-populated areas.³¹¹ The United States and its coalition partners acted under a similar view of UNSCR 1973—that it allowed for military operations to include airstrikes against air-defense systems and military airfields in preparation for imposing a no-fly zone.³¹² On the contrary, Russia expressed its belief that NATO exceeded the scope of the resolution by conducting a military operation when the resolution did not contemplate military action.³¹³ As such, even instances where states are vested with Security Council approval, there may still be objections to the way an intervention is carried out and debate about the scope of the approved intervention.

In the end, Security Council approval does not directly confer legality on all actions.³¹⁴ Also, when a state has used or threatens to use the veto, the Security Council is paralyzed and fails to act; or when it does act, it is not definitive. In these cases, the Security Council has failed to act for the purposes of the test.

The Security Council’s inaction would also mean that a UAHl would be a “last resort” as required by just-war theory.³¹⁵ In an op-ed in the *New York Times* before the Iraq War, former U.S. President Jimmy Carter wrote about the just-war requirement of last resort, “war can only be waged as a last resort, with all non-violent options exhausted.” The Kosovo report found that the intervention there was legitimate, in part, “because all diplomatic avenues had been exhausted.”³¹⁶ In cases where

³¹⁰ Greenway, *supra* note 119 (quoting former Secretary of Defense Robert M. Gates that a no-fly zone is considered both an act of war and an intervention into sovereign airspace).

³¹¹ Chesney, *supra* note 308.

³¹² Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 4 (2011).

³¹³ *Russia Says NATO Strikes on Libya Exceed Mandate*, FRANCE24 (Apr. 14, 2011), <http://iphone.france24.com/en/20110415-russia-says-nato-libya-strikes-exceed-un-mandate>) (describing Russia’s opinion that NATO strikes on Libya exceeded the Security Council mandate because the resolution did not authorize military action).

³¹⁴ Scheffer, *supra* note 120, at 273.

³¹⁵ Verdirame, *supra* note 108 (citing the United Kingdom’s published legal advice on Syria and the view that Security Council failure to act means that UAHl is a last resort: “Previous attempts by the UK and its international partners to secure a resolution of this conflict, end its associated humanitarian suffering and prevent the use of chemical weapons through meaningful action by the Security Council have been blocked over the last two years. If action in the Security Council is blocked again, no practicable alternative would remain to the use of force to deter and degrade the capacity for the further use of chemical weapons by the Syrian regime”).

³¹⁶ KOSOVO REPORT, *supra* note 21, at 4.

there is extreme human suffering or imminent extreme human suffering, the failure of the Security Council to act would mean that all diplomatic avenues have been exhausted. In that case, an individual state would meet the last resort requirement. Thus, if the Security Council fails to act even in the presence of extreme human suffering, or imminent extreme human suffering, the first element of the proposed test is met.

B. Element 2: The Intervening State Must Show Substantial and Compelling Evidence of Extreme Human Suffering or Imminent Extreme Human Suffering to Rebut the Presumptions of Sovereignty and Non-intervention

To meet this element of the test, the intervening state must (1) show substantial and compelling evidence (2) of extreme human suffering or imminent extreme human suffering (3) that is sufficient to rebut the presumptions of sovereignty and non-intervention. This substantial evidence will show that the intervention is a “just cause” and “based upon . . . a need to right an actual wrong.”³¹⁷ It would also show that the intervening state has a “right intention.” In other words, the state intends to fight the war for the sake of the just cause and not for other purposes.³¹⁸ This section concludes that the rebuttable-presumption test adequately addresses sovereignty and non-intervention and allows the intervening state to take the next step toward UAHl legality.

1. *Substantial and Compelling Evidence*

Intervening in another state’s affairs against the international norms of sovereignty and non-intervention should require a heightened standard of evidence.³¹⁹ Sovereignty and non-intervention are the foundations of international law and relations. There must be a high evidentiary standard to overcome the presumptions that the state still retains its sovereignty and right of non-intervention. The substantial and compelling evidence standard meets this requirement.³²⁰

³¹⁷ DiMeglio, *supra* note 209, at 128.

³¹⁸ *Id.*

³¹⁹ See Kanter, *supra* note 99, at 15 (characterizing sovereignty as a “substantial presumption against intervening that must be surmounted by the compelling nature of the particular circumstances”).

³²⁰ Cf. Schmitt, *supra* note 65, at 40 (discussing the common law standard of clear and convincing with regard to use of force in self-defense). The burden of clear and

2. *Of Extreme Human Suffering*

There is near agreement in the international community with regard to the type of events that qualify as “extreme human suffering” for the purpose of determining if a UAH is just. In short, “extreme human suffering” in this context refers to genocide or other large-scale loss of life,³²¹ war crimes, ethnic cleansing, or other crimes against humanity.³²² These types of events are generally considered *jus cogens*, or peremptory norms, from which no derogation is ever permitted.³²³ No derogation means that a state may not itself do something that conflicts with a rule of *jus cogens* or make an agreement to allow another state to do something that conflicts with a rule of *jus cogens*.³²⁴

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such:

- (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.³²⁵

Under the 1948 Genocide Convention, signatories have the obligation to prevent and punish the crime of genocide.³²⁶ No derogation from these obligations is permitted.³²⁷ However, the issue with the Genocide Convention is that it requires signatories to call upon “the competent organs of the United Nations to take such actions as they

convincing requires that a party prove that it is substantially more likely than not that a specific proposition is true. *Id.* Substantial evidence would be the equivalent of the clear and convincing standard in a common law system. *Id.*

³²¹ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 4.19.

³²² HEINZE, *supra* note 108, at 96; *see also* RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 4.19; *High-level Panel Report*, *supra* note 8, ¶ 13; World Summit Outcome Document, *supra* note 78, ¶¶ 138–39.

³²³ BROWNLEE, *supra* note 25, at 517 (positing that genocide is *jus cogens*).

³²⁴ *Id.* at 516.

³²⁵ Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277, S. Exec. Doc. O, 81-1 (1949).

³²⁶ *Id.*

³²⁷ *Id.*

consider appropriate.”³²⁸ This means, of course, that genocide does not, in and of itself, create legal UAH.

The Rome Statute³²⁹ lists the following as crimes against humanity when “part of a widespread or systematic attack against any civilian population, with knowledge of the attack”: murder, extermination, enslavement, forcible deportation of a population, unlawful imprisonment, torture, rape and other sexual violence, racial or ethnic persecution, enforced disappearance, apartheid, and other inhumane acts causing great human suffering.³³⁰

These extreme acts stand in contrast to other, less extreme forms of denying important human rights, guaranteed by customary international law or treaty. For example, the International Covenant on Civil and Political Rights (ICCPR),³³¹ to which the United States is a party, guarantees a broad set of rights the denial of which may constitute “human suffering” but only some of which would meet the “extreme human suffering” standard. The ICCPR enumerates a number of rights, including: freedom of thought, conscience, and religion; freedom of opinion and expression; freedom of association; the right of peaceful assembly; the right to vote; equal protection of the law; the right to liberty and security of the person; the right to a fair trial, including the presumption of innocence; the right of privacy; freedom of movement, residence, and immigration; freedom from slavery and forced labor; protection from torture or cruel, inhumane, or degrading treatment or punishment; and the right to life.³³² While a violation of any of these would arguably cause human suffering, a violation of some might not amount to extreme human suffering. For example, denying voting rights would be a human rights violation but would not be extreme enough to meet the definition here of extreme human suffering.

This formulation of extreme human suffering generally follows Professor Walzer’s “chasm” approach.³³³ Walzer explains that on one

³²⁸ *Id.*

³²⁹ The Rome Statute of the International Criminal Court art. 6, U.N. Doc. A/CONF.183/9 (1998).

³³⁰ *Id.*; see also HEINZE, *supra* note 108, at 96.

³³¹ International Covenant on Civil and Political Rights (ICCPR), *adopted* Dec. 16, 1966, 999 U.N.T.S. 171.

³³² *Id.*; see also Stigall, *supra* note 26, at 28 (citation omitted).

³³³ Michael Walzer, *The Argument About Humanitarian Intervention*, in *ETHICS OF HUMANITARIAN INTERVENTIONS* 22 (Georg Meggle ed., 2004).

side of the chasm are “common brutalities of authoritarian politics, the daily oppressiveness of traditional social practices,” which do not necessitate an intervention.³³⁴ These issues are better handled internally by the people who understand the social and political fabric of that country; outsiders may misinterpret situations and cause more harm than good by intervening in these situations.³³⁵ On the far side of the chasm are the acts that necessitate intervention: genocide, war crimes, crimes against humanity, and ethnic cleansing.³³⁶ These acts do not call for interpretation by the local populace—they are banned absolutely and must be addressed. The general consensus in the international community is that the acts Walzer identifies on the far side of the chasm constitute extreme human suffering. Any of those acts would constitute extreme human suffering for the purposes of the proposed test.

3. *Imminence*

The determination of whether there is imminent extreme human suffering will be based on all the facts and circumstances known to the intervening state at the time of the proposed intervention.³³⁷ The standard for imminence is the one articulated by then-U.S. Secretary of State Daniel Webster in the *Caroline Case*: a state need not wait for the people of the targeted state to suffer actual extreme human suffering before taking action but may intervene if the circumstances leading to the use of force are “instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation.”³³⁸ By this high standard of extreme human suffering or imminent extreme human suffering, the proposed test limits interventions to the most extreme cases. It thus limits the instances to those where there will likely be international consensus on the need to act.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 78 (2013).

³³⁸ DESKBOOK, *supra* note 30, at 37; *see also* Deeks, *supra* note 51, at 502 (describing the *Caroline Case*).

4. *To Rebut the Presumptions of Sovereignty and Non-intervention*

Sovereignty is not an absolute bar to intervention. The best formulation is that sovereignty is a rebuttable presumption that can be overcome by substantial and compelling evidence that the government of a state is suppressing the people's sovereignty but is more specifically violating the human rights of its citizens by taking their lives and freedom through genocide, war crimes, crimes against humanity, or ethnic cleansing. This view was expressed by Arnold Kanter with regard to U.S. policy on humanitarian intervention: "By itself, the principle of national sovereignty may not be an absolute bar to armed humanitarian interventions, but it should constitute a substantial presumption against intervening that must be surmounted by the compelling nature of the particular circumstances."³³⁹

5. *The "Inherent Dilemma" of This Element*

There is an "inherent dilemma"³⁴⁰ posed by the proposed test's second element. On the one side, the bar for intervention is high and requires evidence of extreme human suffering or imminent extreme human suffering.³⁴¹ On the other side, interventions may be required to save lives before the decision-makers have all of the information.³⁴² It is both a difficult hurdle to overcome and a necessary one to protect the rights of the citizens of the target state.³⁴³ It is also part of the proposed test to ensure that sovereignty and non-intervention are addressed.

There is also an issue of the evidence relied upon to establish substantial and compelling evidence of extreme human suffering or imminent extreme human suffering. "Obtaining fair and accurate information is difficult but essential," argues the ICISS.³⁴⁴ The experience in Iraq and the evidence relied upon regarding Saddam Hussein's alleged weapons of mass destruction have made the international community cautious about intelligence and information.³⁴⁵

³³⁹ Kanter, *supra* note 99, at 15.

³⁴⁰ *Id.* at 8.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Cf.* Walzer, *supra* note 333, at 22.

³⁴⁴ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 4.28.

³⁴⁵ See Verdirame, *supra* note 108 ("There is no better evidence of the long shadow that the Iraq war continues to cast [than] that, while in 2003 the British Parliament supported

In that regard, if time permits, the ICISS recommends a report on the “gravity of the situation.”³⁴⁶ The difficulty with this approach is that in cases of genocide, war crimes, crimes against humanity, or ethnic cleansing, there typically will not be time to complete a comprehensive report before intervention is necessary. As a result, the international community may be acting on incomplete information or, possibly, misleading information. This is an issue that must be taken into account by the intervening state—and the international community—when determining whether there really is *substantial and compelling* evidence of extreme human suffering or imminent extreme human suffering.

C. Element 3: The Intervening State Must Have a Defined Mission

This element has both an internal and external component for the intervening state. Internally, the intervening state must maintain domestic political and popular support for its action. Externally, the intervening state must maintain international political and popular support for its action. Having a properly defined mission that is acceptable internally and externally will help a state maintain the action’s legitimacy from the time of the intervention through the post-intervention phase. It is especially important to maintain legitimacy in the post-intervention phase for the state to maintain, and possibly even increase, the support it receives from international partners.³⁴⁷

To this end, a state should define its mission in two ways. First, the purpose of the intervention must be predominantly humanitarian, thus showing the intervening state’s “right intention.”³⁴⁸ Second, it must establish that the defined mission has a strong probability of success.³⁴⁹

1. *Right Intentions*

The first requirement is succinctly stated in the ICISS’s R2P report, and is adopted in this article—“[t]he primary purpose of the intervention

intervention against the mere possibility that weapons of mass destruction might be used, ten years later the British Parliament voted against it after they had actually been used.”).

³⁴⁶ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 4.29.

³⁴⁷ STROMSETH ET AL., *supra* note 270, at 19.

³⁴⁸ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 4.33.

³⁴⁹ DiMeglio, *supra* note 209, at 127 (“A state may not resort to war if it can reasonably foresee that doing so will have no measurable impact on the situation.”).

must be to halt or avert human suffering.”³⁵⁰ Other motives for intervening, such as alteration of borders or overthrow of a regime, are not considered right intentions.³⁵¹ This does not mean that a state cannot have any self-interest involved in its decision to intervene. It is inevitable that there needs to be some self-interest to meet the internal pressures of domestic political and popular opinion. Due to the cost of interventions, both in terms of lives of military personnel and budgets, it is also not unlikely that an intervening state may in some way benefit from the intervention.³⁵² These factors should not preclude intervention if the predominant motivation is humanitarian.

2. *Probability of Success*

Second, it is critical that an intervention be viewed as having a strong probability of success. Probability of success is even more important in humanitarian interventions because they likely will be controversial uses of force to begin with. Interventions must have a defined goal to provide metrics by which to measure its success or failure. Without a defined goal pre-intervention, there is no way to determine if the intervening state achieved its goals post-intervention.

The intervention in Somalia is an excellent case study as to why a defined mission and probability of success are important components in gaining and maintaining international support for a humanitarian intervention. When the Security Council approved Resolution 794 under its Chapter VII authority in December 1992,³⁵³ and the United States took the lead in providing military power to the intervention in Somalia, it was seen as a harbinger for the future of humanitarian interventions.³⁵⁴ The initial stages of the intervention were to “establish as soon as possible a secure environment for humanitarian relief operations in Somalia,”³⁵⁵ and they went well.³⁵⁶ The end of the intervention in

³⁵⁰ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 4.33.

³⁵¹ *Id.* (explaining that regime change is not always bad: “disabling that regimes’ capacity to harm its own people may [be] essential to discharging the mandate of protection”).

³⁵² *Id.* para. 4.35.

³⁵³ S.C. Res. 794, ¶ 10, U.N. SCOR, 47th Year, U.N. Doc. S/RES/794, at 3 (Dec. 3, 1992) (empowering the Unified Task Force (UNITAF) headed by the United States to “use all necessary means” to ensure security for the delivery of humanitarian aid).

³⁵⁴ Burmester, *supra* note 110, at 269.

³⁵⁵ *See supra* note 353 (describing S.C. Res. 794).

Somalia, however, was not favorable after the mission had changed—from ending civil disorder and providing humanitarian relief to nation-building.³⁵⁷ The mission was no longer well-defined, and there was no good way to measure its success or failure. The failure of some aspects of the intervention in Somalia has led to a humanitarian intervention decision-making process where “the desire to help collides with cold calculus of national interest.”³⁵⁸ In most cases, the national interest prevails.

To meet this third element, an intervening state must show that the predominant reason for the intervention is humanitarian and that the intervention will probably be successful in meeting the goals the state set out. In the context of a UAHl under the proposed test, success is stopping the extreme human suffering or imminent extreme human suffering and putting governing structures and political systems in place to ensure that the extreme human suffering does not recur. If a state can show how they intend to accomplish these two things, the element of defined mission is met and the inquiry moves to the final and probably most controversial of the four elements—the requirement to intend to meet and actually carry out *jus post bellum* obligations.

D. Element 4: The Intervening State Must Intend to and Actually Meet Jus Post Bellum Obligations

The final element of the proposed test requires that the intervening state intend to meet—and actually does meet—*jus post bellum* (post-intervention) obligations to the targeted state. In addition to *jus post bellum*, this element corresponds to the *jus ad bellum* principle of macro proportionality, which requires a state, before initiating a war, to weigh the expected universal good to accrue from prosecuting the war against the expected universal evils that will result.³⁵⁹ That is, only if the benefits of the UAHl seem reasonably proportional to the costs should

³⁵⁶ WHEELER, *supra* note 69, at 188. *But see id.* (describing the contrary opinion of Alex De Waal who argued that the intervention in Somalia was not as successful as the UN said. De Waal argued that the intervention was flawed from the outset because it aimed to deliver food to starving people even though the famine had passed by the time the intervention occurred in 1992. De Waal believes the intervention would have been better had it focused on vaccinations against malaria and measles).

³⁵⁷ POWELL, *supra* note 231, at 580.

³⁵⁸ *Id.* at 605.

³⁵⁹ DiMeglio, *supra* note 209, at 128.

the UAH proceed.³⁶⁰ It follows that in the context of UAH against genocidal regimes (or regimes committing or allowing crimes against humanity, war crimes, or ethnic cleansing),³⁶¹ many of the universal evils that may result could be avoided by robust criteria for post-intervention obligations to ensure that a governmental system is in place that is free from the genocidal regime and stable enough to ensure it does not return. This element is also a check to ensure right intentions by the intervening state. The requirement to commit to post-intervention obligations exposes whether a state has the right intention for intervening—to alleviate extreme human suffering. There may be no fool-proof way to ensure purely humanitarian intentions but requiring states to meet post-intervention obligations is a check pre- and post-intervention.

This section addresses the development of *jus post bellum* principles from the historical standard of “status quo ante,”³⁶² where supporters argue for states to intervene for the shortest time possible,³⁶³ to a new standard of “clear improvement.”³⁶⁴ It reviews the obligations an intervening state incurs and identifies general principles for post-intervention obligations. Finally, it explains why *jus post bellum* obligations are an integral part of just UAHs.

Jus post bellum is “a third, largely historically neglected prong of the just war tradition . . . which focuses on the issues regulating the end of war and the return from war to peace.”³⁶⁵ It adds a prong to the just-war model for judging UAHs—first, the justness of going to war (*jus ad bellum*); second, the justness of actions during the war (*jus in bello*); and third, the justness of the actions an intervening state takes post-conflict to help the targeted state establish a government and economic and social systems free from the human rights violations that led to the intervention (*jus post bellum*).³⁶⁶ The overriding *jus post bellum* obligation should be to remove, to the greatest extent possible, the root causes of the original

³⁶⁰ Macro proportionality is a *jus ad bellum* principle meaning the justness of the action can be judged before the intervention. The intervention should also be evaluated after the intervention to ensure that the intervening state actually met its obligations.

³⁶¹ For ease of reference, this article uses Professor Bass’s term “genocidal regimes” to describe regimes that engaged in “extreme human suffering”—genocide, war crimes, crimes against humanity, or ethnic cleansing.

³⁶² Bass, *supra* note 207, at 385 n.4.

³⁶³ Jones, *supra* note 4, at 115.

³⁶⁴ Carter, *supra* note 226.

³⁶⁵ DiMeglio, *supra* note 209, at 117.

³⁶⁶ See Bass, *supra* note 207, at 399 (“Some form of authority must be constituted instead, free (as much as possible) from the taint of the previous genocidal regime.”).

conflict and to restore good governance and economic stability to the targeted state.³⁶⁷

1. *Jus Post Bellum: Historical View vs. Modern View*

There are two views of *jus post bellum* obligations, referred to in this article as the historical view and the modern view. The historical view mandated a return to the status quo ante.³⁶⁸ But returning a state to the status quo is no longer an acceptable way to end wars, especially those fought as humanitarian wars against genocidal or criminal regimes. The modern view requires that “[t]he peace it [an intervention] establishes must be a clear improvement over what exists”³⁶⁹ and that the “object in war is a better state of peace.”³⁷⁰ This means states need to demonstrate not only that their reasons for going to war are just but that their post-intervention actions will also be just. Professor Bass argues postwar conduct must be consistent with just war: “helping to make the region more stable and secure, and leaving the affected population less subject to violence and oppression.”³⁷¹

For years, scholars have argued that armed humanitarian interventions should be limited to the time necessary to stop the atrocity.³⁷² Many do not address post-intervention obligations.³⁷³ Northwestern University Law professor David Scheffer argues, “U.N.-authorized forcible intervention should be limited by the humanitarian objectives,” and “should not be aimed at forcing governmental change.”³⁷⁴ He maintains that the government is only a legitimate target if the humanitarian crisis in its borders imposes a “threat to international peace and security” beyond its borders.³⁷⁵ Professor Scheffer is not alone in this view. Professor Samuel Vincent Jones, a law professor and former reserve judge advocate,³⁷⁶ argues that a UAH should be deemed

³⁶⁷ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 5.25.

³⁶⁸ Bass, *supra* note 207, at 385 n.4.

³⁶⁹ Carter, *supra* note 226.

³⁷⁰ WALZER, *supra* note 148, at 121.

³⁷¹ Bass, *supra* note 207, at 385.

³⁷² Burmester, *supra* note 110, at 269 n.80 (citations omitted).

³⁷³ Bass, *supra* note 207, at 384 n.2 (citations omitted).

³⁷⁴ Scheffer, *supra* note 120, at 289.

³⁷⁵ *Id.*

³⁷⁶ Samuel Vincent Jones served as a U.S. Army Reserve Judge Advocate (MAJ, USAR (Ret.)) and is a Professor of Law at The John Marshall Law School in Chicago. *Samual*

appropriate after General Assembly approval if it meets certain requirements,³⁷⁷ including that “the intent of the [intervening state] must be to intervene for as short as [sic] time possible, with the [intervening state] disengaging as soon as the specific limited purpose is accomplished.”³⁷⁸ He maintained also that “it appears appropriate” to add the additional requirement that a UN Commission indicates “the targeted state’s government is complicit in the actions that constitute massive human rights atrocities against its own citizens.”³⁷⁹

The combination of these requirements—to intervene for as short a time as possible and the circumstance that the targeted state’s government is complicit in human rights atrocities—appear incompatible with Just-War Theory. If the targeted state is complicit in massive human rights atrocities, the intervening state should remain as long as necessary to ensure there is a clear improvement over what existed before. This may include replacing the complicit government and helping to ensure freedom for the people of the targeted state.³⁸⁰ These obligations are even more distinct when the intervention is based upon humanitarian reasons and against genocidal regimes according to Professor Bass.³⁸¹ He argues that “[b]ecause these regimes have sought to exterminate their citizens, they have no international standing. Some form of authority must be constituted instead, free (as much as possible) from the taint of the previous genocidal regime.”³⁸² This notion would require the intervening state to act even more strongly to ensure the genocide does not return:

v. Jones, J. MARSHALL L. SCH., <http://www.jmls.edu/directory/profiles/jones-samuel/> (last visited Mar. 17, 2014).

³⁷⁷ Jones, *supra* note 4, at 115. All of the criteria Professor Jones proposes are: (1) The intent of the intervening state must be to intervene for as short a time as possible, with the intervening state disengaging as soon as the specific limited purpose is accomplished; (2) Where at all possible, the intervening state must try and obtain an invitation to intervene from the recognized government and thereafter, to cooperate with the recognized government; (3) The intervening state, before its intended intervention, must request a meeting with the Security Council in order to inform it that the humanitarian intervention will take place only if the Security Council does not act first; and (4) Before intervening, the intervening state must deliver a clear ultimatum or peremptory demand to the concerned state insisting that positive actions must be taken to terminate or ameliorate the gross human rights violations. *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ Bass, *supra* note 207, at 386; *see also id.* at 396 (discussing political reconstruction in a genocidal state). *Cf.* DiMeglio, *supra* note 209, at 146.

³⁸¹ *See* Bass, *supra* note 207, at 399.

³⁸² *Id.*

If a state wages war to remove a genocidal regime, but then leaves the conquered country awash with weapons and grievances, and without a security apparatus, then it may relinquish by its postwar actions the justice it might otherwise have claimed in waging the war.³⁸³

Failing to change regimes may return the targeted state to the *status quo ante*, which could bring the original justification for the intervention into question.³⁸⁴ Regime change, therefore, is not only a possibility but may be a requirement when facing a genocidal regime. The question then becomes whether regime change is a good or bad idea.

2. Regime Change in Genocidal States

Regime change, as Professor Michael Reisman persuasively argues, “is (almost always) a bad idea.”³⁸⁵ However, Professor Reisman explains that the “almost always” contains a caveat and means there are some situations where regime change is a good idea:

There will be times . . . when an individual state must undertake to forcefully change a regime in another state because that regime is both hideous and dangerous, pathological and pathogenic, and because the formal decision structures of the international legal system prove inoperable.³⁸⁶

Reisman proposes guidelines for successful regime changes in these extreme cases.³⁸⁷ These guidelines are stringent by design. Regime

³⁸³ *Id.* at 386; see also Verdirame, *supra* note 108 (“There may be extreme instances (e.g., a genocidal regime like the interim Rwandan government in 1994) where regime change may be by itself an acceptable humanitarian objective but, in all other situations, the cheap Marxist whiff around the idea of regime change—let us do the revolution now and what will follow will surely be better—should not suffice.”).

³⁸⁴ DiMeglio, *supra* note 209, at 150.

³⁸⁵ W. Michael Reisman, *Manley O. Hudson Medal Lecture: Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. SOC’Y INT’L L. PROC. 290, 298 (2004).

³⁸⁶ *Id.*

³⁸⁷ *Id.* The ten factors are:

change should not be entered into lightly and should be done with great care. It must be a last resort.

Interestingly, a number of regime changes—even those not approved by the Security Council—are met with approval by the international community or, at the very least, not disapproval. Professor Reisman points out that there were four regime changes in 1979 alone³⁸⁸ and just one—the Soviet invasion of Afghanistan—was met with disapproval from the international community.³⁸⁹ The other three regime changes shared something in common: the replaced regimes had caused extreme human suffering.³⁹⁰

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- (1) There should be as much support from international organizations as possible.
 - (2) If a regime change is not formally authorized by the UN, there should be significant foreign support (especially in the states contributing forces) for the regime change.
 - (3) There should be significant domestic and internal support for the regime change in both the would-be changer and the targeted state.
 - (4) The elite that is the target of regime change should not have an effective internal base of support.
 - (5) There should be an acceptable and readily available alternative government that promises to be effective so that, ideally, all that is involved is regime change, not regime reconstruction or nation-building.
 - (6) The occupation by an outside force should be short.
 - (7) The costs to the outside force should be minimal.
 - (8) The force accomplishing the regime change should not be believed, by those within the country or outside of it, to have a parochial interest in securing the regime change.
 - (9) Where nation building is an inevitable part of the regime change, the United Nations should be responsible or prominently involved, and the UN commitment should be secured before the regime change.
 - (10) Do not forget Murphy's Law. As in all elective uses of force, the Powell Doctrine (overwhelming force) should apply.

Id.

³⁸⁸ *Id.* at 292 (“Tanzania invaded Uganda and replaced the Idi Amin dictatorship with a government led by a former elected president. France invaded what was then known as the Central African Empire, imprisoned the self-styled emperor, Jean Bedel Bokassa, and put in power a former president, David Dacko, who had conveniently been residing in Paris. Vietnam invaded Cambodia, expelled the Khmer Rouge government from Phnom Penh, and put Hun Sen in power. The Soviet Union invaded Afghanistan, made Babrak Karmal president and later replaced him with another puppet.”).

³⁸⁹ *Id.*

³⁹⁰ Jean Bedel Bokassa, former President of the Central African Republic, personally participated with his imperial guard in the massacre of 100 schoolchildren and other crimes for which he was tried (he was acquitted of cannibalism). *Jean-Bédel Bokassa (president of the Central African Republic)*, *ENCYCLOPAEDIA BRITANNICA*, JEAN-BEDEL

More recently, the international community has taken part in regime changes in Afghanistan, Iraq, Egypt, and Libya, with mixed results. The regime change in Iraq is the one most will remember and it may be viewed in a negative light. But each of the states mentioned are arguably better off than they were under the previous regime.³⁹¹

Genocidal states are in a different category when it comes to post-intervention requirements.³⁹² This is because, through its actions, a genocidal state “has lost the moral personality that normal states have; it has lost its claim to be recognized and respected as a state.”³⁹³ This article proposes more robust *jus post bellum* obligations in UAHJ because of the special circumstance in which the UAHJ is undertaken: after the Security Council’s failure to act in the face of extreme human suffering or imminent extreme human suffering.

3. Four Principles for Jus Post Bellum Obligations

This article proposes four general principles of *jus post bellum* obligations: restraint, restoration of national sovereignty, perfect is the enemy of good enough, and multilateralism. The two overarching principles for post-intervention obligations should be “restraint” by respecting the sovereignty of the targeted state and “restoration of national sovereignty.”³⁹⁴ Sovereignty, in this view, is derived “from the consent of [a state’s] individual citizens.”³⁹⁵ Therefore, the intervening state must respect the rights of the individual citizens post-intervention to maintain legitimacy. The intervention may well be found to be

BOKASSA,

<http://www.britannica.com/EBchecked/topic/71915/Jean-Bedel-Bokassa> (last visited Mar. 17, 2014).

³⁹¹ It is beyond the scope of this article to discuss the leaders of these countries and the crimes each committed against its own citizens. However, the list of the leaders of these

states reads like a “rogues gallery” of the most notorious human-rights abusers in recent times. Afghanistan had the Taliban before the intervention and it was the most repressive regime in the world in addition to it giving safe haven to terrorists; Iraq had Saddam Hussein, who used chemical weapons against his own people; Egypt had Hosni Mubarak, who has been on trial for murdering protestors and embezzling government funds; and Libya had Muammar Gaddafi, who was a sponsor of terror, and the UN Security Council referred his crackdown on protestors to a war-crimes tribunal. These states all face uncertain futures, but their pasts were difficult indeed.

³⁹² Bass, *supra* note 207, at 396. Cf. WALZER, *supra* note 148, at 113 (citing Nazi Germany as the only state considered a “genocidal regime”).

³⁹³ WALZER, *supra* note 148, at 106.

³⁹⁴ Bass, *supra* note 207, at 395.

³⁹⁵ *Id.* at 387.

illegitimate and illegal without compliance to the principles of restraint and restoration of sovereignty post-intervention. The principle of restraint also corresponds with the view that “just wars are limited wars” and “conservative in character.”³⁹⁶ The paradigmatic just war is the one fought in self-defense, which typically would not require disablement of the regime of the attacking country.³⁹⁷ Wars against genocidal regimes would not fit the paradigm but still would require that the intervening state’s post-intervention actions be restrained to be successful.

The third principle in post-intervention obligations is that “perfect is the enemy of good enough.”³⁹⁸ In other words, *jus post bellum* does not require that the newly established government and state be a model, liberal, Jeffersonian democracy but that the state should not be left in chaos.³⁹⁹ Additionally, the state need not be at perfect peace, but the state should be stable enough to ensure that the underlying causes of the genocide (or any other reason for the intervention) do not recur. Also, there should be a focus on returning the state to the people so that they can exercise their right of self-determination.⁴⁰⁰ Professor Bass explains this idea by way of the Serbian example after the Kosovo intervention, where, “[t]he job of remaking the genocidal Serbian state has therefore been left in the hands of the people of Serbia.”⁴⁰¹ The Serbs revolted against Slobodan Milosevic and toppled his regime in October 2000.⁴⁰² Mr. Milosevic was then tried for war crimes in The Hague.⁴⁰³

³⁹⁶ WALZER, *supra* note 148, at 121–22.

³⁹⁷ But see the examples of Afghanistan after the 9/11 attacks and Germany in World War II. In Afghanistan, regime change was required because the state was supporting the terrorist acts. In Germany, the Nazi regime had to be changed because it was a genocidal state.

³⁹⁸ This phrase is attributed most often to Voltaire, who wrote in his poem *La Begueule*,

*Dans ses écrits, un sage Italien
Dit que le mieux est l'ennemi du bien.*

In his writings, a wise Italian
Says that the best is the enemy of the good.

THE OXFORD DICTIONARY OF QUOTATIONS 797 (Elizabeth Knowles ed., 5th ed. 1999).

³⁹⁹ Bass, *supra* note 207, at 402.

⁴⁰⁰ *Id.* at 395.

⁴⁰¹ *Id.* at 402.

⁴⁰² Marlise Simons & Alison Smale, *Obituary: Slobodan Milosevic, 64, Former Yugoslav Leader Accused of War Crimes Dies*, N.Y. TIMES, Mar. 12, 2006, http://www.nytimes.com/2006/03/12/international/europe/12milosevic.html?pagewanted=all&_r=0.

⁴⁰³ *Id.*

The final principle is that the post-intervention period should be as multilateral as possible. That is, “reconstruction should include the participation of a broad array of governments.”⁴⁰⁴ A coalition of states would help to defray the reconstruction costs, but would also show the people of the targeted state that the intervention was with right intention. The intervening state must respect the rights of the citizens of the targeted state throughout the process to maintain legitimacy, argues Professor Stromseth, and the best way to do that is through a coalition of states post-intervention. “[T]he ability of intervening states to act in a manner consistent with fundamental principles of international law—including human rights and international humanitarian law—will influence not only international support for but also local acceptance of the intervention’s legitimacy.”⁴⁰⁵

Post-war situations are difficult in the best of circumstances, and interventions against genocidal states are the worst of circumstances. It will be difficult to carry out *jus post bellum* obligations while, at the same time, maintain legitimacy throughout the process. However, meeting the *jus post bellum* principles laid out above—restoration of national sovereignty, restraint, perfection being the enemy of good enough, and multilateralism—is critical to the completion of a legal and legitimate intervention.

4. Judging UAHJ Pre- and Post-Intervention

The *jus post bellum* element of the test should be evaluated twice: before the intervention (*jus ad bellum*) based on what the intervening state presents to the international community as its post-intervention intentions, and post-intervention to determine what the intervening state has actually done to establish a more stable governing structure free from the former genocidal regime. The pre-intervention evaluation allows the international community to assess the true intentions of the intervening state as it lays out what its post-intervention plans are; and second, it provides the international community with a roadmap of goals it can use to evaluate post-intervention. The evidence presented would serve to confirm the justness of the intervention ahead of and after action. This shift—or return—to the just-war paradigm carries with it responsibilities and legal obligations for the intervening state to end an armed

⁴⁰⁴ Bass, *supra* note 207, at 403.

⁴⁰⁵ STROMSETH ET AL., *supra* note 270, at 20.

humanitarian intervention justly. These requirements may be staggering to some and may discourage states from intervening. But they are critical to conducting a just war and achieving a just peace.

E. Addressing Objections to Elements 2, 3, and 4: UAHl as a Solution to the Pretext Problem

The following discussion demonstrates that the elements of the proposed test ensure that any UAHl carried out under its framework are primarily humanitarian and are not based on pretext. The international community currently holds that multilateral action is the best solution to the pretext problem.⁴⁰⁶ However, multilateral action is not the only solution. The elements of the proposed test offer a framework for solving the pretext problem by providing more certainty as to when a state may intervene and ensuring the reasons for intervening are predominately humanitarian. The proposed test does this by ensuring that the intervening state has right intentions through requiring substantial and compelling evidence of extreme human suffering or imminent extreme human suffering (Element 2), a defined mission (Element 3), and implementation of *jus post bellum* obligations (Element 4).

A properly crafted unilateral justification for armed humanitarian intervention could “discourage wars with ulterior motives [pretext].”⁴⁰⁷ In other words, by meeting just-war principles as justification for a UAHl, a state’s unilateral intervention would pose less risk of pretext rather than more. Professor Ryan Goodman of Harvard Law School argues in *Humanitarian Intervention and Pretexts for War* that the pretext problem is based on questionable assumptions about the ways states behave.⁴⁰⁸ These assumptions are that “international law affects how states—particularly duplicitous, aggressive states—orient themselves to the international order.”⁴⁰⁹ The international community generally believes that legalizing UAHl would affect how and when states use force because states would use whatever justification is most politically palatable at home and abroad to allow them to continue their

⁴⁰⁶ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 6.28; *see also High-level Panel Report*, *supra* note 8, ¶ 3; World Summit Outcome Document, *supra* note 78, ¶¶ 138–39.

⁴⁰⁷ Goodman, *supra* note 23, at 107.

⁴⁰⁸ *Id.* at 111.

⁴⁰⁹ *Id.*

intervention.⁴¹⁰ Hitler's invasion of Czechoslovakia, mentioned earlier, is an example of this way of thinking. Goodman argues this is in error. He believes that the "justifications that leaders contrive in order to build political support for war can meaningfully constrain subsequent governmental action."⁴¹¹ That is, a domestic political audience may support an intervention for humanitarian purposes if that is what has been sold to them but would not allow one for other purposes. But Goodman does not stop there:

An appeal to humanitarian interest as the justification for war can produce two types of pacifying effects. First, it can frame (or reframe) an interstate dispute in a manner that is ultimately less escalatory. That is, non-humanitarian frameworks are, in general and on average, less controllable and more incendiary than humanitarian ones. . . . Second, the addition of humanitarian issues to an existing framework can facilitate negotiations to avoid war—in particular, by providing opportunities for issue linkage and face-saving settlements.⁴¹²

Thus, the UAHF framework of the proposed test (especially Element 2) can solve the problem of pretext because it provides more certainty for when a state may act unilaterally for humanitarian purposes and do so legally and legitimately.

The test requires specific findings with regard to extreme human suffering or imminent extreme human suffering in the targeted state and the evidence must be substantial and compelling to rebut the presumptions of sovereignty and non-intervention. Additionally, the test requires a defined mission and demands that the intervening state meet *jus post bellum* obligations. By imposing a high bar, these elements ensure—as much as possible—that the intervening state is not acting on pretext. Similarly, the test helps to ensure the primary motivation for intervention is humanitarian. The ICISS recognizes that states may have

⁴¹⁰ *Id.* at 113 (“[T]he argument proceeds from the premise that legalizing [unilateral humanitarian intervention] will affect, if only on the margins, the use of force by such states.”).

⁴¹¹ *Id.* at 116.

⁴¹² *Id.*

mixed motives for intervening—even under R2P’s multilateral action paradigm—but that the motives should not be disqualifying:

Complete disinterestedness—the absence of any narrow self-interest at all—may be an ideal, but it is not likely always to be a reality: mixed motives, in international relations as everywhere else, are a fact of life. Moreover, the budgetary cost and risk to personnel involved in any military action may in fact make it politically imperative for the intervening state to be able to claim some degree of self-interest in the intervention, however altruistic its primary motive might actually be.⁴¹³

Knowing that states act in their own self-interest and their motives are not purely humanitarian in most interventions—even multilateral ones—the proposed test follows the R2P example by taking a pragmatic stance. It rejects the idea that an intervening state’s motives must be entirely humanitarian,⁴¹⁴ and the test elements are in place to verify that the intervening state’s interests are primarily humanitarian. The proposed test offers significant safeguards against pretext and ensures, to the greatest extent possible, that the intervening state’s reasons for acting are primarily humanitarian and not based on pretext.

F. Summary of the Proposed Test

The following diagram summarizes the proposed test by setting out the elements; the diagram also indicates which just war principles are implicated by each element and whether the element addresses sovereignty, non-intervention, or pretext.⁴¹⁵ This chart serves as a graphic representation of the argument for UAHl—that the proposed test meets all just-war principles and addresses sovereignty, non-intervention,

⁴¹³ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 4.35.

⁴¹⁴ Burmester, *supra* note 110, at 269 (discussing that Conditionalists feel the predominant motivation for intervening must be humanitarian and not to achieve political, economic, or social gain.) Realists believe essentially the same except that the intervening state need only demonstrate its altruistic motive by deed and not by word. *Id.*

⁴¹⁵ The chart does not address *jus in bello* (justness in war) principles, but those are operative as well during any action. Because this is a test to judge the UAHl before and after action, *jus in bello* principles are not implicated here.

and pretext. An intervention that meets the elements of the proposed test should be determined to be legal and legitimate.

	Element of the Proposed Test	Just-War Principles Implicated	Does the element address sovereignty, non-intervention, or pretext?
I.	The Security Council fails to act under Chapter VII of the UN Charter.	<u>Proper Authority</u> – a decision to wage war can be reached only by a legitimate authority. ⁴¹⁶ <u>Last Resort</u> – must have exhausted all plausible, peaceful alternatives to resolving the conflict in question. ⁴¹⁷	Yes, sovereignty and non-intervention
II.	The intervening state must show substantial and compelling evidence of extreme human suffering—or imminent extreme human suffering—to rebut the presumptions of sovereignty and non-intervention.	<u>Just Cause</u> – a decision to resort to war must be based upon either a need to right an actual wrong or be in self-defense or be to recover wrongfully seized property. ⁴¹⁸ <u>Right Intention</u> – the state must intend to fight the war only for the	Yes, sovereignty, non-intervention, and pretext

⁴¹⁶ DESKBOOK, *supra* note 30, at 12; *see also* DiMeglio, *supra* note 209, at 128.

⁴¹⁷ *See* DiMeglio, *supra* note 209, at 128.

⁴¹⁸ *Id.*

		sake of the Just Cause. It cannot employ the cloak of a Just Cause to advance other intentions. ⁴¹⁹	
III.	The intervening state must have a defined mission.	<u>Right Intention</u> ⁴²⁰ <u>Probability of Success</u> – reasonable expectation of victory. ⁴²¹	Yes, pretext
IV.	The intervening state must intend to carry out—and actually carry out— <i>jus post bellum</i> obligations.	<u>Macro-Proportionality</u> – prior to initiating war, weigh the expected universal good to accrue against the expected universal evils to result. Only if the benefits seem reasonably proportional to the costs may the war action proceed. ⁴²² <u>Right Intention</u> ⁴²³ <u>Jus Post Bellum</u> ⁴²⁴	Yes, pretext

⁴¹⁹ *Id.*⁴²⁰ *Id.*⁴²¹ *Id.*⁴²² *Id.*⁴²³ *Id.*

IX. Limitations of and Possible Objections to the Proposed Test

This test has been carefully crafted to meet all just-war requirements, including “proper authority” and *jus post bellum* obligations. It is designed to overcome the presumptions of sovereignty and non-intervention with a high evidentiary standard (substantial and compelling evidence) that is challenging yet realistic to achieve. This is not a perfect test. It will be difficult for any state wishing to intervene to meet the standards. Only a few states would be able to carry out such an intervention unilaterally. This is by design; it should not be easy to intervene in the affairs of another state. There should be a “substantial presumption against intervening that must be surmounted by the compelling nature of the particular circumstances.”⁴²⁵ It should, however, be possible to intervene in the face of extreme human suffering or imminent extreme human suffering when the Security Council fails to act.

The proposed test will face objections and does, admittedly, have limitations. Many, including the ICISS in the R2P report, argue that the UN should continue to play a vital role in these matters—despite a history of failing to approve interventions in a timely manner and of disagreements over the scope of interventions when they have been approved.⁴²⁶ The test does not preclude UN involvement; rather, it encourages it. It serves as an additional and complementary test to R2P, not as a replacement. The formulation of the proposed test allows the Security Council the discretion to approve or not approve an intervention. If the Security Council definitively approves an armed intervention, the test will not apply. The test is designed for situations where the Security Council fails to act or fails to act definitively. In that way, the UN will continue to play a vital role in armed humanitarian interventions, just not unilateral ones. The test also intends for members of the UN, and other agencies of the UN, to play a vital role in the post-intervention phase. One of the goals is to ensure that even if the intervention itself had to be taken on unilaterally, the work of building governing structures and a society free of the underlying causes that led to the extreme human suffering will be multilateral.

⁴²⁴ See generally Bass, *supra* note 207. The first three elements address *jus ad bellum* requirements, while this last element implicates both *jus ad bellum* (macro-proportionality) and *jus post bellum* obligations.

⁴²⁵ Kanter, *supra* note 99, at 15.

⁴²⁶ RESPONSIBILITY TO PROTECT, *supra* note 9, ¶ 6.28; see also *High-Level Panel Report*, *supra* note 8, ¶ 202; Putin, *supra* note 132.

Another objection to UAHl, and by relation the proposed test, is that an armed intervention may authorize another state to respond to the armed attack under the theory of self-defense.⁴²⁷ For example, in Syria, had the United States elected to act militarily without Security Council approval, an ally of Syria may have been justified in responding to that attack militarily.⁴²⁸ This objection highlights the need for a test to authorize legal and legitimate UAHIs. An intervention that is not legal and legitimate would be an armed attack under Article 51 and could justify a response by the attacked state or its allies.⁴²⁹ On the other hand, an intervention that is legal and legitimate would not be an armed attack, in the same way that an intervention approved by the Security Council would not be an armed attack.

Russian President Vladimir Putin makes a related argument as an objection to UAHl. In an op-ed in the *New York Times* during the debate over Syria, he argued that if the world cannot depend on consistent application of international law on use of force, the rest of the world could react by acquiring weapons of mass destruction.⁴³⁰ President Putin is suggesting that if UAHl is allowed indiscriminately, the world will react with a new arms race to protect itself from states bent on intervening to advance their own interests—whether those interests are humanitarian or not. The proposed test addresses President Putin's objection by both allowing for UAHl and providing consistency if the Security Council fails to act. The test contains stringent requirements that must be met before the UAHl is considered legal and legitimate.

The test is also limited in ways stemming from the domestic political situation of the intervening states or the international political interests of those states. With regard to domestic politics, states are generally unwilling to place the lives of their people in danger to save strangers. States do not want to use ground troops in armed humanitarian interventions and would prefer that other forms of military force be used (if at all), such as no-fly zones and aerial bombardment. In considering

⁴²⁷ E-mail from Major Bill Johnson, to Major Jeremy Haugh (Sept 1., 2013) (on file with author) (arguing Syria would have the right to self-defense under Article 51 of the UN Charter if it was attacked).

⁴²⁸ *Id.* The most prominent ally of Syria is Russia, which had rendered the Security Council ineffective by threatening to veto a resolution for action in Syria. *Id.* See also Major Donald L. Potts, *U.S. Ad Bellum: Law and Legitimacy in United States Use of Force Decisions*, 219 MIL. L. REV. 196 (Spring 2014).

⁴²⁹ U.N. Charter art. 51.

⁴³⁰ Putin, *supra* note 132.

an intervention, a state weighs whether it is willing to risk the lives of its troops to save the lives of people in another country. Recent interventions, including those in Bosnia and Libya, have been conducted almost exclusively from the air, with very few “boots on the ground” from the intervening state or states. The debate in the United States leading up to a possible intervention in Syria was focused solely on an air campaign, starting with a “no-fly zone.” U.S. Secretary of State John Kerry confirmed in testimony before the U.S. Congress that ground troops would not be used.⁴³¹ States are not eager to send ground troops for humanitarian interventions, even though that may be exactly what is required to address the underlying causes of the human suffering and meet *jus post bellum* obligations. Ground troops would be the best (and maybe only) way to maintain security so that provisions could be delivered to those in crisis or so that governmental institutions could be rebuilt and maintained with legitimacy.

This is not a small issue. From a military standpoint, ground troops are critical to carrying out any mission that includes providing humanitarian assistance, protecting the civilian population, or ensuring security so that a new governing structure can be established free from the old genocidal regime. Ground troops are also necessary to provide legitimacy for the action. Air power is limited because it can increase the risk of civilian casualties.⁴³² This increased risk of civilian casualties has a chilling effect on the international community’s view of the intervention’s legitimacy.⁴³³ A state must be willing to send troops, and possibly risk the lives of those troops, if the UAH is to be successful. But once lives of the intervening state’s troops are at risk, the people of that state will be more likely to demand to know what the state’s vital interests are in intervening in the targeted state.⁴³⁴ This is a delicate

⁴³¹ N.Y. TIMES VIDEO, <http://www.nytimes.com/video/us/100000002419637/no-ground-troops-in-syria-kerry-insists.html> (last visited Mar. 17, 2014) (showing American Secretary of State John F. Kerry emphasizing that no American ground troops would go to Syria).

⁴³² KOSOVO REPORT, *supra* note 21, at 5.

⁴³³ *Cf. id.* at 297.

⁴³⁴ See POWELL, *supra* note 231, at 605 (“We [the United States] proudly and readily allow our young sons and daughters in uniform to participate in humanitarian enterprises far from home . . . but when the fighting starts, as it did in Somalia, and American lives are at risk, our people rightly demand to know what vital interests that sacrifice serves.”). *Cf. Amar Khoday, Prime-Time Saviors: The West Wing and the Cultivation of a Unilateral American Responsibility to Protect*, 19 S. CAL. INTERDISC. L.J. 1, 33 (2009) (describing The NBC Show “The West Wing” in which a fictional President Josiah “Jed” Bartlet wrestles with the issue of sending American troops to unilaterally intervene in

balance for politicians and a serious limitation for any proposed test for legalizing and legitimizing UAHIs.⁴³⁵

X. Conclusion

The ICISS's R2P report sets out the international community's current position that armed humanitarian intervention must be approved by the Security Council to be legal. It did not answer the question of what happens when the Security Council fails to act. As a result, the international community needs a well-thought out test to allow for UAHIs in time to stop extreme human suffering or in time to ensure that it never occurs. Despite limitations, the test proposed in this article represents the best formulation for determining when a state may undertake UAHIs because it meets all just-war principles and addresses sovereignty, non-intervention, and the pretext problem. It formulates a way for an individual state to become a proper authority and requires an intervening state to meet *jus post bellum* obligations. Other tests have failed to address each of these elements and have therefore failed to gain acceptance as legal bases for the use of force.

This article has shown why the test is necessary, how the test was developed through its three foundations, and the specifics of the test. More importantly, it has shown why the international community must accept the concept of legal and legitimate UAHIs in situations where this test is met. International law must expand to allow interventions to protect the citizens of a state that is not meeting its responsibilities and when the Security Council fails to take action under Chapter VII of the Charter. If not, international law will become powerless and thus irrelevant in the face of extreme human suffering when states choose not

another state.) In "Inaugural, Part I" in season 4, the Bartlet administration is faced with a genocide in Equatorial Kunda, a fictional country in Africa. *Id.* While contemplating whether to send U.S. forces in a UAHIs, President Bartlet asks one of his staff members why a Kundaese life is worth less to him than an American life. The staff member responds, "I don't know, but it does." *Id.* This exchange identifies why it is so difficult for states to risk the lives of their troops to save the lives of others. Without some direct benefit to the United States, either financially or politically, it is difficult to gain and maintain popular support for a UAHIs.

⁴³⁵ Cf. Ignatieff, *supra* note 142 (writing in context of Iraq, Liberia, and Afghanistan, but citing the history of American interventions throughout the world, Mr. Ignatieff argued, "If we take stock and ask what will curb the American appetite for intervention, the answer is, not much. Interventions are popular, and they remain popular even if American soldiers die").

to act multilaterally. Humanitarian interventions have made things better in places like Somalia, Rwanda, Haiti, and Kosovo.⁴³⁶ There are risks with having a test for legalizing and legitimizing UAH, but the benefit is that a state may be able to legally and legitimately act to end extreme human suffering or even act before extreme human suffering occurs when the Security Council fails to do so.

This article began with a short explanation of the extreme human suffering in Rwanda during the genocide of 1994. It now ends with a reference to the same event. Former Secretary-General Kofi Annan, speaking in the context of NATO's unauthorized intervention in Kosovo, starkly presented the challenge to the international community in weighing the benefits and drawbacks of UAH:

To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate, one might ask—not in the context of Kosovo—but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt [Security] Council authorization, should such a coalition have stood aside and allowed the horror to unfold?⁴³⁷

It seems unthinkable that a coalition would stand aside again if the Security Council failed to act in a similar situation. It seems unthinkable that even an individual state would stand aside in the face of such extreme human suffering. Under the proposed test, an individual state would not need to stand aside. It could, instead, legally and legitimately stand up for the suffering people.

⁴³⁶ Fernando Tesón, *The Liberal Case for Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 113 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

⁴³⁷ Press Release, Secretary-General, Secretary-General Presents His Annual Report to General Assembly, U.N. Press Release SG/SM/7136 GA/9596 (Sept. 20, 1999).

SEXUAL ASSAULT PREVENTION: REFRAMING THE COAST GUARD PERSPECTIVE TO ADDRESS THE LOWEST LEVEL OF THE SEXUAL VIOLENCE CONTINUUM—SEXUAL HARASSMENT

LIEUTENANT COMMANDER BRYAN R. BLACKMORE*

We get it. We know that the larger issue is a cultural problem, which has allowed demeaning behavior and attitudes towards women to exist within the Navy Department. Our senior leadership is totally committed to confronting this problem and demonstrating that sexual harassment will not be tolerated. Those who don't get the message will be driven from our ranks.

—Acting Navy Secretary Sean O'Keefe¹

In my view, all this stuff is connected. If we're going to get serious about things like sexual assault, we have to get serious about an environment that could lead to sexual harassment. In some ways, this stuff can all be linked.

—Gen. Mark A. Welsh III, Air Force Chief of Staff²

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¹ Melissa Healy, *Pentagon Blasts Tailhook Probe, Two Admirals Resign*, L.A. TIMES, Sept. 25, 1992, http://articles.latimes.com/1992-09-25/news/mn-1182_1_investigative-service/2.

I. Introduction

He was the “cool” Chief. He was the most approachable senior enlisted on the cutter. He let the junior enlisted come into the ship’s office where he would listen to them vent about life on a cutter. He offered them career advice. He played cards with them on the messdeck. He earned the complete trust of the crew. He also earned the trust of the command; he was the Executive Officer’s trusted assistant, ably handling all administrative matters on the cutter and earning a selection on the Chief Warrant Officer list.³

Chief became especially close to two junior enlisted females. The first female (Female 1), a junior petty officer, would come to his office regularly and discuss life with Chief. She told him all about her boyfriend, who was on another cutter. He provided her updates on his A-school status.⁴ Chief would also refer to her as his “boo” and call her “babe.” The other female (Female 2), a seaman,⁵ would also come to his office and hang out. Chief identified with her because they were both from the same hometown. They often talked about home; she sought career advice from him; and he updated her on her A-school status. He did not call her “boo,” but he did call her by her nickname, a shortened version of her last name.

During one patrol, Chief saw Female 1 in a bikini during a port call. He made a point of telling her that she looked really good in her bikini and that he really liked the pink bottom. She thought nothing of the comment at the time. During another port call a month later, and after most of the crew had consumed alcohol, Chief called her to his office. She thought Chief was going to update her on her boyfriend’s A-school status. Instead, Chief locked the door, sat on her lap and tried to kiss her.

² Becky Iannotta, *Air Force-wide Inspections Begin Today*, A.F. TIMES, Dec. 5, 2012, <http://www.airforcetimes.com/article/20121205/NEWS/212050303/Air-Force-wide-inspections-begin-today>.

³ *United States v. Hughey*, 72 M.J. 809 (C.G. Ct. Crim. App. 2011). The author was detailed as Trial Counsel in the general court-martial of Yeoman Chief Petty Officer (YNC) Hughey, and the case’s facts are based upon the author’s knowledge of the case.

⁴ A-school refers to the school that prepares Coast Guard members in the pay grade of E-3 to function as Third Class Petty Officers in their chosen rating. *See* U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1500.10C, PERFORMANCE, TRAINING AND EDUCATION MANUAL art. 7.F.1 (May 2009).

⁵ A Seaman in the Coast Guard has a pay grade of E-3. *See* U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1000.2, ENLISTED ACCESSIONS, EVALUATIONS, AND ADVANCEMENTS art. 2.B (Sept. 2011).

She resisted and reminded him that she had a boyfriend. She was able to get up, but Chief then pinned her up against the printer and rubbed himself against her. She continued to resist, and Chief finally relented. Before she was able to leave, he insisted that she tell him that they were still friends. She left the ship's office that night and did not report the incident.

At the next port call, Chief got really intoxicated. Most of the crew congregated at one bar shore-side. Chief made his way to a table of junior enlisted females. He sat down, leaned over, and rubbed the leg of a female Seaman sitting next to him. She slapped his hand away; Chief called her a "bitch."

Chief ended up at another table sitting next to another female junior petty officer. He rubbed her leg and told her she was beautiful; she rebuffed him and Chief left the table. Chief walked away and proceeded to hit on another junior enlisted female, telling her she looked "fine tonight" and that she was a "sexy Russian." She told him he was being inappropriate.

Chief was later seen grinding on other females on the dance floor. While dancing with one female petty officer, Chief told her to "get on my dick" and also said to her "damn, look at that ass." Another female petty officer reported Chief grabbed her butt on the dance floor. On the way back to the cutter that night with other crewmembers, he asked one female petty officer where her rack was located. She also told him that was inappropriate. Chief replied he was untouchable, he handled the "captains masts," and he would not get in trouble.

Later that night, Chief went to the rack of Female 2 and sexually assaulted her. The next day she was in shock and did not report the sexual assault to the command. Chief came to her rack the next night and sexually assaulted her again, accusing her of leading him on and kissing on him on the dance floor the night before. She woke up the next morning and reported both sexual assaults to a shipmate. She eventually spoke with Female 1 and learned that Chief sexually assaulted her during a previous port call.

Chief was tried by a general court-martial and convicted by a panel of members of one specification of Aggravated Sexual Contact and three specifications of Wrongful Sexual Contact, in violation of Article 120 of

the Uniform Code of Military Justice (UCMJ).⁶ He was also convicted of multiple specifications of Assault Consummated by Battery, in violation of Article 128 UCMJ;⁷ one specification of Housebreaking, in violation of Article 130; and two specifications of Unlawful Entry, one specification of Statements to the Prejudice of Good Order and Discipline in the Armed Forces, and one specification of Drunk and Disorderly Conduct, all in violation of Article 134.⁸ Chief was also charged with three specifications of Maltreatment, Article 93, based on his “get on my dick,” “damn, look at that ass,” and “sexy Russian” comments, as well as the comments about Female 1’s bikini. The panel found him not guilty of these specifications.

The armed forces receive harsh criticism daily from every direction because of the number of sexual assaults occurring within its ranks.⁹ Congress made significant changes to the UCMJ in the National Defense Authorization Act (NDAA) for Fiscal Year 2014,¹⁰ to include revising the Article 32 process,¹¹ limiting a convening authority’s ability to modify the findings and sentence of a court-martial,¹² allowing a victim to submit matters to a convening authority before the convening authority takes action on a court-martial,¹³ and mandating discharge or dismissal for members found guilty of sex-related offenses.¹⁴

The contemporary U.S. military culture has been cited as the source of the military sexual assault problem.¹⁵ In response, the Coast Guard, like the other services, has formulated a Sexual Assault Prevention and Response (SAPR) Strategic Plan to eradicate military sexual assaults.¹⁶

⁶ Hughey, 72 M.J. at 810.

⁷ *Id.* Specifically, Chief was convicted of three specifications of Assault Consummated by Battery and one specification of Simple Assault. *Id.*

⁸ *Id.* at 810–11.

⁹ See Lorelei Laird, *Military Lawyers Confront Changes as Sexual Assault Becomes Big News*, ABA J. MAG., Sept. 1, 2013, http://www.abajournal.com/magazine/article/military_lawyers_confront_changes_as_sexual_assault_becomes_big_news.

¹⁰ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 511 (2013).

¹¹ *Id.* § 1702.

¹² *Id.*

¹³ *Id.* § 1706.

¹⁴ *Id.* § 1705.

¹⁵ Captain Megan Schmid, Comment, *Combating a Different Enemy: Proposals to Change the Culture of Sexual Assault in the Military*, 55 VILL. L. REV. 475, 478 (2010).

¹⁶ See All Coast Guard Message, 197/13, 062012Z May 13, Commandant, U.S. Coast Guard, subject: The Coast Guard Sexual Assault Prevention and Response (SAPR) Strategic Plan.

All of the services have attempted to address sexual assault through training and providing more robust services and protections to victims, with the hope of changing each service's culture. But with the exception of the Army, the services fail to explicitly address sexual harassment as an enabler of sexual assault in their SAPR policies and training.¹⁷

Admiral Papp, Commandant of the Coast Guard, stated in his Commander's Intent that the Coast Guard shall "[c]reate a culture intolerant of sexual assault or behaviors that enable it."¹⁸ The general court-martial of Chief Hughey¹⁹ exemplifies how sexual harassment can lead to, or enable, sexual assault. Many aspects of Chief Hughey's behavior constituted sexual harassment, but he was left unchecked and his acts of sexual harassment became acts of sexual assault. Sexual harassment is normally viewed as a form of employment discrimination,²⁰ which the Coast Guard recognizes.²¹ But the Coast Guard fails to recognize that sexual harassment is a form of sexual violence that enables sexual assault.²² Sexual harassment is a part of the sexual-violence continuum, a continuum that ends with sexual assault.²³

This article advocates for the Coast Guard to reframe the perspective in which it views and addresses sexual harassment to comprehensively prevent sexual assault. A comprehensive campaign to combat military sexual assault must include reframing the perspective through which the

¹⁷ See U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2012 vol. 1, encl. 1, at 1 (May 3, 2013), available at http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf. The cornerstone of the Army's sexual assault prevention strategy is the "I. A.M. Strong" Sexual Assault Prevention Campaign. Noting that sexual harassment may set a foundation for sexual violence, the Army's prevention strategy combines the Sexual Assault Prevention and Response (SAPR) Program with the Prevention of Sexual Harassment (POSH) effort and response to military sexual harassment incidents. The result is an overarching program called Sexual Harassment/Assault Response and Prevention (SHARP). *Id.*

¹⁸ All Coast Guard Message, 244/13, 311402Z May 13, Commandant, United States Coast Guard, subject: Commander's Intent Campaign to Eliminate Sexual Assault from the Coast Guard.

¹⁹ See *United States v. Hughey*, 72 M.J. 809, 810 (C.G. Ct. Crim. App. 2013).

²⁰ See 42 U.S.C. § 2000e-2 (2013).

²¹ U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 5350.4C, COAST GUARD CIVIL RIGHTS MANUAL art. 2.C.2.a (May 2010) [hereinafter COMDTINST 5350.4C].

²² See, e.g., *id.* art. 3.B.2.b (stating that sexual harassment is not sexual assault).

²³ See *Continuum of Sexual Aggression*, NAT'L CTR. ON DOMESTIC AND SEXUAL VIOLENCE, <http://www.ncdsv.org/images/att9selectedappendixcontinuumsexualaggression.pdf> (Mar. 12, 2014).

Coast Guard views sexual harassment, dispensing with the notion that sexual harassment and sexual assault are separate and distinct concepts. Rather than continuing to address sexual harassment as primarily a discrimination issue and sexual assault as criminal conduct, the Coast Guard needs to recognize the connection between the two and must address sexual harassment and sexual assault as part of a continuum of sexual violence. This requires re-evaluating Coast Guard sexual-harassment and sexual-assault policies and training; recognizing that sexual harassment has been, and continues to be, a pervasive problem; understanding the relationship between sexual harassment, organizational climate, and sexual assault; and integrating sexual harassment and sexual assault prevention efforts to maximize unity of effort. Ultimately, efforts to prevent sexual assault must include directly addressing behaviors found at the lower end of the sexual-violence continuum, starting with the enabling offense of sexual harassment.

Part II of this article details the legal background and Coast Guard definition of sexual harassment. Part III details the history and extent of the sexual harassment problem in the military, focusing on reports by the Government Accountability Office (GAO) that assess the levels of, and issues associated with, sexual harassment at the service academies and within the Department of Defense (DoD). Part IV analyzes the relationship among sexual harassment, organizational climate, and sexual assault, to include summarizing the statistics, reframing the perspective to look at the full sexual-violence continuum, and identifying research that both highlights sexual harassment as a precursor to sexual assault and evaluates the effect of organizational climate on the prevalence of sexual harassment and sexual assault. Part V examines Coast Guard sexual harassment policies and training, identifies an artificial distinction between sexual harassment and sexual assault inherent in Coast Guard policies and training, and provides recommendations to update policies and training to reflect the reality of the relationship between sexual harassment and sexual assault. Part VI summarizes the Coast Guard's SAPR Strategic Plan and the establishment of the Coast Guard SAPR Military Campaign Office (SAPR MCO), details the Plan's absence of sexual harassment and its relationship to sexual assault, argues that culture change must include directly addressing sexual harassment in the service's strategic planning, and recommends studying the Army's Sexual Harassment/Assault Response and Prevention Program (SHARP)²⁴ as a model for strategic integration of the Coast Guard's

²⁴ See *supra* note 17.

sexual harassment and sexual assault prevention efforts. Finally, Part VII urges elimination of the sexual harassment discrimination/sexual assault misconduct dichotomy currently present in Coast Guard policies and adoption of the sexual-violence continuum as the conceptual model for addressing sexual harassment and sexual assault as the transformational change necessary to eliminate sexual assault. This section concludes by summarizing the short- and long-term recommendations to effectuate this transformational change.

II. Sexual Harassment Legal Background and Definition

A. Sexual Harassment Legal Background

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer . . . to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”²⁵ In 1986, the Supreme Court held that sexual harassment in the workplace constitutes actionable sex discrimination under Title VII.²⁶ Title VII does not explicitly extend these protections to the military,²⁷ but Coast Guard policy is “to apply the same protections to its military workforce.”²⁸ Despite the Coast Guard’s efforts to extend Title VII protections to its military members, the *Feres* doctrine bars military members from seeking legal remedies for Title VII violations.²⁹

²⁵ 42 U.S.C.A. § 2000e-2 (2013).

²⁶ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

²⁷ *See Hodge v. Dalton*, 107 F.3d 705 (9th Cir. 1997); *Randall v. United States*, 95 F.3d 339 (4th Cir. 1996); *Spain v. Ball*, 928 F.2d 61 (2d Cir. 1991); *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987); *Gonzalez v. Dep’t of the Army*, 718 F.2d 926 (9th Cir. 1983); *Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981); *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir. 1978).

²⁸ COMDTINST M5350.4C, *supra* note 21, art. 2.C.2.a.

²⁹ *See Feres v. United States*, 340 U.S. 135 (1950) (holding that the government is not liable under the Federal Tort Claims Act for injuries to military members arising out of or in the course of activity incident to service).

B. Sexual Harassment Definition

The Coast Guard Civil Rights Manual provides the service's definition of sexual harassment.³⁰ Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is made either implicitly or explicitly a term or condition of employment; or
2. Submission to or rejection of such conduct is used as a basis for employment decisions; or
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
4. This definition also encompasses unwelcome display or communication of sexually offensive materials.³¹

The Civil Rights Manual further delineates sexual harassment into two categories. The first category, tangible employment action, involves sexual harassment by a supervisor when it results in a personnel action.³² Tangible employment actions must be official actions, and include actions such as hiring, firing, promotion or failure to promote, demotion, undesirable assignment, or significant changes in benefits or pay.³³ The second category, hostile environment, encompasses all other situations that fall within the definition of sexual harassment.³⁴ The offender in hostile work environment claim may be a supervisor or coworker.³⁵ The harassment must be so severe and pervasive that a reasonable person would view the environment as hostile, offensive, or abusive.³⁶

³⁰ COMDINST M5390.4C, *supra* note 21, art. 2.C.2.b.

³¹ *Id.* The Department of Defense (DoD) uses the same definition of sexual harassment. U.S. DEP'T OF DEF., DIR. 1350.2, DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY (MEO) PROGRAM encl. 2, para. E.2.1.15 (21 Nov. 2003).

³² COMDINST M5350.4C, *supra* note 21, art. 2.C.2.c.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

In general, sexual harassment ranges from overt behaviors, to include inappropriate touching, to subtle behaviors, such as making suggestive remarks.³⁷ Furthermore, any behavior that relates to sex and is intentional or repeated, unwelcome, and interferes with a member's ability to work, or has an effect on a member's working conditions, may be sexual harassment.³⁸ Specific types of sexually harassing behavior include gender harassment, seductive behavior, sexual bribery, sexual coercion, and sexual imposition.³⁹

Gender harassment consists of sexist statements and behaviors that convey degrading attitudes based upon sex.⁴⁰ Seductive behavior is any unwanted, inappropriate, and offensive sexual advance.⁴¹ Examples include repeated and unwanted requests for dates, repeated and unwanted sexual invitations, and touching in a way that makes a person uncomfortable.⁴² Sexual bribery is the solicitation of sexual activity or other sex-related behavior in return for a reward.⁴³ Sexual coercion is also known as quid pro quo behavior; it is coercion of sexual activity by the threat of unfavorable action, such as a demotion, the failure to promote, or a negative performance appraisal.⁴⁴ Finally, sexual imposition involves uninvited physical violation or sexual assault.⁴⁵

III. The History and Extent of the Sexual Harassment Problem

A. The Problem Is Not New

Sexual harassment in the military is not a new problem. The mention of sexual harassment in the military conjures up images of the

³⁷ *Id.* art. 2.C.2.d.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

Navy Tailhook scandal in 1991⁴⁶ and the sexual harassment and rape of Army female trainees at Aberdeen Proving Ground in 1996.⁴⁷ More recently, a single report of sexual harassment exploded into a full-blown sexual harassment and sexual assault scandal in the Air Force's basic training operations at Lackland Air Force Base in 2011.⁴⁸

Multiple sexual harassment incidents at the Naval Academy in 1989 and 1990, including a female midshipman being handcuffed to a men's room urinal and then being photographed by her male attackers, prompted increased congressional interest in the extent of sexual harassment at the service academies.⁴⁹ This interest prompted what would become the first of multiple GAO⁵⁰ reviews of sexual harassment

⁴⁶ See Michael R. Gordon, *Pentagon Report Tells of Aviators' 'Debauchery'*, N.Y. TIMES, Apr. 24, 1993, <http://www.nytimes.com/1993/04/24/us/pentagon-report-tells-of-aviators-debauchery.html>. A DoD inspector general's report found that as many as 83 women were sexually assaulted or harassed and that 140 service members engaged in improper behavior during the convention. Richard Serrano, *33 Top Officers Disciplined in Tailhook Case*, L.A. TIMES, Oct. 16, 1993, http://articles.latimes.com/1993-10-16/news/mn-46397_1_other-top-officers. "The activities ranged from attacking women along a hallway 'gauntlet' at the Las Vegas Hilton, to other incidents of crude nudity and indecent exposure." *Id.* Three admirals were censured and 30 other top-ranking officers received reprimands for failing to stop or report sexual assaults or harassment that occurred while they were attending the Tailhook Association's 1991 convention in Las Vegas. *Id.*

⁴⁷ See Tim Weiner, *One Sergeant Pleads Guilty as Army Widens Sex Inquiry*, N.Y. TIMES, Nov. 13, 1996, <http://www.nytimes.com/1996/11/13/us/one-sergeant-pleads-guilty-as-army-widens-sex-inquiry.html>.

The Aberdeen scandal was a military sex scandal in 1996 at Aberdeen Proving Ground, a U.S. Army post in Maryland. The Army brought charges against twelve instructors Nearly fifty women made sexual-abuse charges, including twenty-six rape accusations. One instructor was cleared. The remaining eleven were either convicted at court-martial or punished administratively.

The List: Military Scandals, WASH. TIMES, Jan. 8, 2011, <http://www.washingtontimes.com/news/2011/jan/8/list-military-scandals>.

⁴⁸ See Craig Whitlock, *Air Force Investigates Growing Sex Abuse Scandal*, WASH. POST, June 28, 2012, http://articles.washingtonpost.com/2012-06-28/news/35461886_1_sexual-misconduct-sexual-assault-female-recruits. One single complaint made in 2011 led to an investigation resulting in a dozen male drill instructors suspected of abusing, harassing, having sex, with or sexual assaulting female recruits. *Id.*

⁴⁹ U.S. GEN. ACCOUNTING OFFICE, DOD SERVICE ACADEMIES: MORE ACTIONS NEEDED TO ELIMINATE SEXUAL HARASSMENT 2 (Jan. 1994) [hereinafter 1994 GAO REP.].

⁵⁰ The General Accounting Office changed its legal name to the Government Accountability Office in 1994. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811 (2004).

at the service academies. From 1994 to 2007, the GAO conducted three reviews of sexual harassment at the service academies.⁵¹ In 2011, GAO expanded its review to include the DoD's sexual harassment prevention efforts.⁵²

In 1994, the GAO conducted a survey at the service academies and found sexual harassment was both prevalent and underreported.⁵³ During academic year 1991, between 93 and 97 percent of academy women reported experiencing at least one form of sexual harassment, with approximately 50 to 75 percent experiencing at least one form of sexual harassment on a recurring basis. Despite these numbers, there were only twenty-six formal reports of sexual harassment.⁵⁴

A year later, the GAO updated its 1994 report on sexual harassment at the service academies.⁵⁵ Specifically the GAO conducted a follow-up survey at the academies during academic year 1993–94, adding a question on sexual harassment using the wording of the DoD definition of sexual harassment in 1988.⁵⁶ This new question focused on more overt, physical forms of sexual harassment in addition to the verbal forms.⁵⁷ The responses indicated between 36 percent and 42 percent of academy women at least once or twice over the year had experienced physical, gender-related behavior that interfered with their performance, created a hostile environment, or was unwelcome, deliberate physical contact of a sexual nature.⁵⁸ Approximately 11 percent to 22 percent of academy women indicated experiencing *quid pro quo* sexual harassment.⁵⁹

⁵¹ See 1994 GAO REP., *supra* note 49; U.S. GEN. ACCOUNTING OFFICE, DOD SERVICE ACADEMIES: UPDATE ON EXTENT OF SEXUAL HARASSMENT 3 (Mar. 1995) [hereinafter 1995 GAO REP.]; U.S. GEN. ACCOUNTING OFFICE, MILITARY PERSONNEL: THE DoD AND COAST GUARD ACADEMIES HAVE TAKEN STEPS TO ADDRESS INCIDENTS OF SEXUAL HARASSMENT AND ASSAULT, BUT GREATER FEDERAL OVERSIGHT IS NEEDED 2 (Jan. 2008) [hereinafter 2008 GAO REP.].

⁵² See U.S. GEN. ACCOUNTING OFFICE, PREVENTING SEXUAL HARASSMENT: DOD NEEDS GREATER LEADERSHIP COMMITMENT AND AN OVERSIGHT FRAMEWORK (Sept. 2011) [hereinafter 2011 GAO REP.].

⁵³ 1994 GAO REP., *supra* note 49, at 2.

⁵⁴ *Id.* at 20–26.

⁵⁵ 1995 GAO REP., *supra* note 51, at 3.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 28. Two to six percent of academy women indicated experiencing this behavior a couple times a month or more often. *Id.*

⁵⁹ *Id.* at 29. One to 4 percent of academy women indicated experiencing this *quid pro quo* harassment at least a couple times a month. *Id.*

In 2007, twelve years after its last report on sexual harassment at the service academies, the GAO conducted a third review of sexual harassment and assault programs at the academies.⁶⁰ In this review, the GAO evaluated the academies' programs to prevent, respond to, and resolve sexual harassment and assault cases; the academies' visibility of sexual harassment and assault incidents; and DoD and Coast Guard oversight of the academies' sexual harassment and assault programs.⁶¹ With respect to the academies' visibility of sexual harassment and assault incidents, the GAO's conclusions were not positive. The academies collected data on sexual harassment and assault but a comparison of the sexual harassment data provided by the DoD academies' Military Equal Opportunity (MEO) offices and student perceptions collected from a 2006 Defense Manpower Data Center (DMDC)⁶² survey indicated that sexual harassment may be underreported.⁶³ Specifically, the DoD academies' MEO offices reported eight alleged sexual harassment incidents in 2006.⁶⁴ But survey results of DoD academy students in March and April 2006 indicated that an estimated 51 to 60 percent of female respondents and an estimated 8 to 12 percent of male respondents experienced sexual harassment.⁶⁵

A 2006 Coast Guard Academy survey revealed similar disparities.⁶⁶ According to the 2006 Cadet Human Relations and Climate survey,⁶⁷ 63 of the 793 student respondents (43 female and 20 male) reported being

⁶⁰ 2008 GAO REP., *supra* note 51, at 2.

⁶¹ *Id.*

⁶² The Defense Manpower Data Center (DMDC) is a support organization within DoD that reports to the Under Secretary of Defense for Personnel and Readiness. The DMDC's mission is to deliver timely and high-quality support to its customers and to ensure that the data it receives from different sources are consistent, accurate, and appropriate when used to respond to inquiries. The DMDC serves DoD organizations, such as the armed forces, the Office of the Secretary of Defense, and the Joint Staff, as well as external organizations, to include Congress. DMDC data is relied upon by these organizations to assist in making decisions regarding the military. *Id.* at 3 n.5.

⁶³ *Id.* at 21.

⁶⁴ *Id.* at 22.

⁶⁵ *Id.* at 26. In this survey, the DMDC defined sexual harassment as crude or offensive behavior, unwanted sexual attention, and sexual coercion. These estimates are based on a 95 percent confidence level with a margin of error of plus or minus 2 percent. *Id.*

⁶⁶ *Id.* at 21.

⁶⁷ The U.S. Coast Guard 2006 Cadet Human Relations Survey was administered in October 2006 and included all students in class years 2006 through 2009. The entire cadet population was surveyed, with 793 of 996 (80 percent) cadets completing the survey. *Id.* at 45.

subjected to sexual harassment or sexual assault.⁶⁸ The Coast Guard Academy combined sexual harassment and sexual assault into one survey question, thus making it difficult to directly compare the survey responses to reported data.⁶⁹ Regardless, the numbers from the survey responses exceed the ten recorded sexual assault and zero recorded sexual harassment incidents at the Coast Guard Academy in the 2006 academic year.⁷⁰ The disparity in the numbers provided by the academies' offices that are designated to handle sexual harassment complaints and student perceptions of sexual harassment led to the GAO's conclusion that the academies may not have complete visibility on the extent of the sexual harassment problem due to underreporting.⁷¹

Finally, in 2011, Congress tasked the GAO with conducting another performance audit. This time, instead of reviewing sexual harassment at the service academies, Congress directed the GAO to assess the DoD's sexual harassment prevention efforts.⁷² To complete this assessment, GAO officials analyzed DoD service policies and available sexual-harassment complaint data.⁷³ The GAO officials also visited six DoD locations, where they conducted fifty-nine small-group discussions and administered a confidential survey to 583 service members.⁷⁴ In particular, the GAO noted that there was inconsistent support for sexual-harassment policies by military commanders and senior enlisted members.⁷⁵ Notably, DoD Directive 1350.2,⁷⁶ which outlines the department's sexual-harassment policy, states it is DoD policy to use the chain of command to promote, support, and enforce the department's sexual harassment policies.⁷⁷ But the GAO found that service members have mixed perceptions regarding leadership's support of sexual

⁶⁸ *Id.* at 28.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 21.

⁷² 2011 GAO REP., *supra* note 52, at 4.

⁷³ *Id.* at 2–4.

⁷⁴ *Id.* The locations visited include Camp Victory, Iraq; Fort Carson, Colorado; Lackland Air Force Base, Texas; Marine Corps Base Camp Lejeune, North Carolina; Naval Station Norfolk, Virginia; and the USS *Carl Vinson* (CVN 70), Naval Air Station North Island, California. Since these locations are not representative of all DoD locations, the confidential survey results are not generalizable and thus cannot be projected across DoD, any service, or any single location visited. *Id.* at 4.

⁷⁵ *Id.* at 6.

⁷⁶ U.S. DEP'T OF DEF., DIR. 1350.2, DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY (MEO) PROGRAM (18 Aug. 1995).

⁷⁷ 2011 GAO REP., *supra* note 52, at 8.

harassment policies and programs.⁷⁸ The GAO's review of the DoD's 2010 Workplace and Gender Relations Survey of Active Duty Members (2010 WGRA Survey),⁷⁹ responses from the GAO's confidential survey, and feedback from interviews during the GAO's site visits support this finding.

A cursory review of the 2010 WGRA Survey leads to the conclusion that service members generally perceived their leaders to be supportive of sexual harassment policies and programs, but the results also indicated a significant percentage of service members who did not necessarily concur with that perception.⁸⁰ Approximately 76 percent of service members believed that senior leadership made "honest and reasonable efforts to stop sexual harassment, regardless of what was said officially."⁸¹ The survey also found approximately 69 percent of women and 77 percent of men believed their immediate supervisor made "honest and reasonable efforts to stop sexual harassment, regardless of what is said officially."⁸² Those numbers seem to be positive, but the GAO noted that these results also showed that an estimated 31 percent of women and 23 percent of men did not believe or were unsure of whether their immediate supervisor made "honest and reasonable efforts to stop sexual harassment, regardless of what is said officially."⁸³ Further, GAO officials noted the survey also found an estimated 52 percent of women and 38 percent of men indicated that other service members would be able to get away with acts of sexual harassment, at least to some extent, in their work group even if it were reported.⁸⁴

Similarly, the GAO's confidential survey found that service members had mixed perceptions regarding whether their direct

⁷⁸ *Id.*

⁷⁹ See LINDSAY M. ROCK ET AL., 2010 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: OVERVIEW REPORT ON SEXUAL ASSAULT (Mar. 2011) [hereinafter 2010 WGRA], available at http://www.sapr.mil/public/docs/research/DMDC_2010_WGRA_Overview_Report_of_Sexual_Assault.pdf. This survey was the third survey of gender-related issues of active duty service members conducted by the Defense Manpower Data Center since 2002 as part of the quadrennial cycle of human relations surveys required by law. The purpose of this report is to enhance understanding of sexual assault in the military and the results of the Department's prevention efforts.

Id.

⁸⁰ 2011 GAO REP., *supra* note 52, at 8–9.

⁸¹ *Id.* at 8.

⁸² *Id.*

⁸³ *Id.* at 8–9.

⁸⁴ *Id.* at 9.

supervisor created a climate that discouraged sexual harassment.⁸⁵ Sixty-four of 264 female service members and 53 of 319 male service members interviewed by GAO officials responded that they did not think or were not sure whether their direct supervisor created a climate discouraging sexual harassment from occurring.⁸⁶

Feedback from the GAO's interviews during site visits also revealed service members had mixed perceptions of leadership's support of sexual harassment policies.⁸⁷ The GAO noted frequently hearing in interviews that there was "zero tolerance" for sexual harassment and that leaders issued statements against sexual harassment or regularly spoke to service members about sexual harassment, but GAO also heard plenty of examples of leadership not consistently displaying a strong stance against sexual harassment.⁸⁸ Examples included sexual-harassment incidents being "swept under the rug" and incidents of sexual harassment needing to occur multiple times or to multiple people before being addressed or taken seriously.⁸⁹ The GAO was also told during their site visits that some leaders do not back up their words with actions and that leaders who do not support or show their support for sexual harassment policies undermined implementation of the department's programs.⁹⁰ Finally, Equal Opportunity program officials at the site visits stated that leadership could negatively affect unit morale and cohesion by not taking sexual harassment seriously.⁹¹ A military chaplain and multiple service members echoed this sentiment, with one service member's comment specifically resonating: "Why would you stick your neck out for someone who doesn't respect you?"⁹²

B. Sexual Harassment Remains a Persistent Problem

Available statistics from more recent surveys conducted by the DMDC clearly indicate that sexual harassment remains a persistent problem in the active-duty components and at the service academies.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 9–10.

⁸⁹ *Id.* at 10.

⁹⁰ *Id.* at 11.

⁹¹ *Id.*

⁹² *Id.* at 11–12.

The DMDC conducts the WGRA,⁹³ which provides information on the prevalence of sexual assault, sexual harassment, and sexist behavior in the active component; personnel policies, practices, and training related to sexual assault; and an assessment of progress.⁹⁴ The DMDC also conducts the Service Academy Gender Relations Survey (SAGR), which assesses the incidence of sexual assault and harassment and gender-related issues at the three DoD academies and the Coast Guard Academy.⁹⁵ The 2012 surveys clearly indicate sexual harassment remains a persistent problem in the military. In fact, Major General Gary Patton, the former director of the DoD Sexual Assault Prevention and Response Office,⁹⁶ echoed this sentiment in December 2012 in response to the release of the Annual Report on Sexual Harassment and Violence at the Military Service Academies, Academic Program Year 2011–2012,⁹⁷ stating the “report shows that sexual assault and sexual harassment remain persistent problems at the academies.”⁹⁸

In the 2012 WGRA, the DMDC received completed questionnaires from 22,792 of the 108,000 active-duty service members that it

⁹³ The WGRA is a survey of active-duty service members designed to enhance the understanding of sexual assault in the military and the results of DoD’s sexual assault prevention efforts. See 2010 WGRA, *supra* note 79.

⁹⁴ DEF. MANPOWER DATA CTR., SURVEY NOTE, 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS 1 (Mar. 15, 2013) [hereinafter 2012 WGRA], available at http://www.sapr.mil/public/docs/research/2012_Workplace_and_Gender_Relations_Survey_of_Active_Duty_Members-Survey_Note_and_Briefing.pdf; see also 2010 WGRA, *supra* note 79.

⁹⁵ 2012 WGRA, *supra* note 94. The 2012 Service Academy Gender Relations Survey was the fifth in a series of surveys mandated by law. This survey assessed the incidence of sexual assault and sexual harassment and gender-related issues at the U.S. Military Academy, U.S. Naval Academy, U.S. Air Force Academy, and U.S. Coast Guard Academy. *Id.*

⁹⁶ The Department of Defense announced that Major General Jeffrey Snow would be replacing Major General Patton as the Director of the DoD Sexual Assault Prevention and Response Office in January 2014. Major General Patton is scheduled to retire in the spring of 2014. *Secretary of Defense Chuck Hagel Names New DoD Director of Sexual Assault Prevention and Response Office*, U.S. DEP’T OF DEF. (Dec. 16, 2013), <http://www.defense.gov/releases/release.aspx?releaseid=16428>.

⁹⁷ The John Warner National Defense Authorization Act for Fiscal Year 2007 requires an annual report from each military academy during each academic year on the effectiveness of the policies, training, and procedures with respect to sexual harassment and violence involving Academy personnel. The John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 532, 120 Stat. 2083, 2200–2206 (2006).

⁹⁸ *Defense Department Press Briefing via Teleconference with Maj. Gen. Patton and Lt. Col. Galbreath on the Annual Military Academy Sexual Assault Report*, U.S. DEP’T OF DEF. (Dec. 21, 2012), <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5170> [hereinafter *MG Patton Press Briefing*].

surveyed.⁹⁹ The report includes rates for unwanted sexual contact and unwanted gender-related behaviors.¹⁰⁰ Unwanted sexual contact is intended to measure sexual assault; it is used as an umbrella term to include acts prohibited by the UCMJ.¹⁰¹ Unwanted gender-related behaviors encompass sexual harassment and sexist behavior.¹⁰² To determine the extent of unwanted gender-related behaviors, members were provided a list of twelve sexual-harassment behaviors and four sexist behaviors and were then asked to indicate how often they experienced those behaviors in the past year.¹⁰³ The twelve sexual harassment behaviors contain three components of sexual harassment: crude or offensive behavior, unwanted sexual attention, and sexual coercion.¹⁰⁴ Service members must have experienced at least one behavior defined as sexual harassment and indicated they considered that behavior to be sexual harassment to be included in the calculation for the sexual harassment rate.¹⁰⁵

According to the report, 23 percent of women and 4 percent of men reported experiencing sexual harassment in the past year.¹⁰⁶ Forty-one percent of women and 20 percent of men experienced crude or offensive behavior.¹⁰⁷ Twenty-three percent of women and 5 percent of men experienced unwanted sexual attention.¹⁰⁸ Finally, 8 percent of women and 2 percent of men reported experiencing sexual coercion.¹⁰⁹

In the 2012 SAGR, DMDC received completed surveys from 5,425 students out of an eligible sample size of 7,258 students.¹¹⁰ The SAGR report also includes rates for unwanted sexual contact and unwanted gender-related behaviors, and uses the same methodology and definitions as the WGRA. At the Coast Guard Academy, 40 percent of women and

⁹⁹ 2012 WGRA, *supra* note 94, at 6.

¹⁰⁰ *Id.* at 1–2.

¹⁰¹ *Id.* at 1.

¹⁰² *Id.* at 2.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 4.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ DEF. MANPOWER DATA CTR., 2012 SERVICE ACADEMY GENDER RELATIONS SURVEY 7 (Dec. 19, 2012) [hereinafter 2012 SAGR], *available at* http://www.sapr.mil/public/docs/research/DMDC_2012_Service_Academy_Gender_Relations_Survey.pdf.

10 percent of men indicated experiencing sexual harassment in 2012.¹¹¹ Seventy-six percent of women and 46 percent of men reported experiencing crude or offensive behavior.¹¹² With respect to unwanted sexual attention, 42 percent of women and 13 percent of men reported experiencing that type of behavior.¹¹³ Lastly, 11 percent of women and 4 percent of men reported experiencing sexual coercion.¹¹⁴

C. Complete Visibility and Leadership Support Needed

Not only do the GAO and 2012 DMDC reports clearly show sexual harassment has been a problem since the early 1990s and continues to be a problem today, they also underscore the importance of complete visibility over the extent of the problem. Congress took action in 2003 and 2004 to improve visibility of the sexual-harassment problem in the DoD. After reviewing DoD surveys from 1988, 1995, and 2002 that indicated sexual harassment was a problem in the military, the Bob Stump National Defense Authorization Act for Fiscal Year 2003 (2003 NDAA)¹¹⁵ requires DoD to conduct four quadrennial surveys to assess racial, ethnic, and gender issues in the military.¹¹⁶

Similarly, in response to a series of sexual assault investigations at the Air Force Academy in 2003, Congress took action to address sexual harassment and assault at the DoD academies.¹¹⁷ In the National Defense Authorization Act for Fiscal Year 2004 (2004 NDAA), Congress required the three DoD academies to establish policies, programs, and procedures to address sexual harassment and sexual assault incidents and to provide annual reports on sexual harassment and sexual assault incidents.¹¹⁸ Initially, these requirements did not apply to the Coast Guard Academy, but the Coast Guard Academy adopted sexual harassment and assault policies, programs, and procedures similar to the DoD academies on its own accord.¹¹⁹ In 2010, the Department of

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458 (2002) [hereinafter 2003 NDAA].

¹¹⁶ *Id.*

¹¹⁷ 2008 GAO REP., *supra* note 51, at 1.

¹¹⁸ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 527, 117 Stat. 1392, 1468–70 (2003).

¹¹⁹ 2008 GAO REP., *supra* note 51, at 2.

Homeland Security mandated that the Coast Guard comply with these specific provisions in the 2004 NDAA.¹²⁰

The Coast Guard must also take steps to maximize visibility over sexual harassment within the service. Ideally, the Coast Guard would have been included in the 2003 NDAA, and thus included in the mandated surveys conducted by the DMDC. But for some reason, the Coast Guard was expressly excluded from the 2003 NDAA requirements.¹²¹ Regardless, the GAO reports clearly illustrate that sexual harassment is underreported, and the DMDC reports indicate that sexual harassment remains a persistent problem in the DoD services, as well as at the service academies. While these reports mainly address the DoD services, it is logical to conclude the Coast Guard is experiencing similar issues.¹²² Congress implemented the mechanisms to improve the DoD's visibility; the Coast Guard needs to follow suit and implement its own mechanisms to more accurately assess the severity of the sexual-harassment problem. The Coast Guard should consider pursuing a legislative proposal to include the Coast Guard in the surveys mandated in the 2003 NDAA, or it should conduct its own annual surveys that mirror the requirements in the 2003 NDAA.

The GAO also revealed another problematic area in its 2011 report: the perception that military leaders did not support sexual harassment programs or did not create a climate discouraging sexual harassment. These are two critical areas that must be addressed, as leadership support of sexual harassment policies and organizational climate play an important role in the relationship between sexual harassment and sexual assault.

¹²⁰ Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142, 2152 (2009).

¹²¹ See 2003 NDAA, *supra* note 115, at 2554.

¹²² Twenty-one sexual harassment reports were made under the Anti-Harassment and Hate Incident Policy Procedures in fiscal year 2012. De Lesa Hanson & Emily Harcum, *Response: Proactive Prevention at Coast Guard*, CIVIL RTS. ON DECK., July 2013, available at <http://www.uscg.mil/civilrights/News/Civil.Rights.On.Deck/Jul13.pdf>. In fiscal year 2013, fifteen sexual harassment reports were made under the Anti-Harassment and Hate Incident Policy Procedures. E-mail from Ms. Erika Selmon, Formal Complaints Manager, Office of Civil Rights Operations, U.S. Coast Guard, to author (5 Feb. 2014, 16:37 EST) (on file with author).

IV. The Relationship Between Sexual Harassment and Sexual Assault

A. What Do the Statistics Reveal?

Just as the WGRA and SAGR statistics reveal that sexual harassment remains a problem, the statistics also indicate a strong connection between sexual harassment and sexual assault. In the 2012 WGRA, 6.1 percent of women and 1.2 percent of men indicated experiencing unwanted sexual contact.¹²³ Of the 6.1 percent of women who experienced unwanted sexual contact, 30 percent indicated that the offender sexually harassed them before or after the assault, 8 percent indicated that the offender stalked them, and 20 percent indicated that the offender both sexually harassed and stalked them.¹²⁴ Of the 1.2 percent of men who experienced unwanted sexual contact, 19 percent indicated that the offender sexually harassed them before or after the assault, 2 percent indicated that the offender stalked them, and 21 percent indicated that the offender both sexually harassed and stalked them.¹²⁵ Thus, according to these numbers, 50 percent of the women who experienced unwanted sexual contact indicated being sexually harassed by the offender and 40 percent of the men who experienced unwanted sexual contact indicated being sexually harassed by the offender.

For the Coast Guard Academy, the 2012 SAGR reported 9.8 percent of women and 0.7 percent of men indicated experiencing unwanted sexual contact.¹²⁶ Of the 9.8 percent of women who reported unwanted sexual contact, 22 percent indicated that the offender sexually harassed them, 4 percent indicated that the offender stalked them, and 15 percent indicated that the offender both sexually harassed and stalked them; while 59 percent of the respondents indicated that the offender neither sexually harassed nor stalked them.¹²⁷ In total, according to these numbers, 37 percent of the women who reported unwanted sexual contact were sexually harassed.

The 2012 SAGR also examined the timing of sexual harassment or stalking that was associated with an unwanted sexual contact experience.¹²⁸ Of the 9.8 percent of Coast Guard Academy women who

¹²³ 2012 WGRA, *supra* note 94, at 2.

¹²⁴ *Id.* at 3.

¹²⁵ *Id.* at 3–4.

¹²⁶ 2012 SAGR, *supra* note 110, app. D, slides 8–9.

¹²⁷ *Id.* at 32.

¹²⁸ *Id.* at 33.

reported experiencing unwanted sexual contact and acts of sexual harassment or stalking, 11 percent indicated that the offender sexually harassed or stalked them before the assault; 11 percent indicated that the offender sexually harassed or stalked them after the assault, and 19 percent indicated that the offender sexually harassed or stalked them both before and after the assault.¹²⁹

Major General Patton, in assessing the statistics in the 2012 SAGR, also recognized the connection between sexual harassment and sexual assault. In commenting on the 2012 SAGR, Major General Patton stated that the survey “shows no significant change in the prevalence of sexual harassment And we recognize that eliminating sexual harassment is critical to preventing sexual assault.”¹³⁰ He went further, stating:

We know from the survey respondents—that those who experienced a sexual assault in the past year, the vast majority of those people also experienced sexual harassment. So this is an important correlation, and it gets at establishing a climate—a non-permissive climate or environment in which the—the solution to this problem is an environment—creating a non-permissive environment where sexual harassment, sexist behavior, stalking, and these types of behaviors are not condoned, tolerated, or ignored. And we know that that would also contribute to establishing an environment where sexual assault is—would—would be reduced. So it’s important that we survey the sexual harassment and we address that point, as well.¹³¹

As Major General Patton noted, these statistics establish a strong correlation between organizational environment, sexual harassment, and sexual assault. Research on the interrelationship among these three issues further supports Major General Patton’s observations.

¹²⁹ *Id.*

¹³⁰ *MG Patton Press Briefing, supra* note 98.

¹³¹ *Id.*

B. Organizational Environment, Sexual Harassment, and Sexual Assault Are Interrelated

The statistics from the 2012 WGRA and SAGR surveys reveal a strong connection between sexual harassment and sexual assault, and Major General Patton's conclusions regarding that strong correlation are based on prior research that evaluated the relationship among organizational environment, sexual harassment, and sexual assault. Three research studies support the theory that sexual harassment is often a precursor to sexual assault.¹³² These studies also analyzed the effect organizational factors have on the prevalence of sexual harassment and sexual assault.¹³³

1. Factors Associated with Women's Risk of Rape in the Military Environment

In one study, which focused on risk factors for rape in the military, 558 women veterans were interviewed from November 1996 to May 1997.¹³⁴ The sample of women was selected from the Department of Veterans Affairs health care registries.¹³⁵ The 558 subjects selected consisted of women veterans from across the country who served in Vietnam, post-Vietnam, and the Persian Gulf eras, spanning a date range of military service from 1961 to 1997.¹³⁶ Complete interview data was compiled for 506 women veterans, with all branches of the Armed Forces represented.¹³⁷

¹³² See Anne G. Sadler et al., *Factors Associated with Women's Risk of Rape in the Military Environment*, 43 AM. J. OF INDUS. MED. 262 (2003); Melanie S. Harned et al., *Sexual Assault and Other Types of Sexual Harassment by Workplace Personnel: A Comparison of Antecedents and Consequences*, 7 J. OCCUPATIONAL HEALTH PSYCHOL. 174 (2002); DR. RICHARD J. HARRIS, *SEXISM, SEXUAL HARASSMENT AND SEXUAL ASSAULT: COMPARING DATA FROM 2002 AND 2006* (2008).

¹³³ See *supra* note 132.

¹³⁴ Sadler et al., *supra* note 132, at 263.

¹³⁵ *Id.*

¹³⁶ *Id.* The Vietnam era is considered to be February 28, 1961 to May 7, 1975, the post-Vietnam era is May 8, 1975 to August 1, 1990, and the Persian Gulf era is August 2, 1990 to date of interview. *Id.*

¹³⁷ *Id.* at 265. The majority of subjects served in the Army, Air Force, and Navy: 49 percent of the subjects served in the Army, twenty-three percent served in the Air Force, and twenty-two percent served in the Navy. *Id.* Percentages for subjects who served in the Marine Corps and Coast Guard were not detailed. *Id.*

The interview participants were asked about their exposure to violence during their military service. Approximately 399 participants, or 79 percent, reported experiencing sexual harassment during their service.¹³⁸ More than half of the participants, approximately 54 percent, reported experiencing unwanted sexual contact.¹³⁹ Finally, approximately one-third, or 151 participants, reported experiencing one or more attempted or completed rapes.¹⁴⁰ Of the participants who reported experiencing attempted or completed rape, over 60 percent indicated that the offender had sexually harassed them.¹⁴¹

This study also assessed the relationship between the military environment and rape during military service, and it identified several risk factors associated with sexual harassment.¹⁴² In general, women who were exposed to harassment or violence during their service were also more likely to experience rape.¹⁴³ And further, women who were sexually harassed or experienced unwanted sexual contact during their service had significantly elevated odds of in-military rape.¹⁴⁴ According to the numbers provided, women experiencing sexual harassment had approximately fifteen times greater odds of being raped, while those who reporting unwanted sexual contact had approximately seven times greater odds of being raped.¹⁴⁵ Women who reported hostile work environments

¹³⁸ *Id.* at 266. For purposes of this study, sexual harassment included *quid pro quo* demands and hostile environments. Hostile environments included unwanted and uninvited: sexual teasing, jokes, remarks, or questions, pressure for dates, sexually suggestive looks, gestures, letters, or other sexual attention, including unwanted sexual contact. *Id.* at 264.

¹³⁹ *Id.* at 266. Unwanted sexual contact was defined as unwanted intentional sexual touching or fondling of buttocks, thigh, leg, breasts, genitals, or other body part (excluding rape). *Id.* at 264.

¹⁴⁰ *Id.* at 266. The definition of rape adopted by The American Medical Association and The American College of Obstetricians and Gynecologists was used. It is defined as any act that occurred without an individual's consent that involves the use or threat of force and includes an act of attempted or completed sexual penetration of the victim's vagina, mouth, or rectum. *Id.* at 264.

¹⁴¹ *Id.* at 266–67.

¹⁴² *Id.* at 268.

¹⁴³ *Id.*

¹⁴⁴ *Id.* The interview participants were classified as those who experienced rape during their military service and those who did not. *Id.* at 264. “In-military rape” was not specifically defined, but in assessing the characteristics of rape occurring in the military environment, the researchers described the military environment as “a unique situation in which work and living quarters are located together, so rape occurring on and off-duty were considered as potentially work-related when on base or when the perpetrator was a ranking officer.” *Id.*

¹⁴⁵ *Id.* at 269.

had approximately six-fold greater odds of being raped, while those who experienced unwanted sexual advances, remarks, or pressure for dates in sleeping quarters had more than a three-fold increase in the odds of being raped.¹⁴⁶ Finally, and most notably from a military leadership and climate perspective, ranking officer or immediate supervisor behaviors had a strong association with women's frequency of rape.¹⁴⁷ A woman's odds of being raped increased five-fold when officers engaged in *quid pro quo* behaviors.¹⁴⁸ The presence of officers who allowed or initiated sexually harassing behaviors, such as sexually demeaning comments or gestures, was associated with a three to four-fold increase in odds of rape.¹⁴⁹

The conclusions from this study should alarm military leadership. The researchers concluded that military environmental factors were strongly associated with women's risk of rape during service.¹⁵⁰ The results demonstrate that the odds of rape increase when the living or working environments were sexualized.¹⁵¹ In particular, work environments that allow inappropriate sexual conduct, however subtle, can significantly increase the risk of rape for women.¹⁵² This finding indicates a continuum of violence, with rape the most severe behavior.¹⁵³ Lastly, this study's results underscore the importance of leadership behaviors. The behaviors of officers constitute a powerful risk factor with respect to violence towards women.¹⁵⁴ The findings from this study support prior research indicating women often identify higher-ranking personnel as perpetrators of unwanted sexual attention and that such sexual harassment is associated with male service members acting adversely toward female members.¹⁵⁵

¹⁴⁶ *Id.* at 268.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 269.

¹⁵¹ *Id.* at 271.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* See MELANIE MARTINDALE, SEXUAL HARASSMENT IN THE MILITARY: 1988 (1990); LISA D. BASTION ET AL., 1995 DEPARTMENT OF DEFENSE SEXUAL HARASSMENT SURVEY (1996), available at <http://www.ijoa.org/imta96/paper23.html>.

2. *Sexual Assault and Other Types of Sexual Harassment by Workplace Personnel: A Comparison of Antecedents and Consequences*

Another study used data from the 1995 DoD Gender Issues Survey to address whether the antecedents found to be associated with sexual harassment are also associated with sexual assault by workplace personnel.¹⁵⁶ Specifically, the authors noted that previous research had examined sexual harassment and sexual assault by workplace personnel as a unitary construct, but it is unknown whether factors such as organizational climate,¹⁵⁷ job-gender context,¹⁵⁸ organizational power, and sociocultural power that have been proposed as antecedents to sexual harassment also predict sexual assault by workplace personnel when sexual assault is considered separately.¹⁵⁹ This study used aspects of several theories for the causes of sexual harassment, to include sex role spillover theory,¹⁶⁰ organizational climate theory, and power differential theories¹⁶¹ while also considering sociocultural power¹⁶² to guide an examination of the theoretical antecedents and consequences of sexual assault by workplace personnel and sexual harassment in the military.¹⁶³

The sample for this study consisted of 22,372 female service members who responded to the survey, to include representation from all

¹⁵⁶ Harned et al., *supra* note 132.

¹⁵⁷ Organizational climate is defined as employees' perceptions of an organization's implementation of policies and procedures related to sexual harassment, the provision of resources for sexual-harassment victims, and the provision of sexual-harassment training. *Id.* at 176.

¹⁵⁸ Job-gender context is a construct identified in sex role spillover theory; it refers to the gendered nature of the work group, and includes variables such as the ratio of male to female workers and the gender traditionality of the job. *Id.*

¹⁵⁹ *Id.* at 177.

¹⁶⁰ Sex-role spillover theory is the carryover of gender-based roles into the workplace that are irrelevant or inappropriate to the work setting. See Barbara A. Gutek & Aaron G. Cohen, *Sex Ratios, Sex Role Spillover, and Sex at Work: A Comparison of Men's and Women's Experiences*, 40 HUM. REL. 97 (1987).

¹⁶¹ Power differential theories of sexual harassment emphasize the concept of power, viewing sexual harassment as an abuse of organizational power. The classic example involves a male abusing a supervisory position to sexually coerce a subordinate female. One criticism of this theory is that the focus on organizational power does not explain sexual harassment when no formal power differential exists, such as the case of harassment by a co-worker. Harned et al., *supra* note 132, at 176.

¹⁶² Sociocultural power includes factors such as age, marital status, and race, and proposes that women that lack cultural power and status advantages are at a higher risk to experience sexual harassment. *Id.*

¹⁶³ *Id.*

DoD services and the Coast Guard.¹⁶⁴ Of the 22,372 female service members, 941 reported being sexually assaulted by workplace personnel in the previous 12 months.¹⁶⁵ Approximately 72 percent, or 16,204, female service members reported experiencing other forms of sexual harassment while approximately 23 percent indicated not experiencing sexual assault or sexual harassment by workplace personnel in the past 12 months.¹⁶⁶ Of the 941 female service members who reported experiencing sexual assault, 938 (or 99.7 percent) indicated that workplace personnel sexually harassed them in the past 12 months.¹⁶⁷

This study used the data available from the 22,372 surveys to assess how organizational climate, job gender context, organizational power, and sociocultural power relate to sexual harassment and sexual assault. To measure organizational climate, the researchers reviewed the survey respondents' perceptions of the military's efforts to enforce sexual harassment policies, perceptions of the services provided by sexual harassment victims, and perceptions of the prevalence of sexual harassment training.¹⁶⁸ The responses were standardized and summed to create a composite variable of organizational climate, a higher score represented less tolerance of sexual harassment.¹⁶⁹ Four items were used to assess job gender context. These items included "job not usually held by personnel of your gender," "a work environment where personnel of your gender are uncommon," supervisor's sex, and the gender ratio among coworkers.¹⁷⁰ The responses were standardized and summed to create an indicator of how much a participant's workgroup was masculinized.¹⁷¹ To assess the organizational power of a survey respondent, the researchers looked at pay grade and years of active-duty service.¹⁷² A lower pay grade and fewer years of active duty-service represented a lower organizational power.¹⁷³ Lastly, a review of a respondent's age, education, race or ethnicity, and marital status was

¹⁶⁴ *Id.* at 177. Specific percentages of service-representation were not provided. The average age of the women was thirty-one and average time on active duty was just under ten years. *Id.*

¹⁶⁵ *Id.* at 180.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 179.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

completed to assess one's sociocultural power.¹⁷⁴ A younger age, lower education level, minority racial group membership, and non-married status represented lower sociocultural power.¹⁷⁵

After reviewing all of these factors, the researchers concluded there are important similarities and differences between sexual assault by workplace personnel and sexual harassment.¹⁷⁶ The results indicated that low sociocultural and organizational power were associated with an increased likelihood of experiencing both sexual assault and sexual harassment by workplace personnel.¹⁷⁷ With respect to an organization's climate and the job gender context, these two factors were found to be directly associated with sexual harassment but only indirectly associated with sexual assault by workplace personnel.¹⁷⁸ Instead, the relationship between organizational characteristics and sexual assault is completely mediated by women's experiences of sexual harassment.¹⁷⁹ The researchers explained the apparent indirect relationship with organizational characteristics and sexual assault by pointing out while both sexual assault and harassment appear to occur primarily on military installations, sexual assaults are not occurring in the workplace or during duty hours like instances of sexual harassment.¹⁸⁰ The researchers further noted that it is logical that organizational characteristics have an indirect relationship given that the majority of sexual assaults occur outside the immediate work setting.¹⁸¹ But despite this indirect relationship, the researchers highlighted that organizational characteristics are associated with the incidence of sexual assault by workplace personnel.¹⁸² Specifically, organizational characteristics affect how women are treated in the workplace, and this treatment may spill over into interactions between military personnel occurring outside the immediate work setting.¹⁸³ Because of this relationship, the researchers concluded that improving the military climate with respect to sexual harassment may decrease the occurrence of other types of sexual harassment, which, in turn, may lower sexual assault occurrences.¹⁸⁴

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 186.

¹⁷⁷ *Id.* at 185.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 187.

3. *Sexism, Sexual Harassment, and Sexual Assault: Comparing Data from 2002 and 2006*

Lastly, a 2008 Defense Equal Opportunity Management Institute (DEOMI) research report used more recent data to support prior research that analyzed the relationship between sexual assault and sexual harassment in the workplace.¹⁸⁵ The author of this report used data from the Armed Forces 2002 Sexual Harassment Survey¹⁸⁶ and the 2006 WGRA¹⁸⁷ to analyze the relationship among different types of sexual harassment and sexual assault to assess whether sexual assault indicators had changed.¹⁸⁸ Both surveys included responses from enlisted members and officers in the Army, Navy, Marine Corps, Air Force, and Coast Guard.¹⁸⁹

This study focused on using the survey results to identify separate categories of individual and environmental harassment and then to delineate the relationships between these two forms of sexual harassment and sexual assault.¹⁹⁰ On one hand, individualized harassment was characterized as the quid pro quo type of harassment, to include the exchange of work-related benefits or consequences for sexual favors through bribes, threats, or physical force.¹⁹¹ On the other hand, environmental harassment was unwanted sexualized actions that affected one's work performance by creating a hostile work environment.¹⁹² More specifically, this study used the 2002 and 2006 survey responses to identify individualistic forms of sexual harassment that were personal, frequently physical in nature, and left "little room for misinterpretation."¹⁹³ Examples of this individual harassment include sexual assault, touching, and sexual phone calls.¹⁹⁴ This individual harassment was differentiated from the broader and more public

¹⁸⁵ HARRIS, *supra* note 132.

¹⁸⁶ The 2002 Armed Forces Sexual Harassment Survey was conducted by the Defense Manpower Data Center to assess the prevalence of sexual harassment and other unprofessional, gender-related behaviors. *Id.* at 18.

¹⁸⁷ The 2006 Workplace and Gender Relations Survey was conducted by the Defense Manpower Data Center as part of a quadrennial cycle of human relations surveys mandated by law. *Id.* at 22.

¹⁸⁸ *Id.* at 2.

¹⁸⁹ *Id.* at 19, 23.

¹⁹⁰ *Id.* at 6.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 20, 24.

¹⁹⁴ *Id.*

environmental harassment, which included jokes, whistles, and suggestive looks.¹⁹⁵ The survey responses were then classified as having experienced individualistic unwanted, uninvited sexual behavior; environmental unwanted, uninvited sexual behavior; or both.¹⁹⁶ The study used this data to perform a logistic regression analysis¹⁹⁷ to assess the impact of these forms of sexual harassment on the likelihood of reporting sexual assault.¹⁹⁸

In both surveys, more than 50 percent of female service members reported experiencing some form of sexual harassment,¹⁹⁹ which was approximately double the percentage for males in both 2002 and 2006.²⁰⁰ To show the impact of environmental harassment on individualized harassment experiences, the study compared the numbers of attempted or actual sexual assaults against both men and women by whether environmental harassment was reported.²⁰¹ The results show that sexual-assault reports were rare when environmental harassment was not present but that it was much more prevalent when environmental harassment was reported.²⁰² The results of both surveys indicate the odds of sexual assault increased for both men and women when environmental harassment was present.²⁰³ The odds of sexual assault for men increased nearly 35 times, while the odds for women increased 12 times.²⁰⁴

The results of the logistic regression models designed to predict the probability of reporting attempted or actual sexual assault provide insight into what variables increase the odds of sexual assault.²⁰⁵ These models identified the dominant variables as individual harassment, sexist behavior, and environmental harassment.²⁰⁶ The logistic regression

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 21, 25.

¹⁹⁷ Logistic regression models are common in the fields of medicine, economics, sociology, psychology and other social sciences, and are used to predict binary outcomes. Generally, a logistic regression model predicts the probability of an event occurring (as opposed to not occurring) from a set of predictors. *See* Razia Azen & Nicole Traxel, *Using Dominance Analysis to Determine Predictor Importance in Logistic Regression*, 34 J. EDUC. & BEHAV. STAT. 319, 320 (2009).

¹⁹⁸ HARRIS, *supra* note 132, at 19.

¹⁹⁹ *Id.* at 26.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 27.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 29.

²⁰⁶ *Id.*

analysis also sheds light on the roles of individual and environmental harassment.²⁰⁷ The results of the analysis suggest that environmental harassment, along with sexist behavior, create a climate in which individual harassment is viewed as acceptable by potential offenders, and this climate, in turn, increases the likelihood of sexual assault.²⁰⁸ The linkage between individual and environmental harassment is apparent. When environmental harassment is not reported, individual harassment is rarely reported.²⁰⁹ For male service members, approximately 89 percent of those members reporting no environmental harassment also reported no individualized harassment.²¹⁰ For the female service members who reported no environmental harassment, approximately 81 percent of those female service members also reported no individualized harassment.²¹¹ Conversely, when environmental harassment was reported, the probability of acts of individualized harassment was extremely high, that is, approximately 98 percent for males and 99 percent for females.²¹² And according to this study, the presence of individualized harassment results in the greatest increase in the likelihood of sexual assault.²¹³

This research indicates that those members who experienced unprofessional, gender-related behaviors, such as crude or offensive behaviors, unwanted sexual attention, sexual coercion, and sexist behaviors, were also more likely to report experiencing attempted and actual rape.²¹⁴ The research also indicates that experiencing increased numbers of unprofessional, gender-related incidents also increases the likelihood of a sexual assault being reported.²¹⁵ Finally, the author also noted it is likely that an organizational context where environmental harassment may be unofficially condoned and institutionally supported as a process for excluding women and men who may not fit in sends a message to those service members with the propensity to engage in egregious individualized sexual harassment and sexual assault that their behaviors are acceptable.²¹⁶

²⁰⁷ *Id.* at 30.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 31.

²¹⁵ *Id.*

²¹⁶ *Id.*

4. Organizational Environment and Sexual Harassment Are Linked to Sexual Assault

These three research studies provide startling insights into the connections between organizational environment, sexual harassment, and sexual assault. All three support the proposition that sexual harassment is often a precursor to sexual assault. Specifically, service members who are sexually harassed are at significantly increased odds of being sexually assaulted. Furthermore, these studies highlight the importance that the organizational environment plays with respect to the levels of sexual harassment and sexual assault. Not surprisingly, in environments where sexual harassment is tolerated or unofficially condoned by leadership, the risk of sexual assault increases. In particular, the effect of leadership behavior of officers should be noted, as these studies indicate these behaviors constitute a powerful risk factor. If leadership engages in sexually harassing behavior, it creates an environment where other service members feel it is permissible to engage in similar harassing behaviors.

In sum, these studies show that sexual harassment is a precursor to sexual assault. They also show that the organizational environment plays a key part in the levels of sexual harassment, with environments that tolerate or condone sexual harassment and environments where leadership engages in sexually harassing behaviors having higher levels of sexual harassment. Thus, addressing organizational environments with respect to sexual harassment will lead to more successful effort to prevent sexual assaults.

Given that sexual harassment continues to be a persistent problem and the implications of the relationships among organizational environment, sexual harassment, and sexual assault, the Coast Guard must reframe the perspective in which it views sexual harassment and its connections to sexual assault. History and the current state of the sexual assault problem in the military compel a sea change in the culture of sexual harassment prevention and response.

C. Reframing the Perspective: The Sexual-Violence Continuum

The sexual-violence continuum provides a clear, straightforward conceptual model in which service members can understand the nature of sexual violence and how sexual harassment and sexual assault fit within

the overarching construct of sexual violence. Rather than solely focusing on sexual harassment as a discrimination issue,²¹⁷ the Coast Guard should view sexual harassment as offensive conduct within a continuum of sexual violence. In particular, by viewing sexual harassment as part of a continuum of sexual violence, it provides a framework from which the service can view all behaviors that enable, or serve as a precursor, to sexual assault.

Understanding the continuum of sexual violence first requires defining “sexual violence.” According to the Centers for Disease Control and Prevention (CDC), sexual violence “is any sexual act perpetrated against someone’s will.”²¹⁸ The CDC’s definition suggests a continuum of sexual violence, as it includes a completed nonconsensual sex act, such as rape, an attempted nonconsensual sex act, abusive sexual contact, such as unwanted touching, and non-contact sexual abuse.²¹⁹ Examples of non-contact sexual abuse include voyeurism, exhibitionism, unwanted exposure to pornography, threats of sexual violence to accomplish some other goal, taking nude photographs of a sexual nature without a person’s consent, and verbal or behavioral sexual harassment.²²⁰

Other organizations have further explained the sexual violence continuum. The National Center on Domestic and Sexual Violence (NCDSV)²²¹ does not view sexual assault as an isolated act but rather as an act on a continuum related to other common events or activities, both illegal and legal.²²² The NCDSV describes the continuum as beginning with suggestive looks, sexist comments, and verbal harassment, and escalating to exposure, sexual assault, aggravated sexual assault, and ultimately murder.²²³ According to the NCDSV, most women have

²¹⁷ See *infra* notes 241–73.

²¹⁸ *Sexual Violence: Definitions*, CTDS. FOR DISEASE CONTROL AND PREVENTION (Jan. 2, 2014), <http://www.cdc.gov/violenceprevention/sexualviolence/definitions.html>.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ The National Sexual Violence Resource Center’s (NSVRC) designs, provides, and customizes training and consultation, influences policy, promotes collaboration and enhances diversity with the goal of ending domestic and sexual violence. See *About NCDSV*, NAT’L CTR. ON DOMESTIC AND SEXUAL VIOLENCE, http://www.ncdsv.org/ncd_factsheet.html (last visited Nov. 3, 2014).

²²² *Continuum of Sexual Aggression*, NATL. CTR. ON DOMESTIC AND SEXUAL VIOLENCE, <http://www.ncdsv.org/images/att9selectedappendixcontinuumsexualaggressio.pdf> (last visited Mar. 13, 2014).

²²³ *Id.*

experienced some act that falls within the continuum.²²⁴ The NCDSV also states the common denominator in every act along the continuum is a lack of respect.²²⁵

Experts working in the field of sexual violence have also provided a definition for sexual violence.²²⁶ In research sponsored by the National Sexual Violence Resource Center,²²⁷ experts described sexual violence as a continuum of behaviors that includes both physical and nonphysical acts.²²⁸ Sexual violence was defined as nonconsensual acts that are sexual in nature.²²⁹ Most of the experts also emphasized that nonphysical acts, such as emotional or verbal abuse, constitute sexually violent acts.²³⁰ Thus, these experts conceptualized sexual violence as more than just the physicality of the act.²³¹

The Pee Dee Coalition, a volunteer victim advocacy training nonprofit organization in South Carolina, provides a similar description of the sexual-violence continuum.²³² They characterize sexual assault as a range of behaviors, with catcalls, voyeurism, and sexual harassment toward the lower end and molestation, rape, and incest at the higher end.²³³ The sexual-violence continuum represents a set of behaviors, some of which are accepted by society more than others.²³⁴ Underlying every behavior on the continuum are the attitudes and beliefs society

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Moira O'Neil & Pamela Morgan, *American Perceptions of Sexual Violence: A FrameWorks Research Report*, FRAMEWORKS INST. 3–4 (Sept. 2010), http://www.frameworksinstitute.org/assets/files/PDF_sexualviolence/AmericanPerceptionsofSexualViolence.pdf.

²²⁷ The NSVRC mission is to provide leadership in preventing and responding to sexual violence through collaboration, sharing and creating resources, and promoting research. The NSVRC views sexual violence to include a range of behaviors, both physical and non-physical, that constitutes unwanted or age-inappropriate sexual activity. *See About the National Sexual Violence Center*, THE NAT'L SEXUAL VIOLENCE RESOURCE CTR., <http://www.nsvrc.org/about/national-sexual-violence-resource-center#SV> (last visited Mar. 13, 2014).

²²⁸ O'Neill & Morgan, *supra* note 226, at 9.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *The Sexual Assault Continuum*, PEE DEE COALITION VOLUNTEER VICTIM ADVOCACY TRAINING WEBSITE, <http://www.peedeecoalition.org/volunteer/sa2.html> (last visited Mar. 13, 2014).

²³³ *Id.*

²³⁴ *Id.*

holds about gender roles and acceptable behavior.²³⁵ For example, rape is universally unacceptable, but some of the other behaviors, such as catcalls or sexual harassment, may be tolerated, which could lead to offenders advancing from one behavior on the continuum to a more egregious behavior.²³⁶

It is time for the Coast Guard to reframe its perspective and look at sexual harassment and sexual assault through the lens of a sexual-violence continuum. Advocates and others working in the field of sexual violence are clearly using this broader definition of sexual violence and find the continuum to be a useful tool, but the public may not fully understand the concept.²³⁷ For instance, when the sexual-violence continuum was explored in a study involving 951 college students, the results indicated that students were able to identify acts at the more egregious end of the continuum, such as rape, as problematic but not the less serious, more subtle acts, such as harassment.²³⁸

In light of this apparent confusion, framing sexual harassment and sexual assault, as well as other sexually violent behaviors, through the lens of the sexual-violence continuum can reap extraordinary benefits in the Coast Guard's sexual assault prevention efforts. Specifically, the sexual-violence continuum is a useful way to conceptualize ways in which bystanders can intervene before a sexual assault occurs.²³⁹ Incorporating the sexual violence continuum into bystander intervention training can educate Coast Guard members on the behaviors on the continuum, clearly detail that there is a link among these various behaviors, and ultimately show intervention at one end of the continuum can impact other behaviors, to include preventing a sexual assault.²⁴⁰ In other words, the sexual-violence continuum provides a framework through which members can visualize how sexual harassment and sexual assault are connected and how sexual harassment may oftentimes be a precursor to sexual assault. Unfortunately, Coast Guard policies and

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Sarah McMahon, *Changing Perceptions of Sexual Violence Over Time*, VAWNET.ORG: NAT'L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN, http://www.vawnet.org/print-document.php?doc_id=2956&find_type=web_desc_AR (last visited Mar. 13, 2014).

²³⁸ *Id.*

²³⁹ Sarah McMahon, Judy L. Postmus & Ruth Anne Koenick, *Conceptualizing the Engaging Bystander Approach to Sexual Violence Prevention on College Campuses*, 52 J. C. STUDENT DEV. 115, 118 (Jan./Feb. 2011).

²⁴⁰ *Id.*

training fail to recognize the strong connection between sexual harassment and sexual assault.

V. Sexual Harassment Prevention, Response, and Training in the Coast Guard

A. Anti-Harassment and Hate Incident Procedures Policy

The Coast Guard's Civil Rights Manual provides Coast Guard members and employees guidance for applying and complying with the service's Equal Employment and Equal Opportunity (EEO/EO) requirements.²⁴¹ The procedures for combating harassment and promptly addressing any harassment complaint are prescribed in the Anti-Harassment and Hate Incidents Procedures (AHHIP) policy.²⁴² Sexual harassment is one of the forms of prohibited harassment under this policy;²⁴³ and the Sexual Harassment Prevention Policy is outlined in this manual.²⁴⁴ The Civil Rights Manual is intended to provide a single point of focus for the Coast Guard's efforts to prevent sexual harassment,²⁴⁵ and it outlines a service member's options, the command's options, and sexual harassment prevention training.

B. Sexual Harassment Response

1. A Service member's Options

The Civil Rights Manual provides two processes in which service members may respond to sexual harassment. Service members may respond utilizing the Harassment Complaint Process under the AHHIP Policy,²⁴⁶ the Discrimination Complaint Process under the EEO/EO Program,²⁴⁷ or both processes if they wish.²⁴⁸

²⁴¹ COMDTINST 5350.4C, *supra* note 21, art. I.d.

²⁴² *Id.* art. 2.C.1.

²⁴³ *Id.* art. 2.C.1.a.

²⁴⁴ *Id.* art. 2.C.2.

²⁴⁵ U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1600.2, DISCIPLINE AND CONDUCT art. 2.B.2.b.1 (Sept. 2011) [hereinafter COMDTINST 1600.2].

²⁴⁶ *Id.* art. 2.C.2.

²⁴⁷ *Id.* art. 4.A.

²⁴⁸ Joshua Bailes, *Complaints Corner: A Tale of Two Processes*, U.S. COAST GUARD CIV. RTS. DIRECTORATE (Apr. 2012), <http://www.uscg.mil/civilrights/News/Civil.Rights.On.Deck/Apr12.pdf> (last visited Mar. 12, 2014).

Under the Harassment Complaint Process, members are advised not to ignore the problem, not to assume the harassment will stop, and to expect that the harassment will likely intensify when ignored because the lack of corrective action will be seen by the perpetrator as acceptance or encouragement.²⁴⁹ If a service member believes he or she is being sexually harassed, the manual directs the member to tell the harasser that the behavior is unwelcome and must cease immediately, to report such behavior immediately to the supervisor or to an official at a higher level, and to seek advice on how to deal with the situation from the local Civil Rights Office.²⁵⁰

As seen from this guidance, the Harassment Complaint Process encourages service members to confront the harasser before reporting the harassment to a supervisor. The Coast Guard's Sexual Harassment Prevention training reinforces this notion, encouraging members to "try to resolve the issue at the lowest level" by letting "the harasser know that [he or she is] offended."²⁵¹ If the harassment continues or is severe enough to warrant immediate attention, the service member may report the harassment to his or her supervisor.²⁵² Once reported to a supervisor, the command must conduct an investigation and report the findings to the Civil Rights Directorate.²⁵³

A member may also utilize the Discrimination Complaint Process to respond to sexual harassment. Under this process, a member must report the harassment to an EO Counselor and indicate an "intent to initiate the process."²⁵⁴ The Discrimination Complaint Process has three stages: the pre-complaint process, alternative dispute resolution process, and the formal complaint process.²⁵⁵ A member does not have to exhaust the Harassment Complaint Process before initiating the Discrimination Complaint Process; the processes may run in parallel if the member chooses.²⁵⁶

²⁴⁹ COMDTINST M5350.4C, *supra* note 21, art. 2.C.2.f.

²⁵⁰ *Id.*

²⁵¹ THE OFFICE OF CIV. RTS., U.S. COAST GUARD, SEXUAL HARASSMENT PREVENTION OFFLINE STUDY GUIDE 23 (22 Dec. 2011) [hereinafter SHP STUDY GUIDE].

²⁵² COMDTINST M5350.4C, *supra* note 21, art. 2.C.2.h.

²⁵³ *Id.* art. 2.C.1.d.

²⁵⁴ Bailes, *supra* note 248.

²⁵⁵ COMDTINST M5350.4C, *supra* note 21, art. 4.A.

²⁵⁶ Bailes, *supra* note 248.

2. *The Command's Options*

The Civil Rights Manual states the most effective way to limit harassment is to treat it as misconduct even if it does not meet the requirements for action under civil rights laws and regulations.²⁵⁷ Commanding Officers or Officers-in-Charge (CO/OICs) are “directed to be intolerable of sexual harassment at their units and are required to take immediate corrective action when it occurs.”²⁵⁸ In addition to conducting an investigation after receiving a sexual-harassment report, CO/OICs are required to take appropriate steps to end the harassment and must take appropriate administrative and disciplinary action if warranted.²⁵⁹

The administrative and disciplinary options for commands are outlined in the Coast Guard’s Discipline and Conduct Manual.²⁶⁰ Similar to the guidance in the Civil Rights Manual, CO/OICs are directed to take prompt and appropriate administrative action simultaneously with the complaint processes.²⁶¹ The administrative options include informal or formal counseling, documenting the harassment in performance evaluations, and processing the offender for administrative separation.²⁶² Sexual harassment may also rise to the level of criminal offenses under the UCMJ. Conduct constituting sexual harassment can meet the elements of a wide range of UCMJ provisions, to include Attempt to Commit an Offense under Article 80, Failure to Obey an Order or Regulation under Article 92, Cruelty and Maltreatment under Article 93, Sexual Assault under Article 120, and Conduct Unbecoming an Officer and Gentleman under Article 133.²⁶³

In addition to listing these UCMJ provisions as disciplinary options, the Discipline and Conduct Manual also contains a lawful general order prohibiting illegal discriminatory conduct.²⁶⁴ Sexual harassment is included in this order’s definition of illegal discrimination.²⁶⁵ However,

²⁵⁷ COMDTINST M5350.4C, *supra* note 21, art. 2.C.1.

²⁵⁸ *Id.* art. 2.C.2.e.

²⁵⁹ *Id.* art. 2.C.2.j.

²⁶⁰ COMDTINST 1600.2, *supra* note 245, art. 2.B.2.b.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* The Discipline and Conduct Manual lists all potentially applicable UCMJ provisions for sexual harassment allegations. *Id.*

²⁶⁴ *Id.* art. 2.B.1.

²⁶⁵ *Id.*

using this order as an accountability tool is problematic for two specific reasons. First, it is susceptible to constitutional challenge, as it may not be drafted in a manner that it provides sufficient notice of what conduct is specifically prohibited.²⁶⁶ Second, if the order were to overcome a constitutional challenge, intentional discrimination on the part of the accused must be proven as an element.²⁶⁷ Proving the intent to discriminate required by this order in sexual harassment prosecutions is extremely difficult, as the trial counsel must show the purpose of the sexual harassment was to discriminate and that it was committed with the purpose of discriminating against someone because of his or her protected status.²⁶⁸

The responsibilities of COs and OICs are not limited to responding to sexual harassment incidents. They must also ensure members of their units receive annual training in sexual harassment prevention.

3. Sexual Harassment Prevention Training

Coast Guard members are required to complete Sexual Harassment Prevention (SHP) training annually.²⁶⁹ The SHP training is designed to raise awareness among Coast Guard personnel of behaviors that constitute sexual harassment and to educate personnel on how to respond, prevent, and eliminate sexual harassment.²⁷⁰ With respect to SHP training, the Civil Rights Manual is explicit in distinguishing sexual harassment from sexual assault, specifically dedicating a portion of the SHP training section to the topic “Sexual Harassment is not the same as

²⁶⁶ See *United States v. Pope*, 63 M.J. 68, 73 (C.A.A.F. 2006) (“To withstand a challenge on vagueness grounds, a regulation must provide sufficient notice so that a servicemember can reasonably understand that his conduct is proscribed.”).

²⁶⁷ COMDTINST M5350.4C, *supra* note 21, 2.B.1.b. Disciplinary or administrative action shall be taken only where the discriminatory conduct is intentional. Although law and policy prohibit intentional and unintentional discrimination, only those persons who discriminate intentionally are included within the scope of this Section. *Id.*

²⁶⁸ See E-mail from Captain Kevin Bruen, Staff Judge Advocate, Dist. Eleven, U.S. Coast Guard, to author (Mar. 17, 2014, 13:17 EDT) (on file with author). (“Sexual harassment is a form of discrimination, but the purpose of the harassment must be to discriminate. Not all sexual harassment is discrimination. The sexual harassment to be punishable under this order must be motivated by an intention to discriminate against somebody based on their protected status - race, gender etc.”).

²⁶⁹ COMDTINST M5350.4C, *supra* note 21, art. 3.B.2.c.

²⁷⁰ *Id.* art. 3.B.2.a.

Sexual Assault.”²⁷¹ In this section, the manual states SHP training pertains to employment and conditions of employment, and should never be confused with sexual assault.²⁷² The manual further states “sexual assault involves criminal activity and should be reported to the proper law enforcement authorities and investigating entities.”²⁷³

C. Sexual Harassment Policy and Training Must Be Re-evaluated

The Coast Guard’s sexual harassment policies and training need to be re-evaluated and updated to better reflect the reality that sexual harassment is misconduct, not just discrimination. The legal background of sexual harassment and the Coast Guard’s sexual harassment definition are straightforward and uncontroversial. In fact, the Coast Guard’s sexual harassment definition and complaint processes are consistent with the other services’ definitions and processes.²⁷⁴ The definitions of sexual harassment in all of the services describe a spectrum of behaviors, with the most severe forms of sexual harassment legally constituting sexual assault under Article 120.²⁷⁵ Yet, Coast Guard policy specifically states “sexual harassment is not the same as sexual assault” and trains its members accordingly.²⁷⁶

This artificial distinction between sexual harassment and sexual assault is inconsistent with other parts of the sexual-harassment policy and creates needless confusion. At its core, this distinction is completely contradictory, as the Civil Rights Manual’s definition of sexual harassment includes sexual assault.²⁷⁷ In the SHP Training section of the Civil Rights Manual, sexual assault is characterized as criminal activity while sexual harassment only pertains to employment and conditions of employment. The introduction to the AHHIP Policy, which states that the Coast Guard has determined the most effective way to limit harassing conduct is to treat it as misconduct, is not aligned with this notion. It is

²⁷¹ *Id.* art. 3.B.2.b.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *See generally* U.S. DEP’T OF NAVY, SEC’Y OF NAVY INSTR. 5300.26D, DEPARTMENT OF THE NAVY (DON) POLICY ON SEXUAL HARASSMENT (3 Jan. 2006); U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY ch. 7 (18 Mar. 2008); U.S. DEP’T OF AIR FORCE, INSTR. 36-2706, EQUAL OPPORTUNITY PROGRAM MILITARY AND CIVILIAN (5 Oct. 2010).

²⁷⁵ *See* 10 U.S.C.A. § 920 (2014).

²⁷⁶ COMDTINST M5350.4C, *supra* note 21, art. 3.B.2.b.

²⁷⁷ *See supra* note 45.

also inconsistent with the responsibility of CO/OICs in responding to sexual harassment reports, where the CO/OICs are directed to take appropriate administrative and disciplinary action.²⁷⁸

In addition, further guidance on disciplinary options is provided in the Discipline and Conduct Manual, where multiple provisions of the UCMJ and a lawful general order are provided as options for holding offenders accountable. In particular, that lawful general order prohibiting sexual harassment further undermines the Civil Rights Manual's attempt to distinguish sexual harassment from sexual assault. To put it another way, claiming that sexual assault is criminal activity while maintaining sexual harassment only pertains to employment and conditions of employment is misleading when the Coast Guard criminalizes sexual harassment under Article 92 in the Discipline and Conduct Manual.

The Coast Guard's online SHP Training and SAPR Training also perpetuate this artificial distinction between sexual harassment and sexual assault.²⁷⁹ The SHP Training explains the distinctions are important because the reporting procedures are different²⁸⁰ and runs through a number of vignettes to help reinforce the distinction.²⁸¹ The SAPR Training provides an identical explanation and identical vignettes.²⁸² While the Coast Guard SAPR Program Manual outlines the reporting options for victims and dictates that investigations will be conducted by the Coast Guard Investigative Service,²⁸³ sexual harassment allegations are addressed at the lowest level.²⁸⁴ But both the SHP and SAPR Training fail to address instances where sexual harassment would also meet the definition of sexual assault, thereby training Coast Guard members that sexual harassment and sexual assault are separate and distinct concepts.

²⁷⁸ See *supra* note 259.

²⁷⁹ See SHP STUDY GUIDE, *supra* note 251, at 11–13; THE OFFICE OF WORK-LIFE, U.S. COAST GUARD, SEXUAL ASSAULT PREVENTION AND RESPONSE OFFLINE STUDY GUIDE 11–13 (22 Nov. 2013) [hereinafter SAPR STUDY GUIDE].

²⁸⁰ See U.S. COAST GUARD, COMMANDANT INSTR. MANUAL 1754.10D, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM ch. 3 (Apr. 2012) [hereinafter COMDTINST 1754.10D].

²⁸¹ See SHP STUDY GUIDE, *supra* note 251, at 11–13.

²⁸² SAPR STUDY GUIDE, *supra* note 279, at 11–13.

²⁸³ COMDTINST 1754.10D, *supra* note 280, ch. 3.

²⁸⁴ See *supra* note 251.

This artificial distinction, and subsequent training emphasizing it, needlessly confuses Coast Guard members. In this author's experience, facilitating Sexual Assault Prevention Workshops (SAPWs),²⁸⁵ the confusion in distinguishing between sexual harassment and sexual assault is consistently an issue raised by Coast Guard members. Judge Advocates and Sexual Assault Response Coordinators who have facilitated SAPWs Coast Guard-wide have had similar experiences, prompting one facilitator to include a Civil Rights representative as a co-facilitator to help explain the distinction.²⁸⁶ In focus groups conducted at various locations by the SAPR MCO and Commandant's Junior Council in the summer of 2013, Coast Guard members expressed similar confusion with respect to the policies and definitions.²⁸⁷ Junior members indicated they had difficulty seeing the dividing line between "white and black" behavior, specifically noting that sexual harassment is handled at

²⁸⁵ The Coast Guard implemented Sexual Assault Prevention Workshops as part of the Sexual Assault Prevention and Response (SAPR) program to supplement annual sexual assault training. The workshops are facilitated by a combination of Sexual Assault Response Coordinators, Judge Advocates with experience litigating sexual-assault cases, and Coast Guard Investigative Service Special Agents with experience investigating sexual -assault allegations. The workshops are designed to increase awareness amongst Coast Guard personnel of the issues, policies, and procedures associated with sexual assault, and to engage in an open dialogue about the perceived problems, potential misperceptions, and solutions. HEALTH SAFETY & WORK-LIFE CTR., U.S. COAST GUARD, SEXUAL ASSAULT PREVENTION WORKSHOP FACILITATOR GUIDE intro. (June 2013).

²⁸⁶ See E-mail from Kristin Cox, Sexual Assault Response Coordinator, Base Seattle, U.S. Coast Guard, to author (Mar. 7, 2014, 10:03 EST) (on file with author) ("[T]he confusion happens almost every time we do the training—I also have experienced this confusion in a significant portion of the reports that come in. We have a lot of reports that start as [sexual harassment] complaints that are actually [sexual assault] and are now also getting reports that are [sexual harassment] but come in as [sexual assault], due to the ongoing confusion."); e-mail from Lieutenant Commander Luke Petersen, Judge Advocate, Dist. Eleven, U.S. Coast Guard, to author (Mar. 7, 2014, 13:49 EST) (on file with author) ("I agree that the [sexual harassment/sexual assault] dynamic is problematic for members, not just in differentiating the acts but in figuring out how to address what has occurred. We have such a bifurcated system (lowest level vs. highest level) that it suggests the two things can't really be connected."); e-mail from Tiffani Collier, Sexual Assault Response Coordinator, Base Los Angeles/Long Beach, U.S. Coast Guard, to author (Mar. 11, 2014, 13:33 EDT) (on file with author) ("Allowing sexual misconduct to be managed 'at the lowest level' implies that the Coast Guard does not take low level misconduct seriously.")

²⁸⁷ Memorandum from Junior Council, to Commandant, subject: Junior Council Report: SAPR Focus Group Results (28 Aug. 2013). The Commandant's Leadership, Excellence, and Diversity Council established the Junior Council to collect information, ideas, and perspectives related to the topic of sexual assault. Ten focus groups were conducted, with 267 participants representing all types of Coast Guard units. *Id.*

the lowest level but unwanted touching requires reporting.²⁸⁸ This confusion prompted a common recommendation from the focus groups: clarify the definition of sexual harassment and how it differs from or relates to sexual assault.²⁸⁹

Due to the needless confusion created by the artificial distinction between sexual harassment and sexual assault, Coast Guard policies and training need to be re-evaluated and updated to reflect the reality that sexual harassment is a part of the overall sexual-violence continuum. It is readily apparent that Coast Guard policy is drafted in a manner to view sexual harassment as discrimination and sexual assault as criminal conduct. This oversimplification of the nature of sexual harassment minimizes the fact that sexual harassment is also misconduct, and it can be criminal conduct as well.

The artificial distinction between sexual harassment and sexual assault should be immediately deleted from Coast Guard policy and training. Specifically, Article 3.B.2.b of the Civil Rights Manual, which states, “Sexual Harassment is not the same as Sexual Assault,” should be removed. All references to this distinction should also be removed from the annual mandated SHP and SAPR training modules. Not only should the substance of the mandated training be updated to reflect sexual harassment as part of the continuum of sexual violence, the method of delivery should be updated as well. Currently, this training is provided via an online module and does not allow interaction with subject-matter experts. The training should be combined and provided in a manner similar to the SAPWs, with a Sexual Assault Response Coordinator, a Civil Rights Representative, and a Judge Advocate facilitating the training. This format has proven successful in facilitating dialogue, increasing awareness, and clearing up confusion.

In addition to updating the Civil Rights Manual and the mandated training, the Coast Guard should update the Discipline and Conduct Manual to reflect the view that sexual harassment is misconduct. In particular, Article 2.B, titled “Sexual Harassment,” which currently falls under the “Discrimination” chapter, should be deleted. The Discipline and Conduct Manual should be updated with a stand-alone “Sexual Harassment” section that addresses sexual harassment as misconduct. A

²⁸⁸ *Id.* at 2.

²⁸⁹ *Id.* at 5.

proposed stand-alone section is included in the Appendix.²⁹⁰ This proposed section was drafted to define sexual harassment as offensive conduct rather than solely discrimination. In addition, this proposed section incorporates a lawful general order prohibiting sexual harassment as offensive conduct, thereby eliminating the necessity to prove intentional discrimination.

The recommendations above are immediate steps that can be taken in the near-term. To effectuate transformational change, and comprehensively combat sexual assault, the Coast Guard must incorporate the concept of sexual harassment as part of the sexual-violence continuum into its SAPR Strategic Plan. Unfortunately, sexual harassment is currently not explicitly addressed in the SAPR Strategic Plan.

VI. The Coast Guard Sexual Assault Prevention and Response Strategic Plan

The Coast Guard promulgated its first SAPR Strategic Plan on April 24, 2013.²⁹¹ The plan outlines four critical areas and establishes goals to eliminate sexual assault in the Coast Guard: Climate, Prevention, Response, and Accountability.²⁹² More specifically, in his foreword to the strategic plan, Admiral Papp states the plan to eliminate sexual assault will be accomplished by providing a strong culture, policies and procedures for prevention, education and training, response, victim support, intimidation-free reporting, fair and impartial investigations, and accountability.²⁹³ To implement this strategic plan, the Coast Guard chartered the SAPR MCO in June 2013.²⁹⁴ The MCO is tasked with maintaining, updating, tracking, and coordinating timely and effective

²⁹⁰ This proposed Sexual Harassment article was drafted with substantial assistance from Captain Steven Andersen, Commanding Officer, Legal Service Command, U.S. Coast Guard, and Lieutenant Commander Luke Petersen, Judge Advocate, District Eleven, U.S. Coast Guard.

²⁹¹ All Coast Guard Message, 197/13, 062012Z May 13, subj: The Coast Guard Sexual Assault Prevention and Response (SAPR) Strategic Plan.

²⁹² *Id.*

²⁹³ U.S. COAST GUARD, SEXUAL ASSAULT PREVENTION AND RESPONSE STRATEGIC PLAN 2013–2017, at 3 (24 Apr. 2013) [hereinafter COAST GUARD SAPR].

²⁹⁴ Memorandum from Deputy Commandant for Mission Support, to Captain Robert L. Smith, subject: U.S. Coast Guard Sexual Assault Prevention and Response (SAPR) Military Campaign Office (MCO) Charter (20 June 2013) [hereinafter DCMS SAPR MCO Charter].

completion of all activities listed in the SAPR Plan of Actions and Milestones (POAM).

Sexual harassment and its relationship to sexual assault are not specifically addressed in the strategic plan.²⁹⁵ The Introduction states, “[W]e must address all factors that enable this violent crime or impact our ability to prevent it.”²⁹⁶ Yet, sexual harassment is not included in the illustrative list of enabling factors.²⁹⁷ The first goal of the strategic plan addresses climate, and it mandates that the Coast Guard “[c]reate[s] a culture intolerant of sexual assault or behaviors that enable it.”²⁹⁸ In this section, sexual harassment is only addressed to ensure that incidents are properly classified as either sexual harassment or sexual assault.²⁹⁹ Similarly, sexual harassment is not addressed in the SAPR POAM with the exception of ensuring correct classification of incidents.³⁰⁰

Given the stated distinction between sexual harassment and sexual assault in the Civil Rights Manual, it is not surprising that sexual harassment is not directly addressed in the SAPR Strategic Plan or POAM. However, the mandate to “create a culture intolerant of sexual assault or behaviors that enable it” requires directly addressing sexual harassment.

The Coast Guard should study the Army’s SHARP program and execute a similar reorganization of sexual harassment and sexual assault prevention programs to provide for greater unity of effort. The Army has recognized sexual harassment as an enabler of sexual assault and integrated its sexual harassment and sexual assault prevention efforts into one program.³⁰¹ In December 2008, Secretary of the Army Pete Geren directed his Headquarters SAPR Office to restructure and integrate the Prevention of Sexual Harassment (POSH) office to form a new Sexual

²⁹⁵ Notably, sexual harassment and its relationship to sexual assault are not specifically addressed in the DoD’s SAPR Strategic Plan either. *See* U.S. DEP’T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE STRATEGIC PLAN (30 Apr. 2013).

²⁹⁶ COAST GUARD SAPR, *supra* note 293, at 7.

²⁹⁷ The enabling factors listed include poor leadership and command climate, alcohol abuse, predatory behavior, bystander inaction, and inadequate knowledge and education. *Id.*

²⁹⁸ *Id.* at 11.

²⁹⁹ *Id.* at 13.

³⁰⁰ U.S. COAST GUARD, SEXUAL ASSAULT PREVENTION AND RESPONSE STRATEGIC ACTION PLAN—PLAN OF ACTIONS AND MILESTONES (9 July 2013).

³⁰¹ *See supra* note 17.

Harassment/Assault Response and Prevention (SHARP) office.³⁰² Before this integration, the Equal Opportunity Office managed sexual-harassment complaints and POSH training for military members and the Army G-1³⁰³ managed the SAPR program.³⁰⁴

The Army integrated the POSH and SAPR offices after recognizing the relationship between sexual harassment and sexual assault.³⁰⁵ Specifically, the Army found that sexual harassment and sexual assault are often interrelated and exist along a sexual-violence continuum “in which acts of sexual harassment, if unchecked, may lead to acts of sexual assault.”³⁰⁶ The integration of these two offices now provides for a unity of effort between sexual harassment and sexual assault prevention efforts across the Army.³⁰⁷

Currently, the Coast Guard’s unity of effort in combating sexual assault is not maximized due to the separation of sexual harassment and sexual assault prevention efforts. To truly have a unity of effort, the Coast Guard must integrate these two efforts. This requires removing sole responsibility for sexual harassment prevention efforts from the Civil Rights Directorate and combining efforts with the Coast Guard’s SAPR Program Office. Given the relationship between sexual harassment and sexual assault, sexual harassment must be directly addressed to “create a culture intolerant of sexual assault or behaviors that enable it.” From a strategic perspective, the culture change and unity of effort required must start from the top of the organization. Accordingly, the Coast Guard must realign its organization to integrate sexual harassment and sexual assault prevention efforts.

³⁰² All Army Activities Message, 075/2009, 191404Z Mar 09, U.S. Dep’t of Army, subject: Sexual Harassment/Assault Response and Prevention (SHARP) Initiatives.

³⁰³ The Army G-1 develops, manages, and executes all manpower and personnel plans, programs, and policies across the Army. See *Deputy Chief of Staff, Army G-1*, U.S. DEP’T OF THE ARMY, <http://www.armyg1.army.mil> (last visited Mar. 18, 2014).

³⁰⁴ U.S. ARMY SEXUAL HARASSMENT/ASSAULT RESPONSE AND PREVENTION OFFICE, SHARP GUIDEBOOK 3 (Sept. 2013) [hereinafter SHARP GUIDEBOOK].

³⁰⁵ *Id.*; see also e-mail from Nate Evans, Program and Policy Specialist, Deputy Chief of Staff, Army G-1, U.S. Army, to author (Nov. 19, 2013, 15:57 EST) (on file with author). Secretary of the Army Geren discussed sexual harassment and sexual assault with subject-matter experts, to include discussions on the continuum of violence, from innuendo through sexual harassment to sexual assault before making the decision to integrate the Prevention of Sexual Harassment and SAPR offices. *Id.*

³⁰⁶ SHARP GUIDEBOOK, *supra* note 304, at 3.

³⁰⁷ *Id.*

VII. Conclusion

Sexual harassment is not a new problem, and it continues to be a problem as efforts to eradicate sexual harassment in the past three decades have proven ineffective. The GAO reports and DMDC statistics indicate that sexual harassment continues to be prevalent in the military. In addition, the higher levels of sexual harassment reported by GAO and DMDC plainly indicate that sexual harassment is underreported to the services' respective Equal Opportunity or Civil Rights offices.

Coast Guard leadership must recognize that sexual harassment remains an important issue that needs to be addressed. The strong correlations among organizational environment, sexual harassment, and sexual assault require a re-evaluation of sexual harassment prevention and response policies and training, and the culture that underlies these policies. Leadership should start by reframing the perspective through which sexual harassment and sexual assault are viewed. Specifically, the Coast Guard needs to eliminate the notions that sexual harassment is solely a discrimination issue and that the Coast Guard's Civil Rights program is solely responsible for sexual harassment prevention efforts. A re-evaluation of Coast Guard policies and training requires eliminating all references to the artificial distinction that "sexual harassment is not the same as sexual assault" and changing the training delivery to effectively facilitate discussion, increase awareness, and lessen confusion.

Sexual harassment is also a form of violence, a form of violence that falls along a continuum of sexual violence that leads to sexual assault. With this recognition that sexual harassment and sexual assault represent grades of sexual violence along a continuum, the sexual-violence continuum should serve as the conceptual model for addressing military sexual violence.

Sexual-assault prevention must start with addressing the lowest level of the sexual-violence continuum—sexual harassment. Current Coast Guard sexual-harassment policies and training provide an unworkable model for comprehensively preventing sexual assault. Rather than continuing to distinguish sexual harassment from sexual assault, the Coast Guard must embrace its operational principle of Unity of Effort³⁰⁸

³⁰⁸ U.S. COAST GUARD, COAST GUARD PUBLICATION 1, DOCTRINE FOR THE U.S. COAST GUARD 78–80 (Feb. 2014).

in addressing sexual harassment and sexual assault. The principle of Unity of Effort states that “[a]chieving successful outcomes requires positive leadership to ensure clear understanding of the objective and the role that each individual, unit, or organization is expected to play in meeting that objective.”³⁰⁹ Unity of effort in the mission to eradicate sexual assault requires changing the culture of treating sexual harassment and sexual assault as separate constructs and reframing the Coast Guard’s perspective to address the full continuum of sexual violence, starting with sexual harassment. Unity of effort also requires strategic change and organizational realignment; the Coast Guard’s sexual harassment and sexual assault prevention efforts must be integrated.

Reframing the Coast Guard’s perspective to address the full continuum of sexual violence is the type of transformational change that is sought by Coast Guard leadership to fight the sexual-assault problem. Vice Admiral Manson Brown, the Deputy Commandant for Mission Support, states in his SAPR POAM Charter that the campaign to address the scourge of sexual assault “will require innovation and new thinking to effect permanent and lasting organizational and cultural change” and “[e]lements of this change will likely require fundamental adjustments to our climate and culture, HR policies, training requirements, leadership focus, and accountability mechanisms.”³¹⁰ Dispensing with the Coast Guard’s current methods of addressing sexual harassment and sexual assault and viewing both within the sexual-violence continuum is a fundamental adjustment necessary to effect permanent and lasting organizational and cultural change.

³⁰⁹ *Id.* at 78.

³¹⁰ DCMS SAPR MCO Charter, *supra* note 294.

Appendix

Proposed Stand-Alone Sexual Harassment Article for Coast Guard Discipline and Conduct Manual, COMDTINST M1600.2

2.F Sexual Harassment

2.F.1 Policy

The Coast Guard is committed to maintaining a work environment free from sexual harassment and inappropriate behavior. All acts of sexual harassment are degrading to the offended individual and detrimental to the military profession. Commanding officers and officers in charge have a responsibility to investigate all allegations of sexual harassment and to take prompt and effective action. They must be aware of all options available to eradicate sexual harassment, to include discrimination complaint processes, administrative processes, and disciplinary measures under reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). Specific questions regarding holding offenders accountable under this Article shall be addressed to the command's servicing legal office.

2.F.2 Prohibitions

In support of this commitment, military personnel in the Coast Guard shall not:

- a. Commit sexual harassment, as defined in Article 2.F.3;
- b. Take reprisal action against a person who raises an allegation of sexual harassment, who assists another in raising an allegation of sexual harassment, or who provides information on an incident of alleged sexual harassment;

- c. Knowingly make a false accusation of sexual harassment; or
- d. While in a supervisory or command position, condone or ignore sexual harassment of which he or she has knowledge or should reasonably have knowledge.

The reasonable person standard, as defined in Article 2.F.3, shall be used to determine whether a violation of these provisions has occurred.

2.F.3

Definitions

- a. Reasonable person standard. An objective test used to determine if behavior meets the legal test for sexual harassment. The test requires a hypothetical exposure of a reasonable person to the same set of facts and circumstances; if such a person would find the behavior offensive, the test is met. The reasonable person standard considers the victim's perspective and does not rely upon stereotyped notions of acceptable behavior within that particular environment. The reasonable person standard also considers the Coast Guard's core values and customs of the service. Coast Guard members and civilian employees who model the Core Values and customs of the service do not engage in negative behaviors, such as sexual harassment, and do not condone those behaviors in others.
- b. Reprisal. In general, reprisal is taking or threatening to take an unfavorable personnel action or withholding or threatening to withhold a favorable personnel action, or any other act of retaliation, against a military member or civilian employee who raises an

allegation of sexual harassment, who assists another in raising an allegation of sexual harassment, or who provides information on an incident of alleged sexual harassment.

- c. Sexual Harassment. For purposes of this section, sexual harassment is offensive conduct that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:
- i. Submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; or
 - ii. Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or
 - iii. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile or offensive working environment. This definition emphasizes that workplace conduct, to be actionable as "hostile work environment" harassment, need not result in concrete psychological harm to the victim but rather need only be so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the work environment as hostile or offensive. Any person in a supervisory or command position who uses or condones any form of sexual behavior to control, influence, or

affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment. Similarly, any military member or civilian employee who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature in the workplace is also engaging in sexual harassment.

- d. Work Environment. The workplace or any other place that is work-connected, as well as the conditions or atmosphere under which people are required to work. “Work environment” is an expansive term for military members and may include conduct on or off duty, 24 hours a day. Examples of work environment include, but are not limited to, an office, an entire office building, a base or installation, ships, aircraft or vehicles, anywhere when engaged in official Coast Guard business, as well as command-sponsored social, recreational and sporting events, regardless of location.

2.F.4

Behaviors that Constitute Sexual Harassment

Sexual harassment is behavior that is unwelcome, sexual in nature, and connected in some way with a person’s job or work environment. A wide range of behaviors can meet these criteria and, therefore, constitute sexual harassment.

- a. Unwelcome behavior. Behavior that a person does not ask for and which that person considers undesirable or offensive. Since perceptions of “undesirable or offensive” may vary, a reasonable person standard from the perspective of the recipient of the unwelcome behavior is used to determine if the behavior constitutes

sexual harassment. In this context, all behavior that a recipient reasonably finds unwelcome should be stopped.

- b. Behavior sexual in nature. Context matters; common sense and an evaluation of the circumstances surrounding an allegation shall be used to determine whether behavior is sexual in nature. Behavior that is sexual in nature may be verbal, nonverbal, or physical contact. Below are examples of each type, but these are not exhaustive lists.
 - i. Verbal. Examples of verbal behavior sexual in nature may include telling sexual jokes; using sexually explicit profanity, threats, sexually oriented cadences or songs, sexual comments, questions about one's sexual history or life, whistling in a sexually suggestive manner, and describing certain attributes of one's physical appearance in a sexual manner. Verbal behavior sexual in nature may also include using terms of endearment, such as "honey", "babe", "sweetheart", "stud", "dear", or "hunk" towards others.
 - ii. Nonverbal. Examples of nonverbal behavior sexual in nature may include staring at someone (commonly referred to as "undressing someone with one's eyes"), leering, blowing kisses, winking, licking lips in a suggestive manner, thrusting hips to mimic sexual behaviors, and pointing towards or touching one's own genitalia. Other

examples include printed materials that are sexually oriented such as calendars, pictures, or cartoons; using sexually oriented screen savers on one's computer; or sending sexually oriented notes, letters, faxes, or e-mails.

- iii. Physical contact. Examples of physical behavior sexual in nature include touching, patting, pinching, bumping, grabbing, cornering, or blocking a passageway; kissing; and providing unsolicited massages, back, or neck rubs. These acts may also constitute sexual assault; commands shall contact CGIS, the local Sexual Assault Response Coordinator, and their servicing legal office when allegations of physical contact sexual in nature arise.

2.F.5 Accountability

The prohibitions in Article 2.F.2 above are punitive general and regulatory orders and apply to all military personnel individually. A violation of these provisions by military personnel is punishable under reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended).

2.F.6 Process to Address Allegations of Sexual Harassment

Commanding officers and officers in charge have a responsibility to investigate all allegations of sexual harassment and to take prompt and effective action. They must be aware of all courses of action available to them to deal with sexual harassment allegations. Those actions generally fall into three categories:

discrimination complaint processes, administrative processes, and the military justice process. These processes are not mutually exclusive, and two or all three of them may be pursued simultaneously. The actions taken by a command in a particular case will depend upon the severity of the conduct, the state of the evidence, the limits of the commander's authority, and other such factors. Specific questions regarding prosecuting offenders shall be addressed to the command's servicing legal office.

- a. Discrimination Complaint Processes: Coast Guard Civil Rights providers administer these processes, which mirror civilian processes for investigating and handling reports of discrimination. Reference (1), Coast Guard Civil Rights Manual, COMDTINST M5350.4 (series), provides detailed information on processing complaints of discrimination based upon gender to ensure the complainant obtains an appropriate remedy or redress for any wrong he or she may have suffered.
- b. Administrative Processes: Prompt, appropriate administrative action should be taken simultaneously with discrimination complaint processes with regards to sexual harassment offenders when a command has sufficient information to reasonably believe an incident has occurred. It is not necessary to await the completion of the discrimination-complaint or military-justice processes. Commands have a wide variety of actions available, which include but are not limited to informal or formal counseling, evaluation in performance reports, and formal performance reviews, which could lead to separation.

c. Military Justice Process:

- i. As described in paragraph 2.F.5 above, the prohibition of sexual harassment is a punitive general order. A violation of this prohibition is punishable as a violation of Article 92(1), Uniform Code of Military Justice (violation of or failure to obey a lawful general order or regulation).
- ii. Specific acts of sexual harassment may also include criminal offenses punishable under other provisions of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended). Sexual harassment is a specifically listed example of conduct amenable to prosecution under Article 93 of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801-946 (as amended), (Cruelty and maltreatment), in certain cases. However, considering the wide range of conduct that could be characterized as sexual harassment, the following articles of reference (a), Uniform Code of Military Justice, 10 U.S.C. § 801 – 946 (as amended), may have provisions suitable for prosecuting sexual harassment cases depending on the facts of the case:

UCMJ	
Article 78	Accessory after the Fact
Article 80	Attempt to Commit an Offense
Article 81	Conspiracy
Article 89	Disrespect to a Superior Commissioned Officer

Article 90	Assaulting a Superior Commissioned Officer
Article 91	Insubordinate Conduct toward a Warrant Officer, Noncommissioned Officer, or Petty Officer
Article 92	Failure to Obey an Order or Regulation
Article 93	Cruelty and Maltreatment
Article 120	Rape and Sexual Assault Generally
Article 120a	Stalking
Article 120c	Other Sexual Misconduct
Article 125	Sodomy
Article 127	Extortion
Article 128	Assault
Article 133	Conduct Unbecoming an Officer
Article 134	Twelve Specifications, including: Indecent Acts, Assault, Exposure or Language; Communicating a Threat; Depositing or Causing to be Deposited Obscene Matters in the Mail; Disorderly Conduct; Fraternization; Misprision of a Serious Offense; and Soliciting Another to Commit an Offense

As a violation of a general order is a felony-level offense under the UCMJ, allegations of sexual harassment should be reported to the local Coast Guard Investigative Service (CGIS) office in accordance with Coast Guard Investigative Service Roles and Responsibilities, COMDTINST M5520.5F. However, sexual harassment investigations will normally be conducted at the unit level unless the circumstances indicate a specific need for CGIS assistance

**SERIOUS OFFENSE: CONSIDERING THE SEVERITY OF
THE CHARGED OFFENSE WHEN APPLYING THE
MILITARY'S PRE-TRIAL CONFINEMENT RULES**

MAJOR RYAN W. LEARY*

I. Introduction—An Empty Chair

Where is he? The courtroom clock chews through the minutes, and when the start time for the court-martial arrives, the Accused's chair is empty. The government counsel look at the Accused's chair, glance at the Accused's commander, share a knowing look with defense counsel, and look back at the empty chair. On the second day of the trial of Sergeant (SGT) Kirk Evenson, it becomes apparent to all parties in the courtroom that the Accused will not be present to face charges of raping and sexually assaulting a minor child. After a brief hearing outside the presence of the panel, the military judge allows the government to proceed with its case against SGT Evenson *in absentia*. Following the close of evidence, an enlisted panel convicts SGT Evenson of raping, sodomizing, and sexually assaulting a minor child, and subsequently sentences him to confinement for life without the possibility of parole.¹

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¹ This assertion is based on the author's recent professional experiences as the Brigade Judge Advocate, 4th Infantry Brigade Combat Team, 1st Infantry Division, Fort Riley Kansas from June 6, 2010 to July 10, 2012 [hereinafter Professional Experiences]. As the co-counsel for the Government in *United States v. SGT Kirk Evenson*, I was involved in and present during all facets of the case. I personally participated in the presentation of evidence against Sergeant (SGT) Evenson and was in the courtroom, at the counsel's table, when SGT Evenson failed to report to the second day of his trial and when the panel delivered its findings and sentencing in this case.

The day after SGT Evenson was convicted of these heinous crimes, he was discovered hiding-out in a nearby hotel. In short order, countless local and federal law enforcement officers descended upon the hotel. In a scene befitting an action movie, police cars and emergency vehicles littered the hotel parking lot, snipers leveled their rifle scopes on the hotel windows, a special weapons and tactics (SWAT) team clad in body armor hustled into their positions, and the heads of several agencies huddled in a makeshift command center in the hotel lobby to prepare for the ensuing confrontation.² After a protracted stand-off, law enforcement officers cut a hole in the hotel door and forced their way into SGT Evenson's room.³ The officers, armed with MP5s and side-arms, tactically cleared the room and demanded SGT Evenson peacefully submit himself to arrest.⁴ But SGT Evenson resisted, and he was shot twenty-one times, dying as a result.⁵ The book abruptly closed on SGT Evenson's life, and the questions began to mount. How could this happen? Was this result avoidable? Why was SGT Evenson not placed in pre-trial confinement when facing such serious charges?⁶

The purpose of this article is to examine the current Rules for Courts-Martial (RCM) as those rules pertain to pre-trial confinement in cases like SGT Evenson's. The circumstances surrounding SGT Evenson's trial and his ultimate fate serve as a vehicle for a broader discussion of how the military pre-trial confinement system, when

² *Id.* While traveling to Denver, Colorado, during time off from work for Labor Day Weekend, the lead Criminal Investigative Division (CID) agent contacted the author and informed me that they located SGT Evenson at the Holiday Inn Express in Abilene, Kansas. As Abilene was along the route to Denver, I requested access to the scene in order to provide local and federal law enforcement agents with any background information they might need in their efforts to defuse the stand-off. I was allowed to enter the hotel lobby and received a briefing from the tactical commander.

³ See Captain James E. Jones, Army Regulation 15-6 Report of Investigation on the Circumstances Surrounding the Death of Sergeant Kirk Evenson exhibit L (19 June 2012) [hereinafter CPT Jones, AR 15-6 Investigation] (on file with the Admin. Law Div., Office of the Staff Judge Advocate, 1st Infantry Div., Fort Riley, Kan.).

⁴ *Id.*

⁵ See *id.*; see also Associated Press, *AWOL Riley Sergeant Killed During Standoff*, ARMY TIMES (Sep. 2, 2011, 7:27 PM), <http://www.armytimes.com/news/2011/09/ap-awol-riley-sergeant-killed-during-standoff-090211/>; *Ft. Riley Soldier on Trial for Child Rape Killed in Standoff*, WIBW (Sep. 1, 2011, 7:57 PM), <http://www.saljournal.com/news/story/soldier-killed-9-1-11>; *AWOL Fort Riley Soldier Dies After Police Standoff in Abilene*, SALINA POST (Sep. 2, 2011), <http://salinapost.com/2011/09/02/awol-fort-riley-soldier-dies-after-police-standoff/>.

⁶ See *Soldier Killed in Standoff Hadn't Been Confined*, SALINA J. (Sep. 2, 2011, 3:03 AM), <http://www.saljournal.com/news/story/soldier-killed-9-1-11>.

compared to the civilian federal system, is not properly structured to deal with cases in which an accused is facing serious criminal charges that carry with them the potential for severe punishment. To fully explore this question, this article will: (1) identify the precise issue, and commander's dilemma, when an accused is facing serious criminal charges; (2) look at the history of the military's system of pre-trial confinement; (3) examine that system's constitutional boundaries; (4) compare the military system to the federal bail system; (5) address the arguments against changing the military system to mirror the current federal bail system; and consequently, (6) propose changes to the military pre-trial confinement rules.

Based upon the analysis described above, this article shows why it is necessary for Congress and the President to amend the Uniform Code of Military Justice (UCMJ) and the RCMs pertaining to pre-trial confinement in a manner that reflects current federal pre-trial restraint law, particularly when dealing with cases like SGT Evenson's. The current military pre-trial confinement rules fail to recognize or appreciate the risk that service members who are charged with serious crimes and facing significant punishment are more likely to flee when compared to a service member charged with a lesser crime. To that end, the military-justice system should presume, for certain serious offenses, that absent pre-trial confinement an accused will either flee or harm members of the surrounding community. Such a presumption would assist commanders in preventing an unfortunate calamity, like that which occurred in SGT Evenson's case.

II. Why Was SGT Evenson Not Confined?

As a preliminary matter, it is instructive to consider how SGT Evenson's absence at trial, and the command's decision to not place him in pre-trial confinement, developed. This initial discussion is necessary to fully understand a commander's dilemma and the issues at stake when considering pre-trial confinement for a service member who is accused of serious criminal misconduct.

On April 27, 2011, the government preferred three charges containing a total of twenty separate specifications against SGT Evenson,

including, most notably, rape and sodomy of a minor child.⁷ At the time of preferral and at several other junctures throughout the process, government counsel and commanders discussed whether to place SGT Evenson in pre-trial confinement.⁸ Sergeant Evenson's commanders expressed an interest in pre-trial confinement, but the only fact supporting such confinement was the serious nature of the charges SGT Evenson was facing, as reflected in the potential punishment that could result from a conviction.⁹

Under current law, a commander's authority to confine a service member before trial is described in RCM 305.¹⁰ In relevant part, RCM 305 states that a commander may confine a service member before trial when, "confinement is necessary because it is foreseeable that: (a) the prisoner will not appear at a trial, pretrial hearing, or investigation, or (b) the prisoner will engage in serious criminal misconduct; and (iv) less severe forms of restraint are inadequate."¹¹

While it is true that Rule 305's discussion includes, as a consideration, the nature and the circumstances of the charged offense, *United States v. Heard*, discussed below, prohibits commanders from placing a service member in pre-trial confinement on the basis of the charged offense alone.¹² Rather a commander's authority to place an accused in confinement depends on a finding that the accused will either flee or commit additional serious misconduct.¹³ And the indirect reference to an offense's seriousness in the (non-binding) RCM discussion does not go far enough in linking the nature of the charged offenses and its potential punishment to the likelihood that an accused will absent himself from trial.

In SGT Evenson's case, there was no evidence, beyond the nature of the charged offenses, to suggest that he would flee during the trial

⁷ See CPT Jones, AR 15-6 Investigation, *supra* note 3, exhibit I; *see also* Professional Experiences, *supra* note 1.

⁸ See CPT Jones, AR 15-6 Investigation, *supra* note 3, exhibit H1; *see also* Professional Experiences, *supra* note 1.

⁹ See CPT Jones, AR 15-6 Investigation, *supra* note 3, exhibit H1; *see also* Professional Experiences, *supra* note 1.

¹⁰ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 305 (h)(2) (2012) [hereinafter MCM].

¹¹ *Id.*

¹² See 3 M.J. 14 (C.M.A. 1977); *see also* MCM, *supra* note 10, R.C.M. 305 (h)(2) discussion.

¹³ *Heard*, 3 M.J. at 14; *see also* MCM, *supra* note 10, R.C.M. 305 (h)(2) discussion.

process or commit additional serious misconduct. More specifically: (1) SGT Evenson's family lived within the local area; (2) SGT Evenson remained in his unit and did not absent himself once he became aware of the potential charges against him; (3) SGT Evenson observed the terms of a military restraining order put in place by his commander; and (4) SGT Evenson was present through all phases of the pre-trial process, including two Article 32 investigative hearings at which the government presented compelling evidence of his guilt.¹⁴ In light of these facts, commanders at various levels felt they did not possess the authority to place SGT Evenson in pre-trial confinement because they could proffer no evidence that SGT Evenson would flee or commit additional offenses, aside from the common sense understanding that someone facing a potential life sentence has a greater incentive to flee than someone facing a shorter period of confinement.¹⁵ But SGT Evenson's commanders' worst fears were realized on day two of his trial when they saw an empty chair at the defense table.

The factual circumstances that those commanders faced illustrate the current gap existing within the pre-trial confinement rules. Under the current system, a commander is left with little choice but to accept the risk foisted upon that commander by a pre-trial confinement system that fails to acknowledge the obvious: a person facing life is more likely to flee than a person who is not.¹⁶

III. History of Pre-Trial Confinement in the Military

The military legal system, not unlike the federal civilian system, guards against unnecessary detention of an accused before trial and favors release from pre-trial restraint while pending trial.¹⁷ An

¹⁴ CPT Jones, AR 15-6 Investigation, *supra* note 3, exhibit H1; *see also* Professional Experiences, *supra* note 1. Sergeant Evenson faced two Article 32 investigations because CID discovered evidence of additional offenses after the conclusion of the initial hearing. In order to limit confusion at trial, the government decided to dismiss all charges without prejudice and prefer both the original charges and the new charges all on one charge sheet.

¹⁵ *Id.*

¹⁶ Commanders must also be cautious not to aggressively seek pre-trial confinement for service members charged with serious criminal offenses. If a magistrate releases a service member from pre-trial confinement at the seven-day review, a commander may not revisit that decision again without evidence of new misconduct. *See* MCM, *supra* note 10, R.C.M. 305(i)(2)(E).

¹⁷ *See* UCMJ art. 10 (2012); *see also* Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976).

examination of the development of the military pre-trial confinement rules provides a better understanding of the foundational principles of pre-trial confinement in order to determine: (1) if the rules, as they exist, provide sufficient means for a commander to deal with a case like SGT Evenson's; and (2) what are the limitations on any proposed change to those rules.

A. Pre-trial Confinement Prior to the Uniform Code of Military Justice (UCMJ)

The limitations on conditions permitting the government to place an individual in confinement pending trial trace back to the first American Articles of War, which were adopted in 1775.¹⁸ The Articles of War contain three major principles relating to pre-trial restraint in the military: (1) deference to the commander regarding decisions of pre-trial confinement;¹⁹ (2) abhorrence for an unreasonably long period of confinement before trial;²⁰ and (3) the primacy of the risk of flight as the reason justifying restraint.²¹ These three themes play an important part in the later formation of pre-trial confinement rules under the UCMJ. Furthermore, these early principles are the foundation for the later discussion herein of how our current system should be re-structured to

¹⁸ See generally COLONEL WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 110 (2d ed. 1920), reprinted in *American Articles of War of 1775*, arts. XLI, XLII [hereinafter *1775 Articles of War*]; see also Major Richard R. Boller, *Pretrial Restraint in the Military*, 50 MIL. L. REV. 71, 91–92 (1970) (providing a more in-depth look at the history of pre-trial restraint generally as well as a detailed examination of the history of military pre-trial confinement).

¹⁹ See WINTHROP, *supra* note 18, at 113–25. Winthrop discusses how in the case of officers, commanders had vast discretion to determine whether to arrest the officer pending trial, the limits of an officer's arrest, whether to request the accused officer turn in his sword, and whether to discontinue arrest. *Id.* In the case of an enlisted service member, the commander enjoyed a fair degree of discretion when deciding whether to terminate confinement based upon the commander's assessment that the facts merit a trial by court-martial, or when a court-martial cannot be assembled within a reasonable period of time. *Id.*

²⁰ See *1775 Articles of War*, *supra* note 18, at 953 (stating “[n]o officer or soldier who shall be put in arrest or imprisonment, shall continue in his confinement more than eight days, or till such time as a court-martial can be conveniently assembled.”).

²¹ See WINTHROP, *supra* note 18, at 113–14, 125. Winthrop discusses the theory that an officer's commission served as a form of bail, thereby preventing an officer from being required to be placed under arrest. *Id.* By contrast, Winthrop articulates that the early Articles of War viewed the only way to guarantee the presence at trial of an enlisted service member, not possessing a commission or any such value to offer, was to place the enlisted service member in confinement pending trial. *Id.* at 123.

deal with cases involving service members facing serious criminal charges.

B. Pre-trial Confinement Codified in Military Law

In 1950, Congress adopted the UCMJ, which has endured as the single consolidated source of military law.²² The UCMJ's somewhat ill-defined articulations regarding pre-trial are refined by the RCMs established within the *Manual for Courts-Martial (MCM)*.²³ In 1921, the *MCM* created two separate factors that a commander could consider when determining whether to confine a service member before trial: (1) seriousness of the offense; and (2) the necessity of preventing the accused's escape.²⁴ Subsequent editions of the *MCM* maintained these same conditions until 1984, when, based upon the Court of Military Appeals (CMA) decision in *United States v. Heard* (discussed in more detail below), the President made dramatic changes to the *MCM*'s rules and procedures governing pre-trial confinement.²⁵ The *MCM* no longer authorized a commander to confine a service member before trial based upon the serious nature of the charges alone.²⁶ Under RCM 305 of the 1984 *MCM*, commanders were only authorized to confine a service member when, "(a) the prisoner will not appear at a trial, pretrial hearing, or investigation, or (b) the prisoner will engage in serious criminal misconduct; and (iv) less severe forms of restraint are inadequate."²⁷ The serious nature of the charged offense, no longer a stand-alone condition for confinement, instead must be combined with some other evidence indicating the accused will either flee or commit additional serious misconduct prior to trial.²⁸

The rules for confining a service member prior to trial present in the 1984 *MCM* were the same rules in place in 2011 when SGT Evenson's

²² See generally 10 U.S.C. §§ 801–846 (2012).

²³ See *MCM*, *supra* note 10, R.C.M. 305 (reviewing the current rules pertaining to pre-trial confinement in the military).

²⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. V, ¶ 46 (1921); see also *Boller*, *supra* note 18, at 96 ("Such confinement may not be imposed unless actual restraint is deemed necessary to insure the presence of the accused at the court-martial or the offense allegedly committed was a serious felony.").

²⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984); see also *United States v. Heard*, 3 M.J. 14 (C.M.A. 1977).

²⁶ *MCM*, *supra* note 24, R.C.M. 305(h)(2)(B); see also *Heard*, 3 M.J. at 14.

²⁷ *MCM*, *supra* note 24, R.C.M. 305(h)(2)(B).

²⁸ *Id.* R.C.M. 305(h)(2)(B) discussion.

commanders had to decide the appropriate course of action, and they are the same rules that exist in the current version of the *MCM*.²⁹ In limiting the circumstances in which a Commander may seek to confine a service member, the *MCM* drafters have shifted the pre-trial confinement balance away from commanders' discretion and toward the release of the accused prior to trial.

Considering the increased focus and interest in prosecuting sexual-assault crimes within the military, cases where service members face serious charges and potentially severe punishments are likely to increase.³⁰ Thus, it is worth examining whether it is feasible and desirable to shift the pretrial confinement balance back to a position somewhere between the vast discretion available to commanders under the Articles of War and narrow discretion allowed to commanders in the present version of the pre-trial confinement rules.

IV. Constitutional Limitations on Pre-Trial Confinement in the Military

As noted above, the CMA imposed constraints on a commander's authority to place service members in confinement. By examining the boundaries these constraints create, it becomes possible to ensure that any proposed change does not violate the constitutional rights afforded an accused. Specifically, the military pre-trial confinement system developed clear constitutional limitations in the late 1970s and early 1980's when the Supreme Court and military courts struggled with the question of what rights must be afforded an accused when considering detention prior to trial.

A. *Gerstein v. Pugh*—Probable Cause and Magistrate Review Requirements for Pre-Trial Confinement

In 1975, the Supreme Court decided the case of *Gerstein v. Pugh* and the issue of whether the Constitution requires a probable-cause

²⁹ Compare *MCM*, *supra* note 25, R.C.M. 305(h)(2)(B), with *MCM*, *supra* note 10, R.C.M. 305(h)(2)(B).

³⁰ See Nancy Gibbs, *Sexual Assaults on Female Soldiers: Don't Ask, Don't Tell*, *TIME* (Mar. 8, 2010), <http://www.time.com/time/magazine/article/0,9171,1968110,00.html>; see also Leslie Bentz, *Congresswomen Push for Tougher Measures Against Sexual Abuse in the Military*, *CNN* (Oct. 5, 2012), <http://www.cnn.com/2012/10/04/politics/military-assaults-congresswomen/index.html>.

determination before a person may be confined before trial based solely on criminal information filed by the prosecutor.³¹ At the time, the Court decided *Gerstein*, defendants in Florida were not authorized a preliminary hearing on detention after the prosecutor filed the criminal information.³² But the Court rejected this construction.³³

Pursuant to *Gerstein*, police officers are permitted to make a probable-cause determination for the initial arrest and the brief detention required to comply with the administrative requirements of that arrest.³⁴ Once an individual is in custody, however, the Court recognized that there are no longer concerns that the defendant will flee or commit additional crimes, and the Fourth Amendment requires an increased burden on the government to continue post-arrest detention.³⁵ The *Gerstein* Court identified the magistrate's review as sufficient to meet this increased post-arrest burden.³⁶ Therefore, based on the Supreme Court's interpretation of the Fourth Amendment, as applied to pre-trial detention cases, the basic constitutional requirements afforded an accused confined before trial are: (1) a determination that there is probable cause to conclude the person committed the charged offense; and (2) a review of this determination by a neutral magistrate.

B. *Courtney v. Williams*—*Gerstein* Applied to the Military Pre-Trial Confinement System

In 1976, the CMA heard the case of *Courtney v. Williams* and had occasion to apply the Supreme Court's then-recent ruling in *Gerstein* to military cases.³⁷ In *Courtney*, the accused challenged the legality of his pre-trial confinement, claiming that the detention violated his rights under the Fifth Amendment's Due Process Clause.³⁸ The *Courtney* court

³¹ 420 U.S. 103, 105 (1975).

³² *Id.*

³³ *Id.* at 111 (citing *Cupp v. Murphy*, 412, U.S. 291 (1973)).

³⁴ *Id.* at 113.

³⁵ *Id.*

³⁶ *Id.*

³⁷ 1 M.J. 267 (C.M.A. 1976).

³⁸ *Id.* at 268–70. The accused in *Courtney* was pending trial based upon a charge of unauthorized absence. While awaiting trial, the accused allegedly committed an assault and his command subsequently placed him in pre-trial confinement and did not afford him a meaningful opportunity to respond to the detention decision. A few days after the accused's command confined him, the convening authority determined that there was no "objective basis" for continuing detention and released the accused from confinement.

determined that *Gerstein*'s requirements for a probable-cause determination by a neutral and detached magistrate was equally applicable to the military systems, identifying a two-part test for determining if an accused's pre-trial detention of an accused complied with the Fourth Amendment.³⁹ The *Courtney* court concluded that a neutral and detached magistrate is required to decide: (1) whether probable cause exists to detain a service member; and (2) whether an accused should be detained.⁴⁰ Notwithstanding the *Courtney* court's articulation of the principle that pretrial confinement is only appropriate in cases where an accused service member *should* be detained, it fell short of describing the threshold the government must meet at a magistrate's hearing to reach that standard.⁴¹

C. *United States v. Heard*—When Should an Accused Be Detained Prior to Trial

In 1977, the CMA offered an answer to the question left unanswered by the *Courtney* court.⁴² In *United States v. Heard*, the accused was pending court-martial for thirteen specifications of forgery, four specifications of making false statements, and one specification of wrongful appropriation.⁴³ Heard's commander placed him in pretrial confinement on four separate occasions and admitted doing so on two of those occasions because Heard was a "pain in the neck."⁴⁴ The *Heard* court reaffirmed its prior ruling in *Courtney*, which indicated that the government *can* place an accused in pre-trial confinement when there is probable cause to believe: (1) an offense has been committed; and (2) the accused committed it.⁴⁵ The court then went on to analyze the issue of when the government *should* place an accused in pre-trial confinement.⁴⁶

The court began its analysis by looking to pre-trial confinement rules contained in the 1968 MCM, which stated, "[c]onfinement will not be

³⁹ *Id.* at 270; *see also* UCMJ art. 9d (2012) (stating "no person may be ordered into arrest or confinement except for probable cause").

⁴⁰ *Courtney*, 1 M.J. at 270.

⁴¹ *Id.*

⁴² *United States v. Heard*, 3 M.J. 14 (C.M.A. 1977).

⁴³ *Id.*

⁴⁴ *Id.* at 16.

⁴⁵ *Id.* at 18.

⁴⁶ *Id.*

imposed pending trial unless deemed necessary to ensure the presence of the accused at the trial or because of the seriousness of the offense charged.”⁴⁷ The government sought a literal reading of the *MCM* so as to allow commanders to confine service members based upon the seriousness of the charged offense alone.⁴⁸ The court, however, refused to apply such an interpretation citing the presumption of innocence and stating, “unless confinement prior to trial is compelled by a legitimate and pressing social need sufficient to overwhelm the individual’s right to freedom given the fact probable cause exists to believe he has committed a crime, restrictions unnecessary to meet that need are in the nature of intolerable, unlawful punishment.”⁴⁹ Citing several cases and secondary sources, the court recognized two reasons that rise to the level of overwhelming an accused’s right to freedom prior to trial: (1) ensuring the accused’s presence at trial; and (2) the accused’s commission of serious criminal misconduct.⁵⁰

The President changed the pre-trial confinement rules in the 1984 *MCM* to reflect the CMA’s decisions in *Courtney* and *Heard*.⁵¹ As noted above, this change prevented commanders from considering the serious nature of the charged offense as a stand-alone justification for confining a service member before trial. Under the new rules, commanders must now be able to articulate a belief that a service member facing serious charges will either flee from his court-martial proceeding or will commit additional serious criminal misconduct.⁵² In many cases, especially those offenses hinging on the credibility of victim witness testimony, a service member who commits a serious offense will not exhibit any other signs of becoming a flight risk at the early stages of the lengthy trial process. Because the victim may be unable to endure the stress of the process and testify against the accused at trial, an accused, like SGT Evenson, may delay his decision to flee until after the point when the government demonstrates the ability to succeed at trial. Unfortunately for the accused service member’s commander in these types of cases, it is too late to entertain the idea of pre-trial confinement at the moment the accused finally manifests his intent to flee.

⁴⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. V, ¶ 20c (1968).

⁴⁸ *Heard*, 3 M.J. at 20.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *MCM*, *supra* note 10, R.C.M. 305 analysis.

⁵² *Id.* R.C.M. 305(h).

D. *United States v. Salerno*—Future Serious Criminal Activity as a Basis for Confinement and Required Procedural Protections

In 1987, the Supreme Court examined a due-process challenge to the federal pre-trial confinement system in *United States v. Salerno*.⁵³ In *Salerno*, two federal defendants challenged the constitutionality of the Bail Reform Act of 1984 (BA) on the ground that the BA violated the constitutional guarantee of due process by imposing impermissible punishment before trial.⁵⁴ In particular, the defendants claimed that the government's interest in preventing future crime under the BA was insufficient to support the infringement on liberty associated with confinement prior to trial.⁵⁵ The Court, however, upheld the BA as constitutional because of the government's compelling regulatory interest in community safety and the narrow application of the BA based upon the procedural protections available to defendants facing pre-trial detention.⁵⁶

The defendants in *Salerno* did not dispute the authority of the government to place an individual in confinement who exhibit a risk of flight before trial; instead they focused on the government's ability under the BA to confine an individual to prevent potential future criminal activity.⁵⁷ The Court, in its decision, recognized the legitimacy and compelling nature of the government's interest in protecting the community from potential criminal activity, which is furthered by the BA.⁵⁸

Notwithstanding the government interest in preventing future misconduct, the Court noted the importance of the procedural protections present in the BA that ensure individuals who are denied bail are actually those who present a risk of flight or future criminal misconduct.⁵⁹ The Court outlined specifically how defendants facing confinement under the BA may avail themselves of the following procedural protections: (1) an

⁵³ 481 U.S. 739 (1987).

⁵⁴ *Id.* at 746. The Court also examined and rejected the defendant's argument that the BA violated the Eighth Amendment's ban on excessive bail. *Id.* at 752. Whether the military's pre-trial confinement system implicates Eighth Amendment protections is a question outside the scope of this article.

⁵⁵ *Id.* at 748–49.

⁵⁶ *Id.* at 748.

⁵⁷ *Id.*

⁵⁸ *Id.* at 750.

⁵⁹ *Id.*

adversarial hearing; (2) a clear and convincing evidentiary burden, which ultimately must be borne by the government; and (3) and appellate review of the decision to detain.⁶⁰

The Court's decision in *Salerno* provides two important conclusions relevant to the military's pre-trial confinement regime: (1) a rebuttal presumption of the accused's flight risk or likelihood that the accused will commit further serious future misconduct is capable of withstanding constitutional scrutiny; and (2) prior to adopting such a presumption, the military must ensure sufficient procedural protections are also adopted to protect the rights of all accused.

V. Applying Current Federal Bail System Principles to Military Pre-Trial Confinement Rules

With the constitutional limitations of pre-trial confinement identified, the question becomes how to change the RCM to handle cases where an accused is facing serious charges and severe punishment. These cases, by their nature, carry different risks than a standard court-martial and, as such, should be afforded special consideration when determining the issue of pre-trial confinement. By way of analogy, we can look to the federal bail system, which specifically addresses the issue of how to handle pre-trial detention of a federal defendant facing serious charges and severe punishment.⁶¹ After examining the federal system, it is important to consider arguments against this proposed change before examining its practical application to the military.

A. The Bail Reform Act—Rebuttable Presumption Detention is Appropriate for Serious Crimes

The BA is the federal statute that provides the procedure for determining what level of pre-trial restraint is appropriate for federal

⁶⁰ *Id.* at 750–52

⁶¹ In *Courtney*, the Court of Military Appeals refers to the federal bail system by analogy when discussing the question of whether a commander can meet the burden of showing an accused service member should be confined prior to trial. The court specifically stated, “[b]asically, a determination that probable cause exists only confirms that a person could be detained, not that he should be detained. Assuming that he could be detained, the bail procedures in the civilian community would then be applicable.” *Courtney v. Williams*, 1 M.J. 267, 270–71 (C.M.A. 1976).

criminal defendants.⁶² Notwithstanding the limitations placed on pre-trial restraint for federal defendants, the federal criminal system recognizes the need to create a special category for defendants facing certain types of serious crimes and certain levels of punishment.⁶³ The BA accounts for the nexus between a defendant who is accused of committing a serious crime and the increased risk that defendant will flee or commit additional serious crimes. In recognition of this risk, the BA creates a rebuttable presumption that there is no set of conditions that will assure the presence of a defendant at trial and protect the safety of the community in the case of a defendant accused of certain crimes (e.g., certain drug offenses, terrorism, human trafficking, and crimes involving a minor victim).⁶⁴

The practical effect of this rebuttable presumption is to deny bail to a defendant accused of a serious crime unless the defendant rebuts the presumption of flight or additional serious misconduct. The BA's rebuttable presumption is consistent with the constitutional limitations on pre-trial restraint: (1) the BA does not permit the government to place an individual in pre-trial detention based upon a presumption of guilt but rather identifies the practical and realistic circumstance that defendants properly charged with certain offenses are far more likely to flee from the judicial process or commit additional misconduct than would be the case for a defendant accused of committing a minor crime; (2) the BA provides the defendant with an opportunity to present evidence that counters the presumption that he presents either a flight risk, or threat of additional serious misconduct; and (3) the rebuttable presumption does not guarantee confinement because the government still bears the

⁶² Bail Reform Act, 18 U.S.C. §§ 3141–3150 (2012). This act contains the same basic foundational elements as RCM 305: (1) a preference for releasing a defendant from detention prior to trial; (2) a magistrate's review; (3) the requirement that the government show that detention is required either to assure the appearance of the defendant or protect the safety of individuals in the community; and (4) a graduated approach to detention where conditions placed upon an individual's release from detention are considered prior to detaining a defendant prior to trial. *See id.* § 3142(b)–(c).

⁶³ *See* S. REP. 98-225, at 6–7 (1983). In this report, the U.S. Senate identifies the risk associated with releasing certain defendants accused of serious offenses based upon the likelihood of flight or recidivism and includes specific statistics. As an example, the Senate report indicated that, “[a]mong defendants released on surety bond, which under the District of Columbia Code, like the Bail Reform Act, is the form of release reserved for those defendants who are the most serious bail risks, pretrial re-arrest occurred at the alarming rate of twenty-five percent.” *Id.* at 6.

⁶⁴ 18 U.S.C. § 3142(e)(3).

ultimate burden of proving to a magistrate that confinement is appropriate for each individual defendant.⁶⁵

B. Counterarguments to Implementing the Bail Reform Act's Rebuttable Presumption to the Military System.

Applying a similar rebuttable presumption to the military pretrial confinement system would be a method of reducing the inherent risk associated with service members facing serious charges. But there are two major arguments against changing the current system in favor of the rebuttable presumption: (1) it would infringe upon the rights of service members who would be confined in a manner that outweighs the benefit in decreased flight risk and community harm; and (2) including a rebuttable presumption in the military pre-trial confinement rule provides commanders with the authority to summarily confine service members accused of such an offense without a proper check on that authority. While both of these are valid concerns, a deeper analysis of the issue of pre-trial confinement in the military suggests that these arguments are overwhelmed by the greater need to prevent the consequences of SGT Evenson's case.

1. The Current Pre-Trial Confinement Does Not Adequately Protect the Full Rights of the Accused and Other Individuals

The basic, and perhaps, the most compelling argument against changing the military pre-trial confinement system is that including a rebuttable presumption is too great an encroachment upon the rights of an accused service member. Such an argument, however, fails to fully recognize the panoply of consequences resulting from an accused service

⁶⁵ See *United States v. Portes*, 786 F.2d 758 (7th Cir. 1985). The *Portes* court discusses the process of burden shifting that occurs when the government asserts the BA's rebuttable presumption. In maintaining the presumption of a defendant's innocence, the BA's rebuttable presumption operates as a burden of production, whereby the defendant produces evidence that he will not flee or pose a threat to the community. *Id.* at 764. Once the defendant meets that burden of production, the rebuttable presumption still exists as a factor for the magistrate to consider when deciding whether the government has met the burden of proving by clear and convincing evidence that a no condition or set of conditions exists to ensure the presence of the defendant and safety of the community. *Id.*

member's decision to either flee before trial or commit additional serious misconduct.

On one side of the balancing sheet, there are two possible scenarios for an accused who is confined prior to trial under a rebuttable-presumption model. In the least concerning case the accused will be found guilty at trial and sentenced to confinement, and will, consequently, receive credit towards his sentence for the time spent in pre-trial confinement.⁶⁶ In its worst case, a service member accused of a serious crime will be confined prior to trial but will be released upon an acquittal. One must concede that any infringement upon the rights of an individual should be avoided whenever possible; however, such an argument fails to fully examine the other side of the balance sheet. The *Salerno* Court validated the government's interest in using pre-trial confinement to protect the community from harm. Sergeant Evenson's case serves as a stark example of the risks to the community, which includes the accused, when commanders are unable to use the same tools available to the government under the BA.

Under this full calculus, it becomes apparent why the military pre-trial confinement system must recognize, appreciate, and mitigate the true risk existing in cases where an accused is charged with a serious offense. By changing the military pre-trial confinement system to better reflect the current federal system, a service member's rights will be guaranteed the same level of protections as currently exist within the civilian federal system. Further in a culture prepared to sacrifice many rights and freedoms in service to our nation, any rights that service members will sacrifice under this proposed system are outweighed by the government's interest in protecting the rights of service members, families, and victims that were lost in the outcome of SGT Evenson's case.

2. *United States v. Freitas—Bail Reform Act's Rebuttable Presumption Does Not Provide the Government with Excessive Authority*

It is difficult to examine this issue in the context of military justice, as no such presumption has ever existed within our system; however, there are cases within the federal system that have examined the rebuttable presumption of the BA. In *United States v. Freitas*, the

⁶⁶ See *United States v. Allen*, 17 M.J. 126, 126 (C.M.A. 1984).

defendant was placed in pre-trial detention based, in part, upon probable cause that the defendant committed a crime, which triggered the BA's rebuttable presumption, but the defendant argued that the BA's rebuttable presumption effectively denied him an opportunity for an individualized analysis of his bail eligibility and that the presumption, therefore, effectively denied bail to an entire class of persons.⁶⁷

The court ultimately rejected the defendant's argument. In particular, the court noted that the defendant is still entitled to a hearing where the government is required to persuade a magistrate that detention is necessary.⁶⁸ Furthermore, the BA allows the defendant to rebut the presumption that he will flee or commit additional misconduct. The court stated that it was,

not persuaded that the rebuttable presumption in the Bail Act so handicaps a criminal defendant as to create a category of cases for which bail will not be permitted. Since the subject of the inquiry is the defendant himself, much of the information that would be helpful to the court in settling release conditions is likely to be within the defendant's possession.⁶⁹

The same line of reasoning in *Freitas* applies to the military context, in that a commander does not have the last say in whether an accused service member remains in confinement. Even though a commander would be able to order a service member into confinement based upon a rebuttable presumption, the accused would still be entitled to a magistrate's review within seven days of that order.⁷⁰ At this review, the accused would have an opportunity to present evidence to a neutral and detached officer to rebut the presumption, and the government would maintain the burden of persuading a magistrate that confinement is necessary.

⁶⁷ *United States v. Freitas*, 602 F. Supp. 1283, 1288 (N.D. Cal 1985). The defendant's argument in *Freitas* is a close analogy to the argument that commanders in the military system will have unbridled authority to make arbitrary and capricious decisions to confine service members prior to trial, thereby denying the service member the presumption of innocence and the right to be free from unnecessary governmental intrusion.

⁶⁸ *Id.* at 1288–89.

⁶⁹ *Id.* at 1289.

⁷⁰ *See* MCM, *supra* note 10, R.C.M. 305(i)(2).

Moreover, a commander would face a difficult decision when deciding whether to invoke the rebuttable presumption and confine a service member accused of a serious offense before trial. On one hand, if confined the accused has the right to be tried no later than 120 days after the date of confinement, and the government must diligently move a confined service member's case to trial.⁷¹ Consequently, the government's decision to confine a service member may accelerate its trial timeline. On the other hand, the longer a commander waits to make this decision, the more he undercuts his argument that pre-trial confinement is necessary. Therefore, the government cannot take lightly the decision to confine a service member before trial even in the case of a service member accused of a serious offense.

C. Applying the Bail Reform Act to the Military Pre-Trial Confinement System

Once it becomes clear that the current pre-trial confinement system requires the same type of rebuttable presumption within the BA, the question remains as to how to implement such a change. This analysis requires: (1) an examination of whether the BA, as applied to the military system, complies with constitutional limitations as described in case law; and (2) a practical consideration of how the BA's rebuttable presumption would work in the military system.

1. *The BA's Rebuttable Presumption Contained Complies with Constitutional Limitations of Pre-Trial Confinement in the Military*

Based on the factual scenario presented in SGT Evenson's case, it is reasonable to presume that the command would have sought pre-trial confinement if the RCMs contained a provision similar to the one that exists in the BA. Such a provision would have created a presumption that SGT Evenson would have fled at some point during the trial process, allowing for his confinement prior to trial. The question is whether any such rebuttable presumption meets statutory and constitutional scrutiny. The *Heard* case, discussed above, cautions the government from confining a Soldier based solely upon the seriousness of an offense. When responding to the government's contention that the seriousness of the accused's offense in *Heard* alone justified detention, the court stated,

⁷¹ See *id.* R.C.M. 707; see also UCMJ art. 10 (2012).

“[a]n accused is presumed innocent until proved guilty, and, therefore, punishment for an alleged offense is prohibited before trial. Any rule to the contrary would be to deny an accused due process of the law.”⁷² The court goes on to describe that the proper basis for pre-trial detention is: (1) to ensure the accused’s presence at trial or (2) to protect the safety of the community, but only when (3) that all lesser forms of restraint are inadequate.⁷³

The rebuttable presumption contained in the BA is congruent with the pre-trial confinement requirements listed by the *Heard* court. First, the presumption in the BA does not permit the government to confine a defendant based upon the seriousness of an offense alone, instead it identifies certain offenses where, by the nature of the offense, there is an inherent risk that a defendant with either flee or will do further harm in the surrounding community—the precise conditions that the *Heard* court identified as permissible for pre-trial confinement.⁷⁴ Further the BA protects an accused’s right to the presumption of innocence because the government maintains the burden of persuasion throughout the entire pre-trial confinement process.⁷⁵ Consequently, the rebuttable presumption, if adopted for the military system, would appropriately provide a different level of pre-trial confinement analysis for cases where an accused is charged with serious crimes and facing severe punishment while at the same time meeting the constitutional requirements for pre-trial confinement as described by the court in *Heard*.

It remains unsettled whether current procedural protections under RCM 305 are sufficient to withstand the constitutional scrutiny applied in *Salerno*.⁷⁶ In contrast to the significant procedural protections available to a federal defendant under the BA, a military accused receives only a non-adversarial magistrate’s review, which is founded upon the probable-cause standard of proof and for which there is limited post-decision review.⁷⁷ Thus, any discussion of adding a rebuttable presumption of flight risk or danger to the community to the military pre-trial confinement system must include consideration of altering the military pre-trial confinement procedural protections to better reflect

⁷² United States v. Heard, 3 M.J. 14, 20 (C.M.A. 1977).

⁷³ *Id.* at 20–21.

⁷⁴ See 18 U.S.C. § 3142(e)(3) (2012).

⁷⁵ *Id.* § 3142(f)(2)B.

⁷⁶ 481 U.S. 750 (1987).

⁷⁷ See MCM, *supra* note 10, R.C.M. 305.

those Congress provided to federal defendants in the BA.⁷⁸ But as a matter of fairness, any effort to incorporate the BA's rebuttable presumption should include, as a matter of policy, if not constitutional prerequisite, the procedural protections inherent in the BA.

2. How Would the Bail Reform Act's Rebuttable Presumption Work, If Applied to the Military System?

If the Congress adopted a rebuttable presumption, similar to that which exists in the BA, within the military-justice system, it is important to consider the practical effect to ensure that a theoretical rule is capable of realistic application. The first consideration is how extensively to apply the rebuttable presumption, or which charged crimes would carry the presumption that an accused would flee or commit additional serious criminal misconduct. Like the federal system, the military should judiciously apply this presumption to the few crimes in which there is an actual risk of flight or additional criminal activity. In order to determine which crimes should qualify for a presumption of flight or serious misconduct, the Department of Defense could conduct a study and review of cases over a specified period of time to determine which offenses result in said increased risk.

The next practical consideration is to determine how a rebuttable presumption would apply within the current pre-trial confinement system. Under the current RCM pertaining to pre-trial confinement, there are generally two major decision points: (1) when an officer initially orders a service member into confinement;⁷⁹ and (2) when the decision to confine that service member is reviewed by a neutral and detached officer within seven days of the confinement order.⁸⁰ The rebuttable presumption would come into play during both of those major decision points.

First, the RCM could include a specific caveat that serves as a limitation on a commander's authority to invoke the rebuttable

⁷⁸ A question remains as to whether the military pre-trial confinement as it exists today requires the procedural protections listed by the *Salerno* Court, even in the absence of an update that would include a rebuttable presumption similar to the BA. The analysis of that topic, as well as the specific form of the protections required to meet the due process requirements of the *Salerno* Court is outside the scope of this article.

⁷⁹ See MCM, *supra* note 10, R.C.M. 305(d).

⁸⁰ *Id.* R.C.M. 305(i)(2).

presumption. This caveat would require commanders to consult with a judge advocate to make sure the accused's misconduct either fits within the traditional pre-trial confinement pre-requisites or that the commander could reasonably charge the accused with an offense that fits within the categories where the rebuttable presumption is applicable.⁸¹

The second time the rebuttable presumption would come into play is at the seven day magistrate's review. A neutral and detached magistrate could initially review the government's claim there is probable cause to believe an accused committed the type of offense that involves a rebuttable presumption the accused will either flee or commit additional misconduct. Then the magistrate could receive any evidence from the accused which rebuts the initial presumption and could analyze whether the government has met the overall burden to persuade the magistrate it has met the foundational elements of the pre-trial confinement rules.⁸²

Applying the BA's rebuttable presumption to the pre-trial confinement system in the military is a feasible solution to prevent the issue that presented itself in SGT Evenson's case—the failure to timely address the flight risk associated with the serious nature of the charged crimes and a potential life sentence facing an accused. The rebuttable presumption meets constitutional muster and can practically be applied to the military system. Therefore, it is worth consideration as a means of mitigating the pre-trial risk of flight or additional misconduct inherent in cases like SGT Evenson's.

⁸¹ This slight alteration to the existing pre-trial confinement rules in the *MCM* would serve as a check on a commander's authority to utilize any rebuttable presumption and bring judge advocates in to the process early enough to advise commanders whether they have sufficient evidence to support a charge which carries the risk an accused would either flee or commit additional serious criminal misconduct prior to trial.

⁸² See generally U.S. ARMY TRIAL JUDICIARY, STANDARD OPERATING PROCEDURE FOR MILITARY MAGISTRATES (10 Sept. 2013). Under the current framework described in the Magistrate's standard-operating procedures, the magistrate already reviews a commander's decisions that an offense was committed by the accused and whether continued confinement is necessary because it is foreseeable that an accused will flee, or engage in serious criminal misconduct, and that lesser forms of restraint are inadequate. It would not be difficult to add one more layer of analysis that requires a magistrate to verify there is sufficient evidence to support a finding that an accused committed an offense where there is a statutorily created rebuttable presumption that an accused will flee or commit additional serious criminal misconduct and that lesser forms of restraint are insufficient.

VI. Conclusion

Notwithstanding SGT Evenson's heinous crimes, the circumstances surrounding SGT Evenson's ultimate demise were nothing less than a tragedy. While in hindsight it is always easy to second guess decisions, one finds it difficult not to come to the conclusion that the end result in SGT Evenson's case was completely and utterly avoidable. Sergeant Evenson's commanders, who knew him best, wanted to place him in confinement but could not find the authority to do so under the existing pre-trial confinement in the military. Sergeant Evenson's commanders and government counsel could only cite their concern for the high degree of risk of flight associated with being charged with the rape of a minor child and a potential sentence of life in prison—which was not sufficient justification under the current rules for courts-martial. The BA provides the proper solution to the problem SGT Evenson's commanders faced. By adopting a rebuttable presumption that service members charged with certain serious crimes and facing potentially severe punishment will flee or commit additional serious criminal misconduct, the military can address the issue presented in the Evenson case. The rebuttable presumption is consistent with the historical principles, congruent with constitutional limitations, and capable of practical implication within the military pre-trial confinement system. Based upon the potential severe consequences as exhibited in SGT Evenson's case and the relative ease with which these consequences can be avoided, the President should amend the RCM pertaining to pre-trial confinement. The RCM should contain a rebuttable presumption for certain cases based upon the serious nature of the charged offenses and the potential for exposure to a grave level of punishment that an accused will not be present for all phases of a trial and that lesser forms of restraint are inadequate.

DESTROYING THE SHRINES OF UNBELIEVERS:**THE CHALLENGE OF ICONOCLASM TO THE
INTERNATIONAL FRAMEWORK FOR THE PROTECTION OF
CULTURAL PROPERTY**

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*On the basis of consultations between the religious leaders of the Islamic Emirate of Afghanistan, religious judgments of the ulema and rulings of the Supreme Court of the Islamic Emirate of Afghanistan, all statues and non-Islamic shrines located in different parts of the Islamic Emirate of Afghanistan must be destroyed. These statues have been and remain shrines of unbelievers and these unbelievers continue to worship and respect them. God Almighty is the only real shrine and all fake idols must be destroyed.*¹

I. Introduction

On March 4, 2001, the *New York Times* confronted its readers with a front-page photograph² of the Taliban's³ destruction of a pair of colossal

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¹ This quote is taken from a February 26, 2001 edict issued by the Islamic State of Afghanistan. The edict is transcribed in full in the following sources: LLEWELYN MORGAN, *THE BUDDHAS OF BAMİYAN* 15 (2012); Finbarr Barry Flood, *Between Cult and Culture: Bamiyan: Islamic Iconoclasm, and the Museum*, 84 ART BULL. 641, 655 (2002).

² Barry Bearak, *Over World Protests, Taliban Are Destroying Ancient Buddhas*, N.Y. TIMES, Mar. 4, 2001, at A1.

³ Literally “the students” in Pashto, the Taliban is a Sunni Islamic fundamentalist group that ruled Afghanistan from 1996 until 2001, when a U.S.-led NATO invasion toppled the regime for providing refuge to al-Qaeda and Osama bin Laden. Zachary Laub, *The*

statues of the Buddha that had watched over Afghanistan's Bamiyan Valley since the 6th century A.D.⁴ In the photograph, smoke and dust billow and roil from the niche, carved into a sandstone cliff face, in which the larger of the statues had towered at a height of 53 meters.⁵ At a time when Afghanistan was just returning to American and international public consciousness after a decade of relative indifference, the deliberate destruction of the Bamiyan Buddhas was, perversely, the first time that many people outside the archaeological community became aware of their existence.⁶ It was significant that the destruction of the Buddhas was pictured on the front page of a newspaper with an international readership. The Taliban ensured that an Al-Jazeera journalist was on scene to capture the destruction on film.⁷ The fact that Afghans were prohibited by the Taliban regime from owning televisions suggests that they had an international audience in mind.⁸ Justified as the enforcement of the religious proscription on idol worship, common to all three of the Abrahamic religions,⁹ the destruction of the Bamiyan Buddhas was also a statement of defiance of the international community, which had lobbied strenuously for their preservation, as well as the preservation of pre-Islamic artifacts at other sites in Afghanistan.

Taliban in Afghanistan, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/afghanistan/taliban-afghanistan/p10551> <http://www.loc.gov/>.

⁴ The dates of the statues' construction have not been established definitively; however, there is general agreement that the smaller (and older) of the statues was constructed in the 6th century AD and that the larger statue was constructed 50 to 100 years later. MORGAN, *supra* note 1, 4.

⁵ 53 meters = approximately 174 feet. By comparison, the Statue of Liberty measures 151 feet from its base to the top of its torch and 306 feet from the base of its pedestal to the top of its torch. *Statue Statistics—Statue of Liberty National Monument*, NAT'L PARK SERV., <http://www.nps.gov/stli/historyculture/statue-statistics.htm> (last visited Oct. 16, 2014). Before their destruction, the Bamiyan Buddhas were the largest standing Buddha carvings in the world. *Id.* at 11–13.

⁶ Although the destruction of the Buddhas was motivated by a desire to destroy their potential for idolatry, their destruction increased their notoriety and arguably augmented their cultural significance.

⁷ MORGAN, *supra* note 1, at 1.

⁸ Emma Graham-Harrison, *Afghanistan's Taliban Embrace Power of Video Propaganda*, THE GUARDIAN, June 4, 2014, <http://www.theguardian.com/world/2014/jun/04/afghanistan-taliban-video-propaganda-bowe-bergdahl> (noting that in "the days before 2001 . . . , owning a television was a criminal offen[s]e").

⁹ "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath or that is in the water under the earth: Thou shalt not bow down thyself to them, nor serve them: for I the Lord thy God am a jealous God" *Exodus* 20:4–5 (King James); "O ye who believe! Strong drink and games of chance and idols and divining arrows are only an infamy of Satan's handiwork. Leave it aside in order that ye may succeed." *Quran* 5:90 (Pickthall).

Indeed, the Bamiyan Buddhas were only the largest and most notable targets of a sustained iconoclastic¹⁰ campaign, which also saw the destruction of an estimated 2,500 pre-Islamic artifacts in the collection of the National Museum in Kabul.¹¹ The collective loss to Afghanistan's archaeological record was staggering.

This article seeks to locate the destruction of the Bamiyan Buddhas within the framework of the post-World War II international laws that were developed to prevent the loss, damage, and destruction of cultural property, defined generally as the tangible constituents of cultural heritage.¹² The inadequacy of these laws to achieve their goals has been frequently lamented,¹³ while one prominent critic has gone as far as to

¹⁰ Literally "image breaking" in Greek, iconoclasm is the deliberate destruction of religious icons, symbols, or monuments for religious motives, political motives, or a combination of the two. See ALAIN BESANCON, *THE FORBIDDEN IMAGE: AN INTELLECTUAL HISTORY OF ICONOCLASM* (2007).

¹¹ Omara Khan Massoudi, *The National Museum of Afghanistan*, in AFGHANISTAN: HIDDEN TREASURES FROM THE NATIONAL MUSEUM, KABUL 35, 39 (Fredrick Hiebert & Pierre Cambon, eds., 2008). These losses are in addition to the losses suffered during the Soviet invasion and Afghan civil war. It has been estimated that 70% of the collection of the National Museum was destroyed or stolen during thirty-five years of near-constant war. Rod Norland, *Saving Relics, Afghans Defy the Taliban*, N.Y. TIMES, Jan. 12, 2014, http://www.nytimes.com/2014/01/13/world/asia/saving-relics-afghans-defy-the-taliban.html?_r=0.

¹² Some commentators argue that the legal term "cultural property" should be replaced by "cultural heritage," a broader concept that embraces not only tangible culture (i.e., buildings, monuments, and works of art), but also intangible culture (i.e., language, folklore, and traditions) and natural heritage (i.e., landscape and biodiversity). See generally Lyndell V. Prott & Patrick J. O'Keefe, 'Cultural Heritage' or 'Cultural Property'?, 1 INT'L J. OF CULTURAL PROP. 307 (1992); Manlio Frigo, *Cultural Property v. Cultural Heritage: A "Battle of Concepts" in International Law?*, 86 INT'L R. OF THE RED CROSS 367 (2004).

¹³ See, e.g., Andrea Cuning, *The Safeguarding of Cultural Property in Times of War & Peace*, 11 TULSA J. COMP. & INT'L. L. 211 (2003) ("This article will examine the development of the law regarding the protection of cultural property in the event of armed conflict and will argue that the contemporary law on the subject is inadequately enforced."); Karen J. Detling, *Eternal Silence: The Destruction of Cultural Property in Yugoslavia*, 17 MD. J. INT'L L. & TRADE 41 (1993) ("Despite nearly universal agreement that cultural property is an inappropriate object of belligerent destruction, such heritage remains as vulnerable as ever, as recent armed conflicts in the Persian Gulf and the former Yugoslavia tragically evidence."); David Keane, *The Failure to Protect Cultural Property in Wartime*, 14 DEPAUL-LCA J. ART & ENT. L. 1 (2004) ("This paper will demonstrate that while the international rules evolve and strengthen, the destruction of cultural property continues."); Sasha P. Paroff, *Another Victim of the War in Iraq: The Looting of the National Museum in Baghdad and the Inadequacies of International Protection of Cultural Property*, 53 EMORY L. J. 2021 (2004) ("Subscribing to the view that artworks and artifacts are the cultural property of all the world's people, international

describe the entire framework as misguided.¹⁴ Indeed the period since these laws were developed has repeatedly demonstrated that, particularly during times of conflict, political unrest, and social upheaval, cultural property remains vulnerable to a wide range of threats, including deliberate targeting, collateral damage, looting, and neglect.

At the time of the destruction of its colossal Buddhas, the Bamiyan Valley was not a site of conflict. Although engaged in a civil war with the Northern Alliance, the Taliban exercised full control of Bamiyan.¹⁵ Consequently, the destruction of the Bamiyan Buddhas did not occur in the context of either an international or a non-international armed conflict.¹⁶ Instead, the destruction of the Buddhas represented a phenomenon that is not clearly addressed under international law: the ideologically-motivated destruction of cultural property in an act of state-sponsored iconoclasm within the state's own territory.¹⁷ In this situation, a gap in international law creates the possibility of a counter-intuitive outcome: namely, there is less potential for criminal liability as a result of the deliberate destruction of the Buddhas while the Bamiyan Valley was under Taliban control than if the Buddhas had merely suffered collateral damage during a battle for control of the valley.¹⁸

agreements have sought to protect cultural property, even during war. However, as the looting in Iraq illustrates, international attempts to protect cultural property have not immunized museums from looting and destruction.”).

¹⁴ Eric Posner, *The International Protection of Cultural Property: Some Skeptical Observations* (Univ. of Chicago Sch. of Law, Pub. Law and Legal Theory, Working Paper No. 141) (“There is no good argument for international legal regulation of cultural property, during peacetime or wartime.”)

¹⁵ Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUROPEAN J. INT’L L. 619, 622 (2003).

¹⁶ The term “international armed conflict” refers to a “traditional” war between two or more sovereign nation-states. The term “non-international armed conflict” refers to an internal conflict within a nation-state, i.e., a civil war or internal rebellion. See INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 15 (2013).

¹⁷ Although the Islamic Emirate of Afghanistan, the government established by the Taliban, was recognized by only Saudi Arabia, Pakistan, and the United Arab Emirates, it was in effective control of over 90% of Afghanistan’s territory at the time of the destruction of the Bamiyan Buddhas. Francioni & Lenzerini, *supra* note 15, at 622.

¹⁸ Other commentators have recognized the challenge that deliberate destruction represents to the international framework designed to protect cultural property. See, e.g., Corrine Brenner, *Cultural Property Law: Reflecting on the Bamiyan Buddha’s Destruction*, 29 SUFFOLK TRANSNAT’L L. REV. 237, 239 (2005–2006) (“while cultural property law provides a useful framework, it is of little use when belligerents intentionally destroy cultural property.”); Megan Kossiakoff, *The Art of War: The Protection of Cultural Property During the “Siege” of Sarajevo (1992–95)*, 14 DEPAUL-

This article argues that the destruction of the Bamiyan Buddhas was a crime under international law and assesses two possible approaches that have been proposed for criminal prosecution of individuals involved in their destruction. One approach would argue that the destruction of the Bamiyan Buddhas violated the human rights of a particular culture or people;¹⁹ the other would argue that the destruction of the Buddhas was a crime against humanity (*crimina juris gentium*).²⁰ After offering an historical overview of cultural-property protections under international law, this article will place the destruction of the Bamiyan Buddhas in its historical and political context before testing the “rights-based” and “crimes-against-humanity” theories for criminal prosecution of the responsible actors by briefly applying each theory to the facts and circumstances surrounding the destruction of the Buddhas. The article will conclude that a “crimes-against-humanity” approach to prosecutions for willful destruction of cultural property offers greater potential to strengthen the protections afforded to cultural property under international law.

II. Protection of Cultural Property Under International Law

The framework for protection of cultural property under international law is generally seen as embracing two separate legal regimes designed to address distinct threats to cultural property.²¹ One regime applies in

LCA J. ART & ENT. L. 109, 125 (2004) (“The Hague Convention, though it offers a framework for responsible commanders, is of little use in the increasingly common situation when an attacker wishes specifically to destroy the other side’s cultural identity.”).

¹⁹ Kruti J. Patel, *Culture Wars: Protection of Cultural Monuments in a Human Rights Context*, 11 CHI.-KENT J. INT’L & COMP. L. (2011), available at http://www.kentlaw.edu/jicl/v11/Student%20Notes/Patel_Note.pdf.

²⁰ Francioni & Lenzerini, *supra* note 15.

²¹ See, e.g., M. Cherif Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYRACUSE J. INT’L L. & COM. 281 (1983) (“[T]he applicable international conventions distinguish their contextual applicability either explicitly or implicitly i.e., during armed conflicts (war), or at other times (peace).”); Victoria A. Birov, *Prize or Plunder?: The Pillaging of Works of Art and the International Law of War*, 30 N.Y.U. J. INT’L L. & POL. 201, 222 (1997–1998) (“International law regulating the transport of cultural property during times of peace developed separately and distinctly from legal mechanisms protecting cultural property during armed conflict. The applicable conventions consider whether the crimes against cultural property were committed during war or peace.”); John C. Johnson, *Under New Management: The Obligation to Protect Cultural Property During Military Occupation*, 190/191 MIL. L. REV. 111, 114 (2006/2007) (“The protection of cultural property can be

times of armed conflict and is intended to spare cultural property from the depredations of war. The centerpiece of this regime is the 1954 Hague Convention for the Protection of Cultural Property During Armed Conflict.²² The other regime applies in times of peace and is intended to prohibit the international trade in moveable cultural property exported in violation of the law of its country of origin. The centerpiece of this regime is the 1970 U.N. Educational, Scientific, and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.²³ This “dual track approach” has been criticized as illogical and confusing.²⁴ In the case of the Bamiyan Buddhas, the lack of clarity regarding which regime—or, indeed, whether either regime—applies creates a significant gap in coverage. In order to understand how this gap in coverage came to exist, this article reviews both the “wartime” and “peacetime” legal regimes, adopting an historical approach that seeks to demonstrate the evolution of cultural property protections.

A. Protection of Cultural Property During Armed Conflict

The development of a specific body of law to protect what we now call cultural property began in the law of armed conflict in the eighteenth and nineteenth centuries. In his 1758 treatise *The Law of Nations*,²⁵ the Swiss political philosopher Emheric de Vattel wrote,

divided into two distinct international legal regimes: one designed to avoid targeting of or damage to cultural property during armed conflict, and another designed to prevent illegal trafficking in cultural property in times of peace”).

²² Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 539, *reprinted in* INT’L AND OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT 40 (2013) [hereinafter 1954 Hague Convention].

²³ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 [hereinafter 1970 UNESCO Convention], *available at* http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_DO=DO_TOPIC&URL_SECTION=201.html [hereinafter 1970 UNESCO Convention].

²⁴ Bassiouni, *supra* note 21, at 287 (“The distinction is no longer helpful or useful because the question concerns not the context, but the object of the protection.”).

²⁵ The full title of Vattel’s text is *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*. EMHERIC DE VATTTEL, LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (Joseph Chitty, trans., 6th ed. 1844), *available at* http://www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/DeVattel_LawOfNations.pdf.

For whatever cause a country is ravaged, we ought to spare those edifices[,] which do honor to human society, and do not contribute to the cause of the enemy's strength—such as temples, tombs, public buildings, and all works of remarkable beauty. What advantage is obtained by destroying them? It is declaring one's self an enemy to mankind, thus wantonly to deprive them of these monuments of art and models of taste We still detest those barbarians who destroyed so many wonders of art, when they overran the Roman Empire.²⁶

This passage, from one of the foundational texts of modern international law, is routinely cited as the earliest expression of the notion that cultural property—in Vattel's terms “monuments of art and models of taste”—should be spared from destruction in armed conflict.²⁷ As conceived by Vattel, respect for cultural property is a characteristic of civilized people, and its absence an attribute of the barbarian. This view has carried through in the commentary on protections for cultural property to this day.²⁸

The call for cultural property to be spared in wartime did not find concrete expression in a binding legal instrument until another century had passed. In 1863, President Abraham Lincoln issued the *Instructions for the Government of Armies of the United States in the Field*, better known as the “Lieber Code” for its author, Francis Lieber.²⁹ Section II of the Code provided for the seizure of all moveable public property.³⁰ And Article 34 of the Code mandated that the kinds of property that we

²⁶ Keane, *supra* note 13, at 2.

²⁷ See generally *id.*; Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277, 283 (1997); Cunniff, *supra* note 13, at 211; Johnson, *supra* note 21, at 117.

²⁸ For example, “The Süddeutsche Zeitung reported the disaster [the looting of the Iraqi National Museum] under the headline ‘Barbaren in Bagdad (Barbarians in Baghdad).’” Wayne Sandholtz, *The Iraqi National Museum and International Law: A Duty to Protect*, 44 COLUM. J. TRANSNAT’L L. 185, 189 (2005). Similarly, the titles of the comprehensive accounts of two notorious examples of cultural pillage evoke images of sexual violence. LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE’S ART TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1995); LAWRENCE ROTHFIELD, *THE RAPE OF MESOPOTAMIA: BEHIND THE LOOTING OF THE IRAQ MUSEUM* (2009). Both titles draw their imagery from the story of the Rape of Europa in Ovid’s *Metamorphoses*.

²⁹ President Abraham Lincoln, GEN. ORDER NO. 100 (24 Apr. 1863), *available at* http://avalon.law.yale.edu/19th_century/lieber.asp [hereinafter Lieber Code].

³⁰ *Id.* art. 31.

would now label “cultural property” were to be treated as private property:

As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property³¹

In addition, Article 35 called for the protection of “classical works of art, libraries, scientific collections, or precious instruments . . . against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.”³²

Although the Lieber Code applied only to the conduct of Union forces during the American Civil War, its influence on the development of the law of armed conflict can hardly be overstated. Subsequent international efforts to codify the law of armed conflict—the Declaration of the Conference of Brussels of 1874³³ and the Oxford Manual of 1880³⁴—took the Lieber Code, including its provisions for protection of

³¹ *Id.* art. 34.

³² *Id.* art. 35.

³³ The Conference of Brussels was a meeting of representatives of fifteen European nations in 1874 in order to consider a draft codification of the law of land warfare submitted for consideration by Czar Alexander II of Russia. *Project of an International Delegation Concerning the Laws and Customs of War*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=42F78058BABF9C51C12563CD002D6659> (last visited Oct. 16, 2014). Although the conference unanimously adopted the ponderously titled declaration, it was never ratified by the sending states. *Id.* Article 8 of the Declaration provides:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure or destruction of, or willful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities.

Id. In addition, Article 39 forbids pillage and Article 40 calls for respect of private property. *Id.*

³⁴ The Oxford Manual, formally entitled *The Laws of War on Land*, was prepared by the Institute of International Law, a private body of international lawyers founded in Ghent,

cultural property, as their starting point.³⁵ Subsequently, the first international treaties regulating the conduct of belligerents, the Hague Conventions of 1899³⁶ and 1907,³⁷ drew heavily on both the Brussels Declaration and the Oxford Manual, extending the influence of the Lieber Code.³⁸ Consequently, it is not an exaggeration to say that the Lieber Code's provisions for protection of cultural property were the progenitors of the entire framework of protections for cultural property that now exist under international law.

The Conventions that resulted from the peace conferences held at The Hague in 1899 and 1907 have been criticized for their failure to prevent the subsequent outbreak of the two World Wars or to prevent the widespread human suffering and destruction of property that characterized both conflicts.³⁹ However, the Hague Conventions represented major steps in the effort to regulate the means and methods of war during international armed conflicts. The 1899 and 1907 Hague Conventions, and their annexed Regulations are substantially similar and the provisions addressing protection of cultural property are identical.

Belgium in 1873. *The Laws of War on Land*, INT'L COMM. OF THE RED CROSS, <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=40371257507EBB71C12563CD002D6676> (last visited Oct. 16, 2014). The Manual purported to codify the existing customary law of war as it then existed. *Id.* Article 34 of the Oxford Manual provides:

In case of bombardment all necessary steps must be taken to spare, if it can be done, buildings dedicated to religion, art, science and charitable purposes, hospitals, and places where the sick and wounded are gathered on the condition that they are not being utilized at the time, directly or indirectly, for defense.

It is the duty of the besieged to indicate the presence of such buildings by visible signs notified to the assailant beforehand.

Id. The Institute of International Law still exists. Information on its history and current activities can be found on its website <http://www.idi-iil.org>.

³⁵ Johnson, *supra* note 21, at 120.

³⁶ Convention with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1779, T.S. No. 392 [hereinafter 1899 Hague Convention], *available at* http://avalon.law.yale.edu/19th_century/hague02.asp.

³⁷ Convention Respecting the Laws and Customs of War on Land and its Annex, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, *reprinted in* INT'L & OPERATIONAL LAW DEP'T, *supra* note 21, at 28 [hereinafter 1907 Hague Convention].

³⁸ Johnson, *supra* note 21, at 120.

³⁹ Keane, *supra* note 13, at 6; Brenner, *supra* note 18, at 240.

Articles 28⁴⁰ and 47⁴¹ of the Regulations prohibit pillage. Article 46 prohibits confiscation of private property.⁴² Article 55 prohibits attack or bombardment of undefended towns, villages, or buildings, which could include cultural targets.⁴³ Two articles of the Regulations specifically address the protection of cultural property (again, the term is not used) in terms familiar from the Lieber Code. Article 27 provides:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.⁴⁴

Article 56 provides that cultural property is to be treated as private property:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art, is forbidden and shall be made subject to legal proceedings.⁴⁵

Although the provisions regarding cultural property in the Hague Regulations do not represent major advances over similar provisions in the Brussels Declaration or the Oxford Manual, the impact of the Hague Regulations extended much further.

Unlike the Brussels Declaration or the Oxford Manual, the Hague Regulations were annexed to binding international Conventions with dozens of States Parties.⁴⁶ This laid the basis for a 1946 judgment of the

⁴⁰ 1907 Hague Convention, *supra* note 37, at 32.

⁴¹ *Id.* at 34.

⁴² *Id.*

⁴³ *Id.* at 35.

⁴⁴ *Id.* at 32.

⁴⁵ *Id.* at 35.

⁴⁶ The 1907 Convention ultimately garnered forty-six States Parties: Austria, Belarus, Belgium, Bolivia, Brazil, China, Cuba, Denmark, Dominican Republic, El Salvador, Ethiopia, Fiji, Finland, France, Germany, Guatemala, Haiti, Hungary, Japan, Liberia,

International Military Tribunal at Nuremberg, which found that the 1907 Hague Regulations were customary international law, binding even on States that had not ratified them.⁴⁷ Unfortunately, the International Military Tribunal was sitting in judgment of events in a conflict that demonstrated the inadequacy of the Hague Regulations to prevent, among other abuses, the systematic plunder of Europe's cultural heritage by the Nazis. Recognition of those failings motivated drafters of the 1954 Hague Convention.⁴⁸

While the earlier Hague conferences were called by great powers, the conference that convened at the Hague in 1954 was called by the recently formed United Nations Educational, Scientific, and Cultural Organization (UNESCO), a specialized agency of the United Nations whose purpose "to contribute to peace and security by promoting collaboration among nations through education, science and culture"⁴⁹ has made it the lead body for development of cultural-property protections since the Second World War. The Convention for the Protection of Cultural Property During Armed Conflict (1954 Hague Convention), which was adopted by the conference on May 14, 1954,

Luxembourg, Mexico, Netherlands, Nicaragua, Norway, Panama, Poland, Portugal, Romania, Russian Federation, South Africa, Sweden, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America. *Convention IV respecting the Laws and Customs of War on Land and Its Annex*, INT'L COMM. OF THE RED CROSS, http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMSStatesParties&xp_treatySelected=195 (last visited Oct. 17, 2014) (listing states party).

⁴⁷ The Tribunal's Judgment: The Law Relating to War Crimes and Crimes Against Humanity reads, in part,

The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption [B]ut by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war

Judgement: The Law Relating to War Crimes and Crimes Against Humanity, YALE L. SCH., <http://avalon.law.yale.edu/imt/judlawre.asp> (last accessed Oct. 17, 2014).

⁴⁸ David A. Meyer, *The 1954 Hague Cultural Property Convention and Its Emergence Into Customary International Law*, 11 B.U. INT'L L.J. 349, 350 (1993).

⁴⁹ *A Decade of American Foreign Policy 1941-1949, Constitution of the United Nations Educational, Scientific and Cultural Organization*, Nov. 16, 1945, YALE L. SCH., <http://unesdoc.unesco.org/images/0021/002161/216192e.pdf#page=7> (last accessed Oct. 17, 2014).

was the first international treaty to deal exclusively with protection of cultural property in any context.⁵⁰

The 1954 Hague Convention substantially supplements the protections for cultural property provided in the 1899 and 1907 Hague Conventions.⁵¹ One major improvement over the earlier conventions is that 1954 Convention abandoned the private-property distinction that was first used in the Lieber Code. Instead, the Convention introduced the term “cultural property” to legal parlance. Article 1 of the Hague Convention defines the term expansively:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books, and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in subgroup (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-group (a);

⁵⁰ The 1954 Hague Convention currently has 126 States Parties. For a list of them, see Appendix B. Although the United States was an original signatory to the 1954 Hague Convention, the treaty was not ratified by the U.S. Senate until September 25, 2009. Dick Jackson, International and Operational Law Practice Note: *Law of War Treaties Pass the Senate*, ARMY LAW., Jan. 2009, at 56.

⁵¹ Article 36 of the convention clarifies that it supplements the 1899 and 1907 Hague Conventions, as well as the Roerich Pact. 1954 Hague Convention, *supra* note 21, at 46. The Roerich Pact, formerly entitled the Treaty on the Protection of Artistic and Scientific Institutions and Monuments, is an inter-American regional treaty for protection of cultural property; it is still binding in North America and parts of South America. Birov, *supra* note 21, at 209.

- (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as “centres containing monuments.”⁵²

Notably, cultural property’s intrinsic value is derived from its transnational significance—its importance to the cultural heritage of *every people*—rather than to its unique local or national interest. This internationalist view of cultural property is also expressed in the preamble to the convention, which asserts, “damage to cultural property belonging to any people whatsoever means damage to *the cultural heritage of all mankind*” and “the preservation of the cultural heritage is of great importance for *all peoples of the world*.”⁵³

Although the 1954 Hague Convention’s focus is the protection of cultural property during armed conflict, it mandates actions by States Parties during times of peace. Protection for cultural property under the terms of the 1954 Hague Convention consists of two responsibilities: the protection of cultural property and respect for cultural property.⁵⁴ Safeguarding cultural property is action taken by a state party to protect its own cultural property in advance of an armed conflict: Article 3 requires parties “to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.”⁵⁵ Respect for cultural property is action taken by a state party to ensure that cultural property, either in its own territory or in the territory of another belligerent, is unharmed. Article 4.1 mandates that state parties refrain from using cultural property in a manner likely to expose it to damage or destruction and prohibits “any act of hostility directed against such property.”⁵⁶ Article 4.3 requires parties “to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”⁵⁷ Article 4.5 clarifies that a state party is not excused from its responsibilities under the Convention solely because another party failed to take measures to safeguard cultural property prior to the

⁵² 1954 Hague Convention, *supra* note 22, at 40.

⁵³ *Id.* (emphasis added).

⁵⁴ “Art. 2. For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property.” *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 41.

armed conflict.⁵⁸ Unlike the 1907 Hague Convention, which applied only to international armed conflicts, the 1954 Hague Convention extended protection to cultural property during both international and non-international armed conflicts.⁵⁹ Under Article 19, in a non-international armed conflict within the territory of a state party, “each party to the conflict shall be bound to apply, as a minimum, the provisions . . . which relate to respect for cultural property.”⁶⁰

Although the 1954 Hague Convention expanded the protections for cultural property under the 1907 Convention, in one crucial area—that of enforcement—it offered no significant improvement. Pursuant to Article 28, parties agree to take, “within the framework of their ordinary jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit . . . a breach.”⁶¹ Herein lies the greatest weakness of the 1954 Hague Convention. In the words of one commentator,

This article lacks teeth because no international body exists to impose sanctions. Instead, the creation and scope of sanctions are left to the parties actually affected by the crime to impose as they see fit. The language leaves much room for discretion and from this vagueness stems the problems with enforcement.⁶²

Consequently, in common with other areas of international law, including human rights law, the secondary rules—that is, the “rules governing how and by whom [the law] may be made, applied, and enforced”—are insufficiently developed.⁶³

⁵⁸ *Id.*

⁵⁹ Article 18 provides that the Convention applies in the event of “any other armed conflict” between the parties and in cases “of partial or total occupation” of territory, while Article 19 provides for the Convention’s application that “relate to respect for cultural property” in the event of an “armed conflict not of an international character.” *Id.* at 43.

⁶⁰ *Id.* at 44.

⁶¹ *Id.* at 45.

⁶² Meyer, *supra* note 48, at 357.

⁶³ Monica Hakimi, *Secondary Human Rights Law*, 34 YALE J. INT’L L. 596, 596 (2009).

B. Protection of Cultural Property in Times of Peace

Nearly two decades after adopting the 1954 Hague Convention, UNESCO adopted two conventions for the protection of cultural property in times of peace.

At its 16th General Conference in Paris in 1970, UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (1970 UNESCO Convention),⁶⁴ which is focused on preventing illicit trafficking in cultural property.⁶⁵ The 1970 UNESCO Convention expanded the definition of cultural property to include “almost anything made or altered by man.”⁶⁶ Article 1 defines cultural property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science” and which belongs to one of eleven identified categories.⁶⁷

⁶⁴ 1970 UNESCO Convention, *supra* note 23. The Convention currently has 125 States Parties. For a list of them, see Appendix B.

⁶⁵ Johnson, *supra* note 21, at 134.

⁶⁶ Brenner, *supra* note 18, at 244.

⁶⁷ 1970 UNESCO Convention, *supra* note 23, art. 1. The eleven categories are:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) original works of statuary art and sculpture in any material;
 - (iii) original engravings, prints and lithographs ;
 - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;

By contrast with the 1954 Hague Convention, the 1970 UNESCO Convention departs from an internationalist conception of cultural property. The Preamble to the 1970 Convention asserts “that cultural property constitutes one of the basic elements of civilization and *national culture*, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and *traditional setting*.”⁶⁸ Although generally more expansive, this definition of cultural property is narrower than the definition given in the 1954 Hague Convention in one key respect: in order for the property to enjoy protections under the 1970 UNESCO Convention, it must be “specifically designated by the State.”⁶⁹ The designation of cultural property is left to state parties,⁷⁰ but it generally happens through domestic legislation declaring certain categories of goods cultural property.⁷¹ Article 2 of the 1970 UNESCO Convention states that “the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin.”⁷² The Article continues, “To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.”⁷³ In accordance with Article 3 of the Convention, “import, export or

-
- (i) postage, revenue and similar stamps, singly or in collections;
 - (j) archives, including sound, photographic and cinematographic archives;
 - (k) articles of furniture more than one hundred years old and old musical instruments.

Id.

⁶⁸ *Id.* pmbl. (emphasis added).

⁶⁹ Johnson, *supra* note 21, at 135 (noting that this part of the definition narrows the scope of application of the Convention).

⁷⁰ 1970 UNESCO Convention, *supra* note 23, art. 5(a) and (b).

⁷¹ Domestic legislation regarding cultural property can be used in ways that seem to circumvent the purposes of the system. For example, in an interview with the Asia Society, Paul Bucherer discusses a 1998 Pakistani law, which states that “all antique material which remains for at least one year on Pakistani soil becomes Pakistani cultural heritage and may not be exported.” Interview by Nermeen Shaikh with Paul Bucherer, Dir., Bibliotheca Afghanica (n.d.) [hereinafter Bucherer Interview], available at <http://asiasociety.org/how-can-afghanistans-cultural-heritage-be-preserved> (last visited Nov. 4, 2014) (published on the Asia Society website as *How Can Afghanistan’s Cultural Heritage be Preserved?*). Since many Afghan antiquities are smuggled into Pakistan from Afghanistan, the effect of this law is to make it impossible for those antiquities to be returned to Afghanistan when and if they surface on the art market. *Id.*

⁷² 1970 UNESCO Convention, *supra* note 23, art. 2.1.

⁷³ *Id.* art. 2.2.

transfer of ownership of cultural property” is “illicit” if “effected contrary to the provisions adopted under this Convention,”⁷⁴ that is, unless the transfer is accompanied by an export certificate as mandated in Article 6.⁷⁵

At its 17th General Conference in 1970, also in Paris, UNESCO adopted the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (1972 World Heritage Convention),⁷⁶ with the purpose of identifying and protecting sites of mankind’s cultural and natural heritage⁷⁷ around the world that possess “outstanding universal

⁷⁴ *Id.* art. 3.

⁷⁵ *Id.* art. 6.

⁷⁶ Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, T.I.A.S. 8226 (1972) [hereinafter 1972 World Heritage Convention], available at <http://whc.unesco.org/archive/convention-en.pdf> (last visited Mar. 18, 2014).

⁷⁷ *Id.* arts. 1, 2. The convention defines “cultural heritage” as:

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding value from the point of view of history, art, or science; groups of buildings: groups of separate buildings, which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art, or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.

Id. art. 1.

“Natural heritage” is defined as:

natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

value” from a standpoint of history, art, science, aesthetic value, ethnology, anthropology, science, conservation, or natural beauty.⁷⁸ To achieve its goals, the Convention established a World Heritage List—essentially a means for international recognition of sites, much like the National Register of Historic Places in the United States—and a World Heritage Fund to administer the list. As of this article’s date, 190 nations are party to the Convention.⁷⁹ This far exceeds the number of parties to either the 1954 Hague Convention or the 1970 UNESCO Convention. This is perhaps due to the fact that the Convention imposes virtually no burden on state parties and does nothing to threaten national rights with regard to cultural heritage. Article 4 states that the parties recognize each state’s primary responsibility for safeguarding cultural and natural heritage located on that state’s own territory.⁸⁰ In its recognition of world heritage, Article 6.1 stresses national control:

Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.⁸¹

Furthermore, the Convention establishes no system to sanction state parties that fail to fulfill their responsibilities.

III. The Destruction of the Bamiyan Buddhas in Context

The Bamiyan Buddhas have been aptly described as “Afghanistan’s Stonehenge.”⁸² The uncontested importance of the Buddhas as part of the pre-Islamic history of Afghanistan explains the symbolism of their

Id. art. 2.

⁷⁸ Although the Convention’s definition of “cultural heritage” is broader than the definition of cultural property given in the 1954 Hague Convention, it is not as broad as the concept of cultural heritage advanced by some commentators. *See supra* note 12.

⁷⁹ *See* Appendix B (State Parties to Cultural Property Conventions).

⁸⁰ 1972 World Heritage Convention, *supra* note 76, art. 4.

⁸¹ *Id.* art. 6.

⁸² MORGAN, *supra* note 1, at 4.

destruction by the Taliban.⁸³ Among the multiple messages conveyed to the world by the destruction of the Buddhas were contempt for, and a desire to erase, Afghanistan's pre-Islamic past. The goal was nothing less than to remake the past in their own distorted image, just as they were remaking the present. Hence, in order to understand the destruction of the Buddhas, it is necessary to have a general understanding of their place in Afghanistan's history.

Historians believe that Buddhism was transmitted to the territory comprising modern Afghanistan by the 3rd century of the Common Era (CE), mostly like via the fabled "Silk Route," the series of trade routes that linked East Asia with the Mediterranean for hundreds of years.⁸⁴ Buddhism remained the dominant religion in the region for four centuries, until the Islamic conquest in the 7th century CE. For much of that period, the Bamiyan Valley was the site of a large Buddhist monastic community.⁸⁵ In his account of a visit to the region in 630 CE, the Chinese Buddhist pilgrim Xuanzang⁸⁶ described Bamiyan as a flourishing Buddhist center with "several tens" of monasteries and "several thousand" monks.⁸⁷ Many monks lived as hermits in small caves carved into Bamiyan's limestone cliffs, which are clearly visible in photographs of the Buddhas.⁸⁸ The caves were often elaborately decorated with religious statuary and brightly colored frescoes, traces of which remain.⁸⁹ At the time of Xuanzang's visit, the two colossal

⁸³ The destruction of the World Trade Centers in New York was a similarly symbolic act. The parallel between the destruction of both sites was explored in American artist J. Otto Siebald's drawings for a proposal to rebuild both sites in the July 15, 2002 issue of the *New Yorker*. See Calvin Tomkins, *After the Towers*, *NEW YORKER*, July 15, 2002, at 59. In the drawing, "the two Buddhas are rebuilt in New York City, while Twin Towers, accommodating refugees, occupy the empty niches at Bamiyan." MORGAN, *supra* note 4, at 25.

⁸⁴ ARCHAEOLOGICAL SURVEY OF INDIA, *BAMIYAN: CHALLENGE TO WORLD HERITAGE 3* (2002).

⁸⁵ MORGAN, *supra* note 1, at 48–51.

⁸⁶ The name is also transliterated as Hsüan-Tsang. For example, see ARCHAEOLOGICAL SURVEY OF INDIA, *supra* note 84, at 3.

⁸⁷ MORGAN, *supra* note 1, at 54.

⁸⁸ Flood, *supra* note 1, figs.1 & 2.

⁸⁹ *Id.* The destruction of the giant Buddhas revealed many more decorated caves that had been previously hidden. As reported by the French Centre National de la Recherche Scientifique, these previously unknown frescoes include what may be the earliest evidence of oil painting. Géraldine Véron, *Secrets of the Bamiyan Buddhas*, *CNRS INT'L MAG.*, Jan. 2009, <http://www2.cnrs.fr/en/1345.htm>.

standing Buddhas already dominated Bamiyan.⁹⁰ Radiocarbon dating confirms that the smaller of the statues, which stood at 35 meters, was the older of the two, with an estimated date of construction of 550 CE; the larger of the statues, standing at 55 meters, was constructed around 615 CE.⁹¹ The statues were carved in what is described as the “Gandharan⁹² Buddhist” or “Greco-Buddhist” sculptural style, a fusion of Greco-Roman and Indian stylistic influences, which reflect the region’s cultural diversity at this time.⁹³ Although it was once believed that the Islamic conquest of Afghanistan marked a complete break with Afghanistan’s Buddhist past, historians now agree that Buddhism remained a significant religion in Afghanistan until the Mongol invasions in the 13th century CE.⁹⁴ Bamiyan’s decline as a center of Buddhism was probably gradual. Although the Buddhas were periodically targeted by vandals or by rulers who saw them as idols, they remained and eventually their original identifications with manifestations of the Buddha were forgotten. The statues were transformed in the folklore⁹⁵ of the Hazara, the Persian-speaking, Shiite ethnic minority who currently form a majority of the Bamiyan Valley’s inhabitants. The third largest ethnic group in Afghanistan, the Hazaras also form substantial ethnic minorities in neighboring Iran and in Pakistan. However, as adherents of Shi’a Islam, the Hazaras are both an ethnic and a religious minority in Afghanistan.⁹⁶

⁹⁰ MORGAN, *supra* note 1, at 54.

⁹¹ *Id.*

⁹² Gandhara refers to a kingdom that existed in this region of Afghanistan as part of the Kushan Empire from roughly the 1st century CE until the 4th century CE, though its stylistic influence lingered. Afghanistan’s history during this period is obscure. Morgan writes,

The author of the *Beishi*, the Chinese *History of the Northern Dynasties*, writing in the seventh century, speaks for historians of pretty much any period of Afghan history when he writes despairingly of the period from the mid-third to the mid-sixth centuries, ‘From the time of the Northern Wei and the Jin, the dynasties of the Western Territories swallowed each other up and it is not possible to obtain a clear idea of events that took place at that time.’

Id. at 129.

⁹³ *Id.* at 7.

⁹⁴ *Id.* at 93–103.

⁹⁵ See Appendix A (The Tale of Salsal and Shahmama).

⁹⁶ For general background on the Haraza, see S. A. MOUSAVI, *THE HAZARAS OF AFGHANISTAN* (1998).

The destruction of the Bamiyan Buddhas was anticipated by many weeks, but it represented a reversal in Taliban policy. Mullah Omar, the Taliban leader, had previously stated that the statues were part of Afghanistan's pre-Islamic past that should be preserved in part because there were no longer any Buddhists in Afghanistan to venerate them. Hence, the statues no longer function as idols. It has been speculated that Mullah Omar's change of opinion was as a consequence of pressure exerted by Al-Qaeda.⁹⁷ While the Taliban were trying to mollify the West to obtain diplomatic recognition and humanitarian assistance, Osama Bin Laden was, at this stage, deliberately provoking the west. The fact that the Buddhas were culturally significant to the Hazaras, a Shiite minority despised by the devoutly Sunni Al-Qaeda, was perhaps a bonus motivation.

IV. "People" v. "Peoples"

Secondary international law consists in part of case law by international bodies applying norms and assessing penalties against violators. Attaching individual criminal liability for violations of treaty obligations, which generally fall on states, is not automatic, and the 1954 Hague Convention provides that states are generally responsible for prosecuting violators. Consequently, the case law in this area is underdeveloped. However, since 1993, the International Criminal Tribunal for Yugoslavia (ICTY) has been commended for advancing international norms for protection of cultural property in its case law.⁹⁸ The ICTY has convicted Yugoslav commanders for destruction of cultural property; however, the majority of those convictions have been premised on a theory that destruction of the cultural property (in most cases, religious cultural property) was part of a larger campaign of cultural genocide.⁹⁹ Hence, the destruction of the cultural property is an anthropocentric crime (that is, a crime against a group of people for

⁹⁷ Bucherer Interview, *supra* note 71.

⁹⁸ Theodor Meron, President, International Criminal Tribunal for the Former Yugoslavia, Keynote Address at the UNESCO Symposium on the 50th Anniversary of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict: The Protection of Cultural Property in the Event of an Armed Conflict Within the Case-Law of the International Criminal Tribunal for the Former Yugoslavia (May 14, 2004).

⁹⁹ Hiram Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1, 1 (2001).

whom the property forms a significant part of its group identity), rather than a crime against property.¹⁰⁰

The case law of the ICTY has been cited in support of the two competing theories that have been proposed for prosecution of the individuals responsible for the destruction of the Buddhas. One approach would argue that the destruction of the Buddhas represented a violation of the human rights of Buddhists globally for whom the statues are a part of their global heritage.¹⁰¹ Another approach would argue that the Buddhas represented “cultural heritage of significant value for humankind” and that their destruction “constitutes a breach of general international law.”¹⁰² Each of these theories is novel and has not been tested before an international tribunal (and the first challenge would be getting such a case before an international tribunal). However, an assessment of these alternatives exposes competing policy interests within the framework of cultural-property protections, which present a further impediment to closing the “gap” where the destruction of the Buddhas exists.

A human rights-based approach has the potential to strengthen national claims, as the only rightful possessors of cultural property located not only within the nation’s own borders but also in foreign museums and collections, thereby fueling recovery claims.¹⁰³ However,

¹⁰⁰ *Id.* (“The anthropocentric approach of law psychologically confines crimes against cultural property to a less visible position than other crimes. Even when crimes against cultural property are addressed, it is because the perpetrators’ objective was to harm the population whom the cultural property represented. For example, the ICTY addresses crimes involving the destruction of a mosque because they harmed the Muslim population. The same reasoning applies to the destruction of a Catholic monastery, which injured the Croat population, or of an Orthodox church, which harmed the Serb population. These anthropocentric and ethnocentric approaches require the establishment of a link between cultural property and the group of individuals that it represents. As a result, in the hierarchy of international crimes, there is often a tendency to place crimes against cultural property below crimes against persons. Although no one can deny the difference between the torture or murder of a human being and the destruction of cultural property, it remains important to recognize the seriousness of the latter, especially given its long-term effects.”).

¹⁰¹ Patel, *supra* note 19.

¹⁰² Franciono & Lenzerini, *supra* note 15, at 619.

¹⁰³ I deliberately use the legally imprecise term “recovery claim” to refer to a variety of types of claims for return of cultural property. Legal scholarship recognizes three types of recovery of cultural property. “Restitution” is the term most frequently to refer to the recovery of unlawfully obtained property (i.e., wartime pillage or stolen property). “Return” is used for property removed from a colonized country by the colonizing power and for cases of unlawful export. “Repatriation” refers to a specific form of restitution—

more significantly, this approach also has the potential to make the international laws that are designed to protect cultural property enforceable only when enforcement aligns with national interests and that may offer inadequate protection for cultural property that cannot be clearly linked to the identity of a particular people. By contrast, an approach that sees destruction of cultural property as a crime against humanity has the potential to criminalize destruction of a broader range of cultural property and to apply in a wider variety of contexts. However, this approach would also strengthen an “internationalist” view of cultural property,¹⁰⁴ which generally favors freer movement of cultural property and opposes aggressive recovery claims. Consequently, antiquities-rich states, which are heavily invested in laws to prevent the movement of cultural property, may resist this development. In addition, other countries, including the United States, may resist the development based upon long-standing concerns regarding erosion of national sovereignty by international law.

V. Conclusion

This attempt to place the destruction of the Bamiyan Buddhas within the framework of cultural property protections demonstrates the continuing relevance of a criticism made by Prof. M. Cherif Bassiouni twenty years before their destruction. He wrote,

The distinction made between relevant international instruments in their applicability of the contexts of war and peace is inappropriate to the effective enforcement of a common interest, based on the shared values and expectations of the world community which are presumably embodied in all these instruments. The

either to its origin country or to a specific ethnic group—and usually refers to claims by indigenous groups. Marie Cornu & Marc-André Renold, *New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution*, 17 INT'L J. OF CULTURAL PROPERTY 1, 2 (2010).

¹⁰⁴ The legal scholar most closely associated with this view is Stanford law professor John Henry Merryman. See John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985). John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986); John Henry Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. INT'L L. & POL. 1 (1998); John Henry Merryman, *Cultural Property Internationalism*, 12 INT'L J. OF CULTURAL PROP. 11 (2005). See also Joseph P. Fishman, *Locating the International Interest in Intrnational Cultural Property Disputes*, 35 YALE J. INT'L L. 347 (2010).

consequences of this distinction are that certain violations are deemed international crimes while others are not specifically deemed so. The legal distinction, in turn, produces significant differences with respect to enforcement, and that in large part, is reflected in the jurisdictional bases set forth explicitly or implicitly in these instruments. These instruments are either too limited or too narrow in their intended enforcement.¹⁰⁵

The recommendation that Professor Bassiouni subsequently offered—the adoption of a unified convention dealing with all aspects and types of property protection—seems as unlikely to happen now as it did when he wrote.¹⁰⁶ However, the gap that he identified still exists and in it squarely falls the destruction of the Bamiyan Buddhas. In the absence of a new convention, it remains for the elaboration of the second body of international law to close the gap. In order for that gap to be closed and not widened, the case law should articulate an internationalist perspective that “cultural heritage of significant value for humankind constitutes a breach of general international law applicable both in peacetime and in the event of armed conflicts”¹⁰⁷ Ultimately, development of a “trusteeship” model for cultural property, which would emphasize that we all, whatever our nationality, hold cultural property in trust for future generations, would best serve our common interest. This would require a change in a system that often seems to favor the provincial interest over the cosmopolitan in ways that distort our understanding of the past. States respect borders; culture does not.

Of course, these developments may be decades away, and even if it should occur, there is no way to retrieve all that has been lost. The final words of this article go to the writer Bruce Chatwin, who, in the midst of the Soviet invasion, lamented the Afghanistan that he once visited:

But that day will not bring back the things we loved: the high, clear days and the blue icecaps on the mountains . . . We shall not lie on our backs at the Red Castle and watch the vultures wheeling over the valley where they killed the grandson of Genghiz. We will not read Babur’s memoirs in his garden at Istalif . . . We will not stand on the Buddha’s

¹⁰⁵ Bassiouni, *supra* note 22, at 318.

¹⁰⁶ *Id.* at 319.

¹⁰⁷ Franciono & Lenzerini, *supra* note 15, at 619.

head at Bamiyan, upright in his niche like a while in a dry-dock.¹⁰⁸

¹⁰⁸ Bruce Chatwin, *A Lament for Afghanistan*, in *WHAT AM I DOING HERE?* 286 (1989).

Appendix A

The Tale of Salsal and Shahmama

Persian primary sources from as early as the 9th century CE refer to popular romances in which the Bamiyan Buddhas appear as characters.¹⁰⁹ Almost all of these sources refer to the statues as Surkh-But (the Red Idol) and Khing-But (the Bright Gray Idol); the former is identified as a male lover, the latter as his female beloved. Although the texts of the romances have not survived, the outlines of the presumed tale survive in folk tales handed down by the Harzara.¹¹⁰

According to these folk tales, the larger statue represents Salsal, a warrior, and the smaller statue, his beloved, Shahmama, the daughter of the emir (ruler) of Bamiyan. Shahmama's father believed that Salsal was unworthy of Shahmama but agreed to allow Salsal to marry her if he could prove his worth by accomplishing two extraordinary feats. At this time, Bamiyan was plagued by two problems: frequent destructive flooding and a double-headed dragon. If Salsal could resolve both problems, the emir agreed to grant his daughter's hand in marriage.

In order to accomplish these feats, Salsal needed a legendary weapon, a sword made of steel mined from Fuladi Mountain and forged by a wise man at Ahangaran in Ghur. Salsal made this journey and returned with the sword. He first resolved the flooding by damming the river. He then killed the dragon, skinned it, and sent its hide to be used as a carpet at his marriage to Shahmama. The emir accepted Salsal as a hero and agreed to his marriage to Shahmama.

The date of the marriage was announced. The emir then ordered the carving of a pair of niches for Salsal and Shahmama on cliff-face to celebrate their marriage and as a memorial of Salsal's triumph over the dragon. The bigger niche was covered with red curtains, the smaller

¹⁰⁹ Said Reza Hussein, *Destruction of Bamiyan Buddhas: Taliban Iconoclasm and Hazara Response*, 16 HIMALAYAN AND CENT. ASIAN STUD. 15, 22 (2012).

¹¹⁰ *Id.* at 23. The story that I recount here was collected by Said Reza Hussein in fieldwork among the Hazara. However, a variant narrative, using the same names for the statues, was collected by the nineteenth-century British traveler Edward Stirling and recorded in his diary, which was published as *THE JOURNALS OF EDWARD STIRLING IN PERSIA AND AFGHANISTAN, 1828–29* (J. L. Lee ed., 1991). This is the story that Morgan recounts. MORGAN, *supra* note 1, at 129. I have chosen to use Hussein's version because it was collected more recently, at firsthand, and by a native Afghan.

niche with green curtains. Salsal and Shahmama were supposed to remove these curtains at sunrise in order for the people see them as a couple standing in the niches, and then walk on the carpet made of dragon skin towards their marriage home. However, when the curtains were removed, both of them had turned into stone, the result of a curse by the dragon. Thereafter, the niches were referred to as the “niches of love.”

Appendix B

State Parties to Cultural Property Conventions

1. State Parties to the 1954 Hague Convention:

Albania, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Chad, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Holy See, Honduras, Hungary, India, Indonesia, Iran, Iraq, Israel, Italy, Japan, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Latvia, Lebanon, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malaysia, Mali, Mauritius, Mexico, Monaco, Mongolia, Montenegro, Morocco, Myanmar, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Palestine, Panama, Paraguay, Peru, Poland, Portugal, Qatar, Republic of Moldova, Romania, Russian Federation, Rwanda, San Marino, Saudi Arabia, Senegal, Serbia, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Tunisia, Turkey, Ukraine, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Yemen, and Zimbabwe.

2. State Parties to the 1970 UNESCO Convention:

Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Azerbaijan, Bahamas, Bangladesh, Barbados, Belarus, Belgium, Belize, Bhutan, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Central African Republic, Chad, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of Korea, Democratic Republic of the Congo, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Finland, France, Gabon, Georgia, Germany, Greece, Grenada, Guatemala, Guinea, Haiti, Honduras, Hungary, Iceland, India, Iran, Iraq, Italy, Japan, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Lesotho, Libya, Lithuania, Madagascar, Mali,

Mauritania, Mauritius, Mexico, Mongolia, Montenegro, Morocco, Myanmar, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Palestine, Panama, Paraguay, Peru, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saudi Arabia, Senegal, Serbia, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, the Former Yugoslav Republic of Macedonia, Tunisia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Viet Nam, Zambia, and Zimbabwe.

3. State Parties to the 1972 World Heritage Convention:

Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei, Bulgaria, Burkina Faso, Cabo Verde, Cambodia, Cameroon, Canada, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libya, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia, Moldova, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Niue, Norway, Oman, Pakistan, Palau, Palestine, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab

Republic, Tajikistan, Tanzania, Thailand, the Former Yugoslav Republic of Macedonia, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Uzbekistan, Vanuatu, Venezuela, Viet Nam, Yemen, Zambia, and Zimbabwe.

**GET BACK IN LINE: HOW MINOR REVISIONS TO AR
600-8-4 WOULD REJUVENATE SUICIDE LINE OF DUTY
INVESTIGATIONS**

MAJOR MARCUS L. MISINEC*

*I hear you, judge. What he did disgusts me and if he was alive, I'd expect you to put him in jail for a long time. But if I don't find him in the line of duty, then the family gets upset and it draws the attention of higher ups. If I do find him in the line of duty, nobody gives it a second thought.*¹

I. Introduction

In 2009, a master sergeant (MSG Bank) is under investigation for sexual harassment in Afghanistan.² He is in good spirits and tells others he is sure the investigation will be over soon. A few days into the sexual-harassment investigation, a search and seizure authorization is issued for MSG Bank's computer and electronic devices.

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¹ A student of the 62d Judge Advocate Officer Graduate Course shared this paraphrased quote with the author. According to the judge advocate, he received the response from the appointing authority of a suicide line of duty (LOD) investigation after the judge advocate recommended that the deceased Soldier be found not in the line of duty [hereinafter Appointing Authority Quote].

² This example is loosely based on the author's recent professional experience as an administrative law attorney in 2009. Information may have been added or deleted for the purposes of this article. Specific names, units, and locations have been changed or withheld to protect the privacy of the military personnel involved, as well as the surviving family members [hereinafter Professional Experience, Bank suicide].

When MSG Bank learns that all of the devices will be searched, his mood immediately changes because he knows what the search will uncover—proof of adulterous affairs with multiple civilian and military women (including one subordinate claiming it was against her will) and thousands of pornographic images and videos of female Soldiers. A few hours later, he tells some junior Soldiers that he cannot handle being court-martialed and going to prison, as well as having to explain everything to his wife. Master Sergeant Bank says he would rather be dead. A few hours later, he puts his pistol in his mouth and kills himself.³

In 2011, Captain (CPT) Wills finds out that his thirteen-year-old step-daughter just told his wife that he has been sexually molesting her since she was ten.⁴ His wife has proof and is going to the police. Captain Wills hangs up on his wife, gets into his car, and drives off post. As friends and other members of his unit are looking for him, CPT Wills sits in the parking lot of a vacated department store, posting a Facebook message apologizing to his step-daughter and family for the pain he has caused them. “I cannot live with what I have done” is the last line of the post. Captain Wills then pulls a handgun out of the glove box and shoots himself in the head.⁵

Pursuant to Army Regulation (AR) 600-8-4, line of duty (LOD) investigations were conducted in both cases to examine the circumstances surrounding the deaths.⁶ The two investigations shared much in common. First, neither of the individuals had a documented history of mental issues before their suicides. Second, substantial evidence in both cases indicated that MSG Bank and CPT Wills committed the wrongful acts of which they were accused.⁷ Further, both decedents communicated in some way that they realized the finality of

³ *Id.*

⁴ This example is also loosely based on the author’s recent professional experience as a Battalion Judge Advocate in 2012. Information may have been added or deleted for the purposes of this article. Specific names, units, and locations have been changed or withheld to protect the privacy of the military personnel involved, as well as the surviving family members [hereinafter Professional Experience, Wills suicide].

⁵ *Id.*

⁶ U.S. DEP’T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS para. 2-3c(3) (4 Sept. 2008) [hereinafter AR 600-8-4]. The author has personal knowledge that suicide LOD investigations were conducted for Master Sergeant (MSG Bank) and Captain (CPT) Wills.

⁷ See generally Professional Experience, Bank suicide, *supra* note 2; see also Professional Experience, Wills suicide, *supra* note 4.

the acts they were about to commit.⁸ Finally, MSG Bank and CPT Wills both had a “motive for self-destruction,”⁹ which was to avoid the personal and criminal consequences of their misconduct.

For these reasons and in accordance with regulatory guidance, both investigating officers (IOs) recommended the deceased be found “not in the line of duty—due to misconduct.”¹⁰ The judge advocates who conducted the legal reviews found the investigations sufficient. But in both cases, the approving authorities disapproved the IOs’ recommendations and determined the deceased was “in the line of duty.”¹¹ Their justification was that the deceased was mentally unsound when he committed the suicidal act.¹² However, the unspoken reason was that MSG Bank and CPT Wills had wives and children they left behind to fend for themselves and the command desired to ensure they received as much support from the Army as possible.¹³ Consequently, based on the LOD determinations, both families were eligible to receive their full contingent of death benefits.¹⁴

Though understandable from an emotional standpoint, that approach is problematic for judge advocates charged with upholding the integrity, intent, and purpose of laws, regulations, and investigations. The purpose of AR 600-8-4, for example, is to investigate “the circumstances of disease, injury, or death of a soldier”¹⁵ and not to simply find a way to ensure surviving family members receive as many posthumous benefits

⁸ See *supra* note 7. Master Sergeant Bank told others he specifically could not deal with the embarrassment of a court-martial, going to prison, and having to face his wife. Captain Wills never made an attempt to deny his thirteen-year-old step-daughter’s allegations and instead posted a public apology to her for what he had done.

⁹ U.S. DEP’T OF ARMY, REG. 600-10, THE ARMY CASUALTY SYSTEM para. 5-18d(3) (30 June 1966) [hereinafter AR 600-10]. Based on the evidence against them, both MSG Bank and CPT Wills would have likely faced significant adverse action for their misconduct.

¹⁰ AR 600-8-4, *supra* note 6, para. 2-6.

¹¹ See Professional Experience, Bank suicide, *supra* note 2; see also Professional Experience, Wills suicide, *supra* note 4.

¹² See *supra* note 7.

¹³ In a survey conducted by the author, 12 out of 17 (70.6%) current suicide LOD appointing authorities (future approving authorities) stated that making sure the surviving family is taken care of was the most important thing to them when one of their Soldiers committed suicide. Only one was most concerned with determining the Soldier’s line of duty status.

¹⁴ *Id.* Part III of this article examines how suicide LOD determinations impact surviving family benefits.

¹⁵ AR 600-8-4, *supra* note 6, para. 1-1.

as possible. Additionally, a finding that suicides like the above are “in the line of duty” is concerning because it fails to distinguish those cases from the cases of Soldiers who took their lives but were not under a cloud of criminal suspicion.

While highlighting this problematic practice of commanders undermining the regulatory framework, the purpose of this article is to propose revisions to AR 600-8-4 that resolve the approving authority’s concerns about benefits for the surviving families and also protect the credibility of suicide LOD investigations. This article analyzes the history, current law, and problem areas of the regulation before proposing a solution for those issues. The proposed remedy provides approving authorities a more concrete legal and moral basis to make the difficult determination of finding suicides committed to avoid the consequences of alleged misconduct “not in the line of duty.” At the very least, the suggested changes will allow a commander who feels sorry for a surviving family to more easily make the legally correct decision of finding a non-qualifying suicide not in the line of duty.

II. The Status Quo

Starting in 1966, LOD investigations were required for self-inflicted death, injury, or disease.¹⁶ Little has changed from a procedural standpoint in the past 47 years. To begin a LOD investigation, “[a]n officer exercising special court-martial jurisdiction will appoint a disinterested commissioned officer as an investigating officer.”¹⁷ The IO must first obtain a Department of the Army (DA) Form 2173 and ensure that the Medical Treatment Facility (MTF) completes section I while the unit commander completes section II.¹⁸ Once the form is completed, the IO begins collecting evidence for his suicide LOD investigation.

¹⁶ AR 600-10, *supra* note 9, para. 5-7a(2)(b).

¹⁷ *Id.* para. 5-8; *see also* AR 600-8-4, *supra* note 6, para. 3-6 (“The LD appointing authority is normally the SPCMCA.”).

¹⁸ AR 600-8-4, *supra* note 6, para. 3-8c. A Department of the Army Form 2173 (DA Form 2173) is the Statement of Medical Examination and Duty Status. Section I is filled out by the attending physician or hospital patient administrator. It asks for time of arrival, nature of injury, alcohol or drug use, and solicits an opinion as to whether the injured or deceased Soldier was “in the line of duty.” Section II is completed by the unit commander who must provide the duty status of the individual along with accident details before providing his or her line-of-duty recommendation. *See* U.S. Dep’t of the Army, DA Form 2173, Statement of Medical Examination and Duty Status (Oct. 1972).

For LOD investigations into suicides across all of the services, the IO must obtain “all possible evidence bearing on the mental condition of the deceased.”¹⁹ The type of evidence the IO is looking for in these cases includes the deceased’s actions and moods immediately before the suicide, and any issues that might have motivated the deceased to kill himself.²⁰ Notably, IOs in 1966 were advised that “[i]n a case of self-destruction . . . the investigating officer will obtain the opinion of a psychiatrist as to the mental condition of the individual.”²¹ Currently, suicide LOD IOs are still required to have a mental-health professional posthumously review the evidence to determine the bio-psychological factors that may have contributed to the Soldier’s suicide.²² The mental health officer’s recommendation is reflected in a block check on Department of Defense (DD) Form 261, Report of Investigation Line of Duty Misconduct Status.²³

If after collecting the evidence and required forms the IO finds that the death was “proximately caused by the soldier’s intentional misconduct,” the IO should recommend that the decedent is “not in the [Line of Duty]—due to own misconduct.”²⁴ Because many IOs struggle with the meaning of proximate cause, the regulation sheds some light on how to interpret this standard:

A proximate cause is a cause which, in a natural and continuous sequence, unbroken by a new cause, produces an injury, illness, disease, or death and without

¹⁹ AR 600-8-4, *supra* note 6, para. 3-8e(2)(h); *see also* U.S. DEP’T OF NAVY, JAG INSTR. 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) para. 0231(i) (26 June 2012) [hereinafter JAGMAN]. “In all cases of suicide or attempted suicide, evidence bearing on the mental condition of the deceased or injured person shall be obtained.” *Id.* *See also* U.S. DEP’T OF AIR FORCE, INSTR. 36-2910, LINE OF DUTY (MISCONDUCT) DETERMINATION para. A5.12 (4 Oct. 2002) [hereinafter AFMAN]. “Consider all evidence bearing on suicide attempt or suicidal gesture and any problem that might serve as motivation for the incident.” *Id.*

²⁰ AR 600-8-4, *supra* note 6, para. 3-8e(2)(a) (“Personal notes or diaries of the deceased are valuable evidence.”).

²¹ AR 600-10, *supra* note 9, para. 5-9h(1).

²² AR 600-8-4, *supra* note 6, para. 4-11b. After the review, the mental-health officer will render an opinion as to the probable causes of the suicide and whether the deceased was mentally sound at the time of the incident. *Id.*

²³ *Id.* para. 2-5.

²⁴ AR 600-8-4, *supra* note 6, para. 2-6a (“Injury, disease, or death proximately caused by the soldier’s intentional misconduct or willful negligence is ‘not in LD—due to own misconduct.’ Simple or ordinary negligence or carelessness, standing alone, does not constitute misconduct.”).

which the injury, illness, disease, or death would not have occurred. A proximate cause is a primary moving or predominating cause and is the connecting relationship between the intentional misconduct or willful negligence of the member and the injury, illness, disease, or death that results as a natural consequence that supports a “not line of duty—due to own misconduct” determination.²⁵

If, however, the decedent’s death was due to simple or ordinary negligence, carelessness, or unsound mind, the IO will recommend the that the decedent be found “in the line of duty,”²⁶ which is recorded on the DD Form 261.²⁷

At this point, the appointing authority receives the investigation and conducts a review to determine whether all pertinent regulatory instructions have been followed. If something is missing or has been performed incorrectly, the appointing authority either ensures the issue is fixed or finds that there is a valid reason for noncompliance.²⁸ Once the investigation is complete, a judge advocate drafts a legal review to ensure regulatory compliance as well.²⁹ Then the appointing authority approves or disapproves the IO’s LOD recommendation.³⁰ If the appointing authority disapproves the IO’s recommendation, the appointing authority must specify, in writing, the reasons for that disapproval.³¹

Now, the entire investigation packet is elevated to the final approving authority—the General Court-Martial Convening Authority (GCMCA).³² The GCMCA (or his delegated officer)³³ “approve[s] or

²⁵ *Id.* glossary.

²⁶ *Id.* para. 2-6a.

²⁷ *Id.* para. 3-8f(7).

²⁸ *Id.* para. 3-9a.

²⁹ *Id.* para. 3-9b. The judge advocate will: (1) determine whether legal requirements are in compliance, (2) ascertain if any errors exist and if so, whether such error has a material or adverse effect on any individual’s rights, (3) determine whether the determination of the investigation is supported by substantial evidence or lack of evidence, and (4) examine the investigation to see if potential claims may be involved. *Id.*

³⁰ *Id.* para. 3-11b.

³¹ *Id.*

³² *Id.* para. 3-11a.

³³ See generally *id.* para. 3-11b.

disapprove[s] the determination of the lower headquarters.”³⁴ For death cases, Headquarters Department of the Army (HQDA) receives a copy of the completed LOD investigation, which the Department of Veterans Affairs uses when making its own LOD determination to decide Veterans-Affairs benefits eligibility.³⁵ Arguably, much rides on the decision of the approving authority, but few commanders know exactly how much or how little difference their LOD decisions make in terms of benefits for the Families. The following section examines those death benefits and the impact of a “not in the line of duty” determination.

III. Inside the Numbers

Despite every suicide having its own unique set of circumstances and potential motive, an unsupported majority are found “in the line of duty.”³⁶ This section presents statistical data underscoring that assertion and then proffers a likely reason why such a high percentage of suicides are found “in the line of duty.”

Between 2005 and 2012,³⁷ a total of 1,107 active-duty Soldiers committed suicide.³⁸ As section II of this paper discusses, each of those suicides required a suicide-LOD investigation. And based on statistics provided by the Developing Center on Interventions for the Prevention of Suicide (DCIPS), a staggering 1,011 of those suicides (91 percent) were determined to be “in the line of duty.”³⁹ Appendix A contains a graphical chart illustrating an annual breakdown of these statistics from 2005 to 2012.

Informal statistics maintained by the DCIPS suggest further that of the 96 suicides determined to be “not in the line of duty,” several such

³⁴ *Id.*

³⁵ *Id.* para. 3-12a; *see also generally id.* para. 2-2f. Though the Department of Veterans Affairs (DVA) make its own LOD determination, the determination rests upon the “facts that have been officially recorded and are on file with the DA.” *Id.*

³⁶ *See infra* notes 37–44 and accompanying text.

³⁷ Because today’s AR 600-8-4 mirrors the April 15, 2004 version with respect to investigating suicides, the statistics analyzed in Part III are based on data from 2005–2012.

³⁸ E-mail from Charlotte D. Brough, Data Mgmt. Specialist, Developing Ctrs. on Interventions for the Preventions of Suicide (DCIPS), to Captain Marcus L. Misinec, Student, 62d Judge Advocate Officer Course, The Judge Advocate Gen.’s Sch. (26 Nov. 2013, 11:15 EST) [hereinafter Brough e-mail] (on file with author).

³⁹ *Id.*

findings were most likely due to the decedent being absent without leave (AWOL) at the time of the suicide.⁴⁰ Pursuant to AR 600-8-4, “[a]ny injury or disease incurred while the soldier is AWOL will be handled as ‘not in the line of duty’ unless the soldier was mentally unsound at the inception of the unauthorized absence.”⁴¹ Thus, if it were not for these mandatory “not in the line of duty” determinations, the 91-percent figure would likely be even higher.

A. The One-Question “Investigation”

Every suicide has its own set of circumstances, but it appears that those factual circumstances are trumped by one commonality.⁴² These cases all involve a family being left behind.⁴³ These “survivors of suicide”⁴⁴ are what compel appointing and approving authorities to pause as they make the difficult LOD determination.⁴⁵ So influential is the existence of these individuals⁴⁶ that even though the word “family” is only mentioned once in the thirty-five pages of AR 600-8-4,⁴⁷ often the IO is more concerned with *who* the deceased left behind rather than *what* motivated the suicide⁴⁸

Understandably, taking care of Soldiers’ Families is a valid concern for every military leader. However, it cannot undermine the intent and purpose of a regulation or the integrity of an investigation. Nor should it cause an appointing or approving authority to ignore the fact that in some cases, the family is broken only because of the deceased’s actions. It is important to remember that in a case like that of MSG Bank or CPT

⁴⁰ Telephone Interview with Charlotte D. Brough, Data Mgmt. Specialist, Developing Ctrs. on Interventions for the Preventions of Suicide (DCIPS) (Nov. 26, 2013) [hereinafter Brough Interview].

⁴¹ AR 600-8-4, *supra* note 6, para. 4-7.

⁴² See Misinec LOD Survey, *supra* note 12.

⁴³ See generally Professional Experience, Bank suicide, *supra* note 2; see also Professional Experience, Wills suicide, *supra* note 4.

⁴⁴ A “survivor of suicide” is not an individual who failed in the attempt to commit suicide. Rather, “the term describes loved ones left behind to mourn after the tragedy of suicide.” Christa Scales, *See 25 Tips for Survivors of Suicide Loss*, GIGGLE ON (Mar. 5, 2009), <http://giggleon.com/tips-suicide-survivors/>.

⁴⁵ See Misinec LOD Survey, *supra* note 12.

⁴⁶ *Id.*

⁴⁷ AR 600-8-4, *supra* note 6.

⁴⁸ See generally Professional Experience, Bank suicide, *supra* note 2; see also Professional Experience, Wills suicide, *supra* note 4.

Wills, the misconduct that motivated the suicide would have most likely led to criminal prosecution or adverse separation proceedings had they remained alive. In that instance, the family would have received far less financial assistance from the Army while MSG Bank or CPT Wills were imprisoned or unemployed due to separation.⁴⁹

B. Effect of a Not in the Line of Duty Determination: Reality Revealed

Imagine a judge advocate asking an approving authority the following question: “Sir, we have a two-time drug user with no deployments and a three-time deployer who is a stellar Soldier and just wants to ETS and start a different life. Do you want to give them both Honorable Discharges?” First, he is likely going to answer “no.” Second, he is probably going to call the Staff Judge Advocate for a new attorney. The reason is that he is well-versed in discharge characterizations⁵⁰ and knows how to distinguish one Soldier from another when it comes time to make those decisions.

Some appointing and approving authorities lack the same savvy when it comes to a LOD determination’s effects on surviving family benefits. Consequently, commanders and IOs might make recommendations or determinations that are not congruent with their personal morals or command styles. With that in mind, the remainder of this section addresses benefits as they apply to completed suicides to educate the reader as to what benefits are affected or lost in a negative LOD determination.

First and foremost, regardless of what LOD determination is made, the surviving family members receive Servicemembers Group Life

⁴⁹ See generally U.S. DEP’T OF DEF., INSTR. 1342.24, TRANSITIONAL COMPENSATION FOR ABUSED DEPENDENTS (23 May 1995). The purpose of the instruction is to implement the policies and procedures described under 10 U.S.C. § 1059 for the payment of monthly transitional compensation to dependents of members separated for dependent abuse. Under this program, family members of a Soldier who is either separated by court-martial or administrative proceedings can receive monthly government compensation for up to thirty-six months. However, the offense that led to the separation must be a dependent-abuse offense. A dependent-abuse offense is conduct by a service member on active duty and involves the abuse of a spouse or a dependent child of the servicemember and is a criminal offense under the Uniform Code of Military Justice (UCMJ), federal criminal law, or state criminal law. See 10 U.S.C. § 1059 (2006).

⁵⁰ See generally THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER’S LEGAL HANDBOOK 162–66 (June 2013).

Insurance (SGLI), which is a \$400,000 payout unless the member elected a lesser amount or declined coverage in writing or the service member was absent without leave for more than 30 days.⁵¹ The family also receives the Death Gratuity lump sum payment of \$100,000,⁵² as well as any Unpaid Pay and Allowances.⁵³ Additionally, monthly Social Security benefits are paid to spouses (regardless of age) with children of the deceased under age sixteen.⁵⁴ Those payments continue until the youngest child reaches eighteen.⁵⁵

However, families of Soldiers found “not in the line of duty” will not receive a Survivor Benefit Plan (SBP) payment. The SBP is a monthly annuity paid by the military to the surviving spouse or, in some cases, children of the deceased Soldier when he dies in the line of duty while on active duty.⁵⁶ The initial annuity amount is 55 percent of the retired pay that the member would have been entitled to based on years of service, had he retired on the date of his death.⁵⁷ When the surviving spouse reaches age 62, the annuity is reduced to 35 percent.⁵⁸ Admittedly, because of the longevity of the payout, this is a sizeable amount of money. Using as an example a captain with eight years of active-duty service, the initial annuity amount is \$921 per month. If his wife was thirty-two-years old when he committed suicide and then lived to age seventy-five, she would receive \$422,976 over the course of forty-three years.⁵⁹ Approving authorities may point to the SBP’s potentially high

⁵¹ 38 U.S.C.A. §§ 1967, 1968(a)(b)(i) (West 2014); *see also* Interview with Major Candace Beshers, Assoc. Professor., Tax and Estate Planning, The Judge Advocate Gen.’s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va., in Charlottesville, Va. (Nov. 20, 2013) [hereinafter Beshers Interview] (Major Beshers discussed the block of instruction she gives to senior officers and sergeants major about death benefits.)

⁵² 10 U.S.C.A. § 1478(a) (West 2014).

⁵³ 37 U.S.C.A. § 501 (West 2014). Unpaid allowances may include, but are not limited to, unpaid basic pay, payment for up to 60 days of accrued leave, and unpaid installments of variable reenlistment bonuses.

⁵⁴ 42 U.S.C.A. § 402 (West 2014).

⁵⁵ *Id.*

⁵⁶ 10 U.S.C.A. § 1448d (West 2014).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ This hypothetical is based on CPT Wills who had approximately eight years of active-duty service on the date of his death. Fifty-five percent of his retirement entitlement would be \$921. That amount was multiplied by 12 to determine an annual amount (\$11,052), which was then multiplied by 30 to take CPT Wills’s wife to age sixty-two (\$331,560). The amount was then reduced to 35 percent (\$586) and once again multiplied by 12 to determine an annual amount (\$7032), which was multiplied by 13 (\$91,416).

value as a reason to support finding as many suicides “in the line of duty” as possible. However, the intent and purpose of AR 600-8-4 is to determine why a Soldier committed suicide, not to justify the potential expenditure of close to half a million government dollars over four decades when the Soldier’s actions—not the Army’s—are responsible for his family’s plight.

IV. The Mentally “Unsound” Presumption

Part III examined *why* so many suicides are found “in the line of duty.” This section of the article explores *how* appointing and approving authorities are able to make those recommendations and determinations without anyone likely giving it a second thought.

A. In the Beginning: Motive Trumped Money

Suicide LOD investigation guidelines did not always presume that a Soldier who committed suicide was mentally unsound. In 1966, the original LOD investigation guidelines stated as follows:

Although the mere fact of self-destruction is not alone sufficient to overcome the *legal presumption that every person is sane and intends the natural and probabl[e] consequences of his acts*, any affirmative evidence that the member was so mentally unsound as to be unable to refrain from the act overcomes the presumption. In cases where no *reasonably adequate motive for self-destruction is supplied by the evidence*, a finding of mental unsoundness will be made.⁶⁰

In 1971, the Army implemented AR 600-33 “to render faster and more accurate investigations” for line-of-duty determinations.⁶¹ This version maintained the position that Soldiers can understand the consequences of their suicidal actions and retained the presumption that a suicide was “not in the line of duty.”⁶² Then in 1980, the sanity presumption started

⁶⁰ AR 600-10, *supra* note 9 (emphasis added).

⁶¹ U.S. DEP’T OF ARMY, REG. 600-33, LINE OF DUTY INVESTIGATIONS (11 Oct. 1971) [hereinafter AR 600-33].

⁶² *Id.* para. 2-3b.

to change due to a cultural shift that placed more importance on “the welfare of the family . . . than the strict application of hard to apply retrospective standards of ‘soundness’ to a decedent.”⁶³ The 1980 revision of AR 600-33 stated that “[i]n suicide cases, mental unsoundness should be presumed unless there is positive evidence of mental soundness.”⁶⁴ That change was a complete reversal from the guidelines contained in the original and 1971 LOD regulations.

The 1980 regulation further directed, “When the evidence does not adequately show a motive for suicide, a determination of accidental self-destruction will be found.”⁶⁵ Consequently, had MSG Bank and CPT Wills committed suicide in 1981, the IOs, for the first time, would be charged with finding enough evidence to overcome mental unsoundness in order to support a “not in the line of duty” recommendation.

Also noteworthy from the 1980 version is the introduction of Rule 10 in AR 600-33—the legal presumption of mental unsoundness rule.⁶⁶ Rule 10 remained intact when, in 1986, AR 600-33 was eliminated and LOD investigation guidance once again became part of the much broader Army Casualty Program regulation.⁶⁷ It is similar to today’s Rule 10 except for the following additional language from the 1986 regulation: “Suicide is the deliberate and intentional destruction of one’s own life by a person of years of discretion and a sound mind.”⁶⁸ This language

⁶³ E-mail from Colonel (Retired) David T. Orman, M.D., Chief, Behavioral Health Serv. Line Integration Office, Behavioral Health Div., HQ, MEDCOM, to Captain Marcus L. Misinec, Student, 62d Judge Advocate Officer Course, The Judge Advocate Gen.’s Sch. (Dec. 3, 2013, 15:52 EST) [hereinafter Orman e-mail] (notes on file with author). Colonel Orman retired in 2007 after thirty years of active-duty service and immediately began his civil service. He has authored or co-authored fifteen professional publications and has had several positions within the military mental health field, to include being the Director of Psychiatry Graduate Medical Education at Tripler Army Medical Center. While on active-duty, he held several positions including Division Psychiatrist at 1st Calvary Division, Ft. Hood, Texas, and Psychiatry Consultant to the U.S. Army Surgeon General. According to COL Orman, he has “seen more patients than any other DoD psychiatrist alive.”

⁶⁴ U.S. DEP’T OF ARMY, REG. 600-33, LINE OF DUTY INVESTIGATIONS para. 2-6b (15 July 1980) [hereinafter AR 600-33].

⁶⁵ *Id.*

⁶⁶ *Id.* app., R. 10.

⁶⁷ Army Regulation 600-33 became Part Five of AR 600-8-1, *Army Casualty and Memorial Affairs and Line of Duty Investigations*. U.S. DEP’T OF ARMY, REG. 600-8-1, ARMY CASUALTY AND MEMORIAL AFFAIRS AND LINE OF DUTY INVESTIGATIONS (18 Sept. 1986) [hereinafter AR 600-8-1].

⁶⁸ See *id.* app. F, R. 10. The rule described the standard necessary to overcome the presumption that a sane person would not commit suicide and thus should be found in the

directly conflicts with the very next sentence: “The law presumes that a sane man will not commit suicide.”⁶⁹ Understandably then, the language “by a person of years of discretion and a sound mind” was subsequently removed between 1986 and 2004 and no longer exists in Rule 10 today.⁷⁰ This is further evidence of how the suicide LOD investigation regulation underwent continuous modification until an overwhelming number of suicides would be found to be “in the line of duty.”

That brings the LOD regulatory standard evolution to the present day. Today’s IOs are instructed to “never begin the investigation with predetermined ideas as to the cause of the injury, disease, or death.”⁷¹ Interestingly, before collecting the first piece of evidence, the same regulation expressly instructs the IO: (1) to operate under the legal presumption that a mentally sound person will not commit suicide,⁷² (2) that a death “is presumed to be in (the line of duty) unless refuted by

line of duty. “The law presumes a sane person will not commit suicide. This presumption prevails until overcome by substantial evidence and a greater weight of the evidence than supports any different conclusion.” *Id.*

⁶⁹ *Id.*

⁷⁰ Rule 10 is the current rule that guides IOs through the process of determining whether there is enough evidence to overcome the mentally unsound presumption. It reads as follows:

A wound or other injury deliberately self-inflicted by a soldier who is mentally sound is not in line of duty. It is due to misconduct. Suicide is the deliberate and intentional destruction of one’s own life. The law presumes that a mentally sound person will not commit suicide (or make a bona fide attempt to commit suicide). This presumption prevails until overcome by substantial evidence and a greater weight of the evidence than supports any different conclusion. Evidence that merely establishes the possibility of suicide, or merely raises a suspicion that death is due to suicide, is not enough to overcome the in line of duty presumption. However, in some cases, a determination that death was caused by a deliberately self-inflicted wound or injury may be based on circumstances surrounding the finding of a body. These circumstances should be clear and unmistakable, and there should be no evidence to the contrary.

AR 600-8-4, *supra* note 6, app. B-10, R. 10.

⁷¹ *Id.* para. 3-8b.

⁷² *Id.* app. B-10, R. 10; *see also generally* JAGMAN, *supra* note 18, para. 0218c. “In view of the strong human instinct for self-preservation, suicide and a bona fide suicide attempt, as distinguished from a suicidal gesture, creates a strong inference of lack of mental responsibility.” *Id.* *See also generally* AFMAN, *supra* note 18, para. A5.12.1. “A bona fide suicide attempt . . . raises a strong inference of lack of mental responsibility because of the instinct for self-preservation.” *Id.*

substantial evidence contained in the investigation,”⁷³ and (3) to be sure about finding a deceased “not in the line of duty” because “such a person (or his surviving family) stands to lose substantial benefits as a consequences of his or her actions.”⁷⁴ Couple those “considerations” with the likely pressure from superiors to take care of the family and avoid the public and political perception of being insensitive to the Army’s suicide crisis,⁷⁵ and the likelihood of anything other than a finding of “in the line of duty” is minimal.

B. Posthumous Mental Health Evaluations: A Professional’s Opinion

*Soundness has no clinical meaning for us. The best we’re doing is speculating and if we’re going to err, it’s going to be on the side of what’s fundamentally best for the family.*⁷⁶

In concert with an apparent trend in rubber-stamping LOD investigations involving suicides, the Military Psychologists’ Desk Reference (MPDR) asserts that mental-health professionals are simply incapable of determining whether legal issues can be motivating events that lead to suicide.⁷⁷ However, at least one Department of Defense

⁷³ AR 600-8-4, *supra* note 6, para. 2-6b.

⁷⁴ *Id.* para. 2-1.

⁷⁵ In 2009, there were 239 suicides in the Army (including the reserve component). There were also 1,713 known attempted suicides in the same period. *See* PETER W. CHIARELLI, ARMY HEALTH PROMOTION RISK REDUCTION SUICIDE PREVENTION—THE CHIARELLI REPORT, at i (2010) [hereinafter CHIARELLI REPORT]. General (GEN) (Retired) Peter W. Chiarelli retired in 2012 after a forty-year military career that included serving as the Army’s vice chief of staff. Passionate about reducing the number of suicides in the military, GEN Chiarelli led the Army Suicide Prevention Task Force and the Army Suicide Prevention Counsel and is now the Chief Executive Officer for One Mind for Research. *See* Master Sergeant Doug Sample, *Army Vice Chief Retires After 40 Years of Service*, U.S. ARMY (Jan. 31, 2012) http://www.army.mil/article/72859/Army_vice_chief_retires_after_40_years_of_service/ (last visited Mar. 10, 2014).

⁷⁶ Telephonic Interview with Colonel (COL) (Retired) David T. Orman, M.D., Chief, Behavioral Health Serv. Line Integration Office, U.S. Army, Med. Cmd. (MEDCOM), Ft. Sam Houston, Tex. (Nov. 26, 2013) [hereinafter Orman Interview].

⁷⁷ *See generally* BRET A. MOORE & JEFFREY E. BARNETT, MILITARY PSYCHOLOGISTS DESK REFERENCE (2013), available at <http://books.google.com/books?id=TArtDfLILKeYC&pg=PA338&dq=Army+mental+health+reference+suicide&hl=en&sa=X&ei=AoGeUq6LEdONkAeL54GgBg&ved=0CC0Q6AEwAA#v=snippet&q=courts-martial&f=false> (last visited Dec. 22, 2013).

(DoD) medical professional disagrees with that assessment. When asked whether he believed that the discovery of misconduct could lead a Soldier to rationally choose suicide over facing the consequences of his wrongful acts, Colonel (COL) (Retired) David Orman, M.D., replied, “Of course. We have all kinds of examples of individuals choosing to face death . . . particularly impulsively in the heat of their initial shock of facing major loss (career, confinement, etc.) before allowing themselves to process their options.”⁷⁸ Supporting COL Orman’s position that misconduct being revealed can be a motive for death, a study of military suicides committed between 2005 and 2009 indicated that military-justice encounters and administrative actions were present in 34 percent of the suicides.⁷⁹

Discussing whether such impulsive acts demonstrate mental unsoundness, COL Orman stated, “We make decisions in the negative. Therefore, we wouldn’t normally say that someone was or wasn’t mentally unsound when he committed suicide, we would say there was no prior evidence of mental defect or disease and an impulsive act doesn’t make them mentally ill.”⁸⁰ Supporting COL Orman’s position, the MPDR, which is “written by leading experts in their respective fields of military psychology,” is completely void of any language about mental unsoundness.⁸¹ In fact, the only reference to mental soundness at all in the MPDR’s 330-plus pages is in the translation of a Roman poet. In replying to a question about what people should desire in living, Juvenal said, “mena sana in corpore sano” (a sound mind in a healthy body).⁸² Though poetically pleasant, Juvenal’s prose about happy living lacks revolutionary insight and psychological expertise. Unfortunately,

It is important to note that legal issues in the military can have unique characteristics as they include courts-martial, administrative separation actions, nonselection for promotion, and disciplinary actions (e.g., Article 15). Although there has been some discussion in the literature of suicide “triggers” (i.e., an event known to be the motivation for death), current methodologies do not allow for precision in understanding the associated stressors in the vast majority of cases.

Id. at 144.

⁷⁸ Orman e-mail, *supra* note 62.

⁷⁹ See CHIARELLI REPORT, *supra* note 74, at 25. “From 2006–2009, criminal legal issues were the most prevalent individual risk factor for senior personnel and contributed to 39% (7 of 18) of field grade officer suicides.” *Id.*

⁸⁰ *Id.*

⁸¹ MOORE & BARNETT, *supra* note 76.

⁸² *Id.*

based on the opinions of COL Orman and the drafters of the MPDR, the same can be said about evaluating the mental soundness of the dead.

Nevertheless, as discussed in Part II, AR 600-8-4 currently requires IOs to obtain a posthumous evaluation of the decedent's mental health at the time of the suicide. This is so even though in many cases, the mental-health professional never even met the deceased.⁸³ Understandably, COL Orman finds it difficult to rationalize this practice in light of the otherwise thorough nature of his profession. "In my opinion, asking officers to make these determinations is 'unsound' unless there is well-documented behavioral evidence from others with direct knowledge who can attest to the behavior and mental state of the decedent."⁸⁴ Nevertheless, COL Orman reluctantly admits that DoD psychiatric residents are taught to err on the side of an unsound finding even if a decedent was never formally diagnosed before the fatal event.⁸⁵ That instruction is unsettling to COL Orman, who believes making a determination about soundness for purposes of paying out family benefits is a "flawed rationale from our perspective as experts on human behavior."⁸⁶

Colonel Orman's conclusion on soundness determinations is confirmed after reviewing the two cases discussed at the start of this article. There is no well-documented behavioral evidence for MSG Bank or CPT Wills upon which to make a mental-soundness determination because they likely acted impulsively in response to their wrongful acts being exposed. Consequently, based on the opinion of a mental-health professional with 35 years of experience, there was no basis for MSG Bank or CPT Wills to be determined mentally unsound and thus "in the line of duty." The fact that they were found "in the line of duty" is further evidence that AR 600-8-4 allows for mental-health expertise and evidentiary-based motives to be suppressed in favor of emotional desires to take care of surviving family.

⁸³ See generally Professional Experience, Bank suicide, *supra* note 2; see also Professional Experience, Wills suicide, *supra* note 4.

⁸⁴ Orman e-mail, *supra* note 62.

⁸⁵ *Id.*; see also Orman Interview, *supra* note 75. During his phone interview, it was evident that COL Orman was opposed to the Department of Defense's practice of tying soundness determinations to family benefits: "In my opinion, the whole premise is flawed and without human purpose." *Id.*

⁸⁶ *Id.*

The practice of conducting a post-mortem mental-health evaluation is suspect because it forces mental health professionals to speculate as to the decedent's mental state at the time of the suicide. This is especially true when the mental-health professional had no prior interaction with the decedent and there was no documented history of mental disease or defect to which the mental-health professional may refer. Thus, the normally thorough and specialized practice of diagnosing mental disorders is reduced to a speculative finding often supports the approving authorities' desire to find the decedent "in the line of duty" so that surviving family members can receive as much financial support as possible.

V. The Fix: Do It Right or Don't Do It At All

A. Why Bother?

Recently, the National Football League (NFL) considered the idea of eliminating the extra-point kick after touchdowns because they have become near-automatic despite defensive players' efforts to block them.⁸⁷ The one-point "chip-shots" have become so routine that coaches are reluctant to use their best linemen on the play out of fear they will be subjected to unnecessary injury.⁸⁸

Statistics analyzed in Part III of this article suggest that perhaps suicide line-of-duty determinations have become "near-automatic" as well. Yet, like exposing linemen to injury, the Army still subjects family and friends to unnecessary emotional distress by conducting personal and sensitive inquiries despite what has apparently become a predetermined outcome.

So, why not just do away with LOD investigations for completed suicides? Or, in the alternative, decouple the LOD findings and the survivor benefits? The answer to these questions is that doing so may

⁸⁷ See Josh Alper, *Roger Goodell: NFL Will Explore Eliminating the Extra Point*, NBC (Jan. 20, 2014), <http://profootballtalk.nbcsports.com/2014/01/20/roger-goodell-nfl-will-explore-eliminating-the-extra-point/>. In 2013, 1256 out of 1261 (99.6%) extra points were made. *Id.*

⁸⁸ See generally Mike Florio, *Eliminating Extra Point Makes Sense*, NBC (Jan. 21, 2014), <http://profootballtalk.nbcsports.com/2014/01/21/eliminating-extra-point-makes-sense/>. On November 19, 2012, the New England Patriots' star tight-end, Rob Gronkowski, broke his arm while blocking for an "automatic PAT try." *Id.*

incentivize wrongdoers to commit suicide to avoid the consequences of their offenses. A fictional dramatization of this situation was depicted in an episode of the television show *Blue Bloods*.⁸⁹ In that episode, Corporal John Russell, who was suffering from Post Traumatic Stress Disorder (PTSD), beat his wife and ran away with their eight-year-old son.⁹⁰ A few days later, Corporal Russell was cornered by police on a high-rise rooftop. He let his son go, but the detective's attempt to talk Corporal Russell down from the ledge was unsuccessful. Just before going over the edge, Corporal Russell stated his loved ones would be much better off if he jumped.⁹¹

Because there is such an overwhelming likelihood that they will be found "in the line of duty," Soldiers contemplating suicide in today's Army may have the same mentality as the fictional Corporal Russell did when it comes to taking care of their surviving family members. In their minds, the benefits of committing suicide far outweigh the cost of taking their own lives. Therefore, there must be a motivating factor to compel these troubled Soldiers to climb down off the edge. Eliminating LOD investigations altogether or decoupling the LOD determination and survivor benefits is not the solution because it would completely remove a potential inhibition, no matter how slight it is. That is the last thing that an already suicide-plagued Army needs.⁹² Rather, Soldiers must come to understand that there is a legitimate chance a suicide will be found "not in the line of duty," which would negatively impact their legacy and Families' financial future. Admittedly, this approach will not stop every suicide, but it will demonstrate the Army's resolve to support AR 600-8-4's intended purpose and perhaps provide at least some deterrence to committing suicide.

⁸⁹ *Blue Bloods: Unfinished Business* (CBS television broadcast Jan. 17, 2014).

⁹⁰ *Id.* Corporal Russell was in the U.S. Army and, according to his storyline, had deployed multiple times. Upon returning home from his last deployment, Corporal Russell became paranoid about his surroundings. According to his psychiatrist, he "brought the war home with him." Corporal Russell's wife referred to him as "the love of her life," but after she told him she wanted a divorce because she could no longer deal with his behavior, Corporal Russell beat her and ran away with their son. *Id.*

⁹¹ *Id.* Corporal Russell searched for improvised explosive devices while in Afghanistan. Several of his friends were killed in combat, and he could not deal with his survivor's guilt despite receiving some level of professional help. *Id.*

⁹² See Brough e-mail, *supra* note 37 (1,107 Soldiers have committed suicide in the last eight years).

B. The Right Answer: *Get Back to Where You Once Belonged*⁹³

1. *Eliminate the Mentally Unsound Presumption and Focus on the Motive*

The mentally-unsound presumption found in the current AR 600-8-4 conflicts with other legal mental responsibility standards⁹⁴ and stacks the deck in favor of a finding of in the line of duty before the investigation even begins. Moreover, it degrades the mental-health profession,⁹⁵ demeans the investigatory process, and discounts a judge advocate's subject-matter expertise when it comes to evaluating evidence of the decedent's motives. For these reasons, the Army should eliminate the mentally-unsound presumption and revert to the original LOD investigation regulation. That standard correctly focused on the motive for the suicide, not just the act of committing it.

Motive is "something that leads one to act."⁹⁶ As an example for the use of the word "motive," Merriam-Webster provides, "Their *motive* in running away was to avoid being punished."⁹⁷ Being motivated to choose death to avoid a life filled with shame and punishment is not a new concept. Rather, it transcends culture and time. For example, ancient samurai used to perform a suicide ritual known as seppuku⁹⁸ for a variety of reasons in accordance with the samurai code of conduct. "Motivations could include personal shame due to cowardice in battle" or due to "shame over a dishonest act."⁹⁹ In 1894, COL Robert G.

⁹³ THE BEATLES, *Get Back, on LET IT BE* (Apple Records 1970).

⁹⁴ In criminal proceedings, a defendant or an accused is presumed to be of sound mind and has the burden of proving that he either lacked the mental responsibility to commit the crime or is suffering from a mental disease that makes him unfit to stand trial. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 706 (2012) [hereinafter MCM].

⁹⁵ See generally Orman e-mail, *supra* note 62 (COL Orman suggested that the DoD's insistence on making a determination of mental soundness is archaic and flawed from the perspective of human behavior).

⁹⁶ BLACK'S LAW DICTIONARY 712 (9th ed. 2009).

⁹⁷ *Motive*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/motive> (last visited Jan. 24, 2014).

⁹⁸ Kallie Szczepanski, *Seppuku*, ABOUT, <http://asianhistory.about.com/od/asianhistoryfaqs/f/seppukufaq.htm> (last visited Jan. 23, 2014). To perform seppuku, a Samurai would use a short sword or dagger to cut into his abdomen either vertically or horizontally or both to disembowel himself. In most cases, once that was done, a second Samurai would decapitate him immediately. *Id.*

⁹⁹ *Id.*

Ingersoll¹⁰⁰ wrote a letter published in the *New York Times* discounting the belief that only cowards or the insane committed suicide.¹⁰¹ He went on to cite reasons why a person would choose to kill himself: “To the hopelessly imprisoned—to the dishonored and despised—to those who have failed, who have no future . . . to those who are only remnants and fragments of men and women—how consoling, how enchanting is the thought of death.”¹⁰²

Recalling the cases of MSG Bank and CPT Wills, their motive to commit suicide was to avoid punishment (as well as humiliation and disgrace). That is a different circumstance from an honorable Soldier whose motive to kill himself is driven by the continuous agony caused by a mental disease or defect (such as PTSD or depression).¹⁰³ The two motives are incongruent, and dismissing that difference degrades the entire LOD investigation process. Consequently, AR 600-8-4 is ripe for a change that will once again focus on the motive for the suicide as the determinative factor for LOD decisions.

2. Implementation: The Lawyer Also Makes a Formal Line of Duty Recommendation

In suicide cases involving allegations of decedent criminal misconduct, a judge advocate is best suited to evaluate the credibility of any incriminating evidence regarding what may have motivated the suicide. He is also best qualified to conduct a causation analysis to

¹⁰⁰ Michael Robert Patterson, *Robert Green Ingersoll*, ARLINGTON NAT’L CEMETERY, <http://www.arlingtoncemetery.net/rgingersoll.htm> (last visited Nov. 22, 2013). Colonel Ingersoll was born in New York and lived from 1833-1899. He was an accomplished orator and known as the Great Agnostic. He was self-educated and was admitted to the Illinois bar in 1854. In 1862, he organized the 11th Illinois Regiment “and went to the front as a Colonel.” It is believed that had it not been for his agnostic views, he would have received “preferment” as the Republican Presidential Nominee in 1880. *Id.* Colonel Ingersoll is buried at Arlington Cemetery. *Id.*

¹⁰¹ *Ingersoll Says He Wrong It*, N.Y. TIMES, Sept. 1, 1894.

¹⁰² *Id.*

¹⁰³ See generally Chelsea C. Cook, *Soldier’s Suicide Note Goes Viral; Family Demands Better for Veterans*, CNN, <http://www.cnn.com/2013/07/06/us/soldier-suicide-note/html> (last visited Jan. 23, 2014). This analogy is loosely based on the suicide of Sergeant Daniel Somers. Sergeant Somers was actually diagnosed with his mental diseases in 2008 and struggled for five years to overcome them before committing suicide on June 10, 2013. *Id.*

determine whether the exposure of the decedent's wrongful acts was a suicidal trigger.

In all military-justice or adverse-administrative actions, commanders rely on their judge advocates to thoroughly review the evidence before making recommendations about what action should be taken.¹⁰⁴ Yet in suicides involving the exposure of the decedent's misconduct, a judge advocate is usually relegated to simply providing legal support to an IO.¹⁰⁵ Meanwhile, a mental-health professional, who likely had no prior involvement with the decedent and who is certainly not a criminal evidentiary expert, provides a formal LOD recommendation to the approving authority. This practice is insensible; therefore, in addition to eliminating the mentally-unsound presumption, AR 600-8-4 should be revised to require the judge advocate to provide a formal LOD recommendation for suicides when exposure of a crime may have been a motive for the suicide.

Under the proposed revisions to AR 600-8-4, the formal legal recommendation would be initiated by the mental-health professional on the pre-existing, but slightly revised, DA 2173. The mental-health professional would complete blocks 1 to 10 of DA Form 2173 as usual. However, block 11 would be revised as follows:¹⁰⁶

Current Block 11 of DA Form 2173 Proposed Revision to Block 11

<p>a. INDIVIDUAL <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT UNDER THE INFLUENCE OF <input type="checkbox"/> ALCOHOL <input type="checkbox"/> DRUGS (<i>Specify</i>):</p> <p>b. INDIVIDUAL <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT MENTALLY SOUND (<i>Attach Psychiatric evaluation if appropriate</i>).</p> <p>c. INJURY <input type="checkbox"/> IS <input type="checkbox"/> IS NOT LIKELY TO RESULT IN A CLAIM AGAINST THE GOVERNMENT FOR FUTURE MEDICAL CARE.</p> <p>d. INJURY <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT INCURRED IN THE LINE OF DUTY. BASIS FOR OPINION:</p>		<p>a. INDIVIDUAL <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT UNDER THE INFLUENCE OF <input type="checkbox"/> ALCOHOL <input type="checkbox"/> DRUGS (<i>Specify</i>):</p> <p>b. INJURY <input type="checkbox"/> IS <input type="checkbox"/> IS NOT LIKELY TO RESULT IN A CLAIM AGAINST THE GOVERNMENT FOR FUTURE MEDICAL CARE.</p> <p>c. INDIVIDUAL <input type="checkbox"/> DOES <input type="checkbox"/> DOES NOT HAVE DOCUMENTED HISTORY OF MENTAL DEFECT OR DISEASE</p> <p>d. EVIDENCE <input type="checkbox"/> DOES <input type="checkbox"/> DOES NOT INDICATE A POTENTIAL MOTIVE FOR SELF-INFLICTED INJURY/DEATH (LEGAL RECOMMENDATION REQUIRED)</p> <p>e. INDIVIDUAL <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT MENTALLY SOUND (<i>Attach Psychiatric evaluation if appropriate</i>)</p> <p>f. INJURY <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT INCURRED IN THE LINE OF DUTY. BASIS FOR OPINION:</p>
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¹⁰⁴ See generally U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (3 Oct. 2011) [hereinafter AR 27-10].

¹⁰⁵ See generally AR 600-8-4, *supra* note 6, para. 4-5.

¹⁰⁶ The author's proposed revisions are in bold.

If the mental health professional indicated that evidence *does* show a potential motive for self-inflicted injury or death in block 11d., he would use block 15 to briefly describe that evidence. See Appendix B for a completed example of the proposed new DA Form 2173.

At this point, the judge advocate would begin formulating a recommendation, as reflected on the DA Form 2173. The formal legal recommendation would be twofold. First, it would include an evaluation of the evidence alleged against the decedent. Second, if deemed sufficient, the judge advocate would conduct a causation analysis to determine whether the exposure of the decedent's criminality led to the suicide. To provide guidance for the changes recommended above, AR 600-8-4 paragraphs 3-8c and 4-11b should be revised as well as Rule 10.¹⁰⁷

Army Regulation 600-8-4 states that "an adverse LD determination is an administrative determination and not a punitive or judicial action."¹⁰⁸ Therefore, preponderance of the evidence should be the evidentiary standard used, rather than the beyond a reasonable doubt level required in criminal cases.¹⁰⁹ Upon reviewing and evaluating all evidence obtained during the investigation, including any final statements by the decedent, the judge advocate would determine whether it is "more likely than not"¹¹⁰ that the decedent committed the wrongful act(s) he was accused of before the suicide. This evaluation of evidence is customary practice for all judge advocates before making recommendations for action regarding misconduct.

¹⁰⁷ These are the most relevant parts of AR 600-8-4 as it applies to suicide LOD investigations. Other pieces of AR 600-8-4 may have to be slightly revised as well in order to provide consistent guidance throughout the regulation. See Appendix C (Proposed Revisions to Army Regulation 600-8-4).

¹⁰⁸ AR 600-8-4, *supra* note 6, para. 4-1.

¹⁰⁹ See generally U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (13 Sept. 2011) [hereinafter AR 600-8-24]; see also U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (4 Sept. 2011) [hereinafter AR 635-200]. When an active-duty enlisted Soldier or officer is subjected to a separation board, the Government has the burden of proving each allegation of misconduct or poor performance by a preponderance of the evidence (more likely than not). This standard of proof differs from criminal proceedings in which the Government must prove all offenses beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358 (1970) (clarifying that the burden of proof in any criminal case is proof beyond a reasonable doubt concerning every element of an offense).

¹¹⁰ This is a phrase used to describe the preponderance of the evidence standard. BLACK'S LAW DICTIONARY, *supra* note 95.

If the evidence does not meet the standard of proof, that would be reflected in the formal recommendation to the approving authority, who would proceed with the IO's investigation and mental-health professional's recommendation accordingly. If, however, the judge advocate finds there is sufficient evidence to support the allegations, a causation analysis would follow. For this, the judge advocate would employ a "but-for" test.¹¹¹ That is: but for the revelation of the decedent's wrongful act(s), the decedent would not have killed himself. This is, of course, difficult to determine.

"Working with the concept of 'proximate cause'—in particular, helping investigating officers (IOs) apply it in the field—can be frustratingly difficult."¹¹² Consequently, the causation examination is often overlooked, which is significant in cases involving suicide as a means to avoid criminal prosecution and punishment. On the other hand, judge advocates deal with proximate cause issues in most every legal discipline, ranging from Financial Liability Investigations of Property Loss (FLIPL) to criminal prosecutions.¹¹³ Therefore, for these types of suicide investigations, judge advocates should conduct the causation analysis.

The analysis would focus on two key areas. First, along with the IO, the judge advocate would evaluate the evidence relative to the decedent's actions, mood, and communications immediately before and after the exposure of his misconduct. The purpose of this evaluation would be to determine whether the derogatory information might have acted as a "motivation for death."¹¹⁴ Second, the judge advocate would consult with the mental-health professional about whether there was a prior history of mental disease or defect. If, like in the cases of MSG Bank and CPT Wills, there was an immediate change in behavior and no history of mental problems, the judge advocate would likely determine that the misconduct's exposure was the motivating cause for the suicide. Thus, he would formally recommend "not in the line of duty" to the

¹¹¹ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 61 (5th ed. 1984).

¹¹² Captain Daniel D. Maurer, *Working With Proximate Cause: An "Elements" Approach*, ARMY LAW., Dec. 2011, at 16.

¹¹³ For example, "but-for" the Specialist failing to secure his Night Vision Goggles (NVGs) to his rifle, his NVGs would not be lost. Also, as an example in a criminal case, "but-for" the accused not driving under the influence, he would not have crossed over the center lane and killed a passenger in a head-on collision.

¹¹⁴ MOORE & BARNETT, *supra* note 76.

approving authority. Appendix D contains an example of such a recommendation. This recommendation would not only maintain the integrity of the LOD investigation, but it would also require the approving authority to acknowledge a second professional's LOD opinion (the first being that of the mental-health professional) before making a final determination.¹¹⁵ Additionally, it could also serve as a deterrent to a Soldier contemplating suicide if he knew that there was more than a nine-percent chance¹¹⁶ that he would not be found "in the line of duty" and that, therefore, his family would not receive all of the benefits for which they might otherwise have been eligible.

VI. Conclusion

In 2010, after two combat deployments and 400 combat missions as a gunner, Army clinical psychologists diagnose SGT Strong with traumatic brain injury and PTSD.¹¹⁷ In spite of his efforts to get better over a three-year period, SGT Strong commits suicide in June 2013. His suicide note reads in part,

I am too trapped in a war to be at peace, too damaged to be at war All day, every day a screaming agony in every nerve ending in my body. It is nothing short of torture. My mind is a wasteland, filled with visions of incredible horror, unceasing depression, and crippling anxiety This is what brought me to my actual final mission. Not a suicide, but a mercy killing.¹¹⁸

The letter is a final communication to loved ones about his remorse and shame in not being able to overcome his mental diseases.

Compare SGT Strong to MSG Bank and CPT Wills. SGT Strong never compromised his integrity and fought for years to get better for himself and his family. Unfortunately, the psychological pain stemming

¹¹⁵ An example of a formal legal LOD recommendation can be seen at Appendix D.

¹¹⁶ See statistics in Part II (91-percent of active-duty Army suicides between 2005 and 2012 were found in the line of duty).

¹¹⁷ Cook, *supra* note 102 (Sergeant Strong is a fictional character based loosely on Sergeant Daniel Somers).

¹¹⁸ *Id.* Sergeant Somers' wife sent the entire letter to *The Phoenix Times*, and with the family's permission, it was posted online. *Id.*

from what he experienced during his combat tours was so deep that he simply could not bear to live with it. That was his suicidal motive.

Meanwhile, MSG Bank and CPT Wills both committed wrongful acts that would have likely resulted in some form of significant adverse action had they not killed themselves. Neither of them had prior mental issues like SGT Strong did. They were not experiencing suicidal ideations while having adulterous sex with subordinates or sexually molesting a ten-year-old step-daughter. Rather, it was when they were caught that they simply caved to immediate mental adversity caused by their own doing, acted impulsively, and killed themselves. Their apparent motive was to avoid the personal and criminal consequences of those shameful acts.

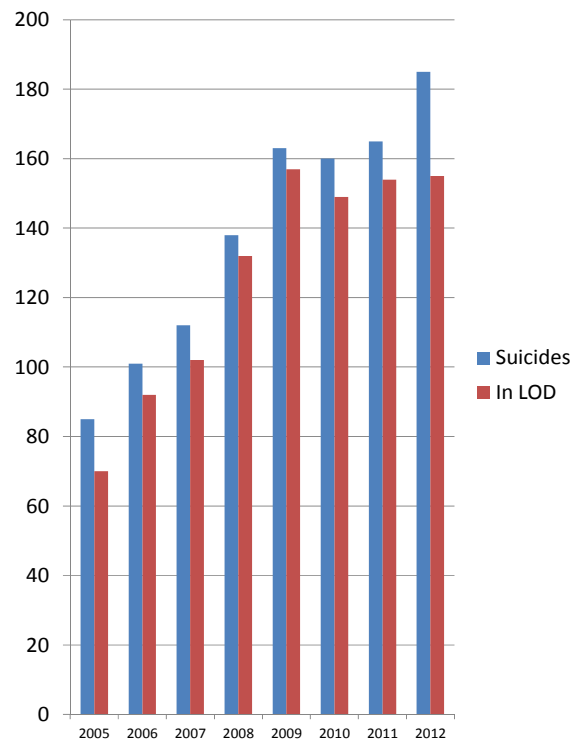
How then do SGT Strong, MSG Bank, and CPT Wills all end up with the same line of duty determination? The reason is that despite each suicide having its own set of circumstances, desperation to help the surviving family diminishes the importance of determining what the suicidal motive was. Although it is laudable that the Army trend is to financially assist surviving family members as much as possible after suicide, IOs and approving authorities must take misconduct into consideration when evaluating and determining the true proximate cause of a suicide. If done correctly and in accordance with the proposed regulatory revisions, SGT Strong would be found “in the line of duty” and MSG Bank and CPT Wills would be found “not in the line of duty—[truly] due to their own misconduct.”

Therefore, the Department of the Army must revise AR 600-8-4 to give approving authorities more of a legal basis to make difficult and potentially unpopular determinations to find undeserving suicides not in the line of duty. Focusing on the motive and increasing the judge advocate’s role in situations of suicides involving misconduct by the decedent as a potential trigger are the keys to AR 600-8-4’s much-needed rejuvenation. When wrongdoers like MSG Bank and CPT Wills are able to receive the same line of duty status as Soldiers like SGT Strong, somebody needs to give “it a second thought.”¹¹⁹

¹¹⁹ See Appointing Authority Quote, *supra* note 1.

Appendix A

Active-Duty Army Suicides and Line of Duty Determinations¹²⁰



¹²⁰ Active-Duty Army Suicide Statistics provided by Ms. Charlotte Brought, Data Mgmt. Specialist for Developing Centers on Interventions for the Preventions of Suicide (DCIPS).

Appendix B

Proposed Revised DA Form 2173

STATEMENT OF MEDICAL EXAMINATION AND DUTY STATUS For use of this form, see AR 600-8-4, the proponent agency is DCS, G-4			
THRU: (Include ZIP Code) COL Commander 12th Brigade, 55th Division Ft. Wherever, Wherever 12345		TO: (Include ZIP Code) Commanding General 55th Division Ft. Wherever, Wherever 12345	
FROM: (Include ZIP Code) COL Commander Ft. Wherever Medical Treatment Facility Ft. Wherever, Wherever 12345			
1. NAME OF INDIVIDUAL EXAMINED (Last, First, and Middle Initial) BANK, JOHN, J		2. SSN 123-45-6789	3. GRADE E-8
4. ORGANIZATION AND STATION Headquarters and Headquarters Company, 99th Support Battalion, 12th Brigade, 55th Division, Ft Wherever, Wherever		5. ACCIDENT INFORMATION a. DATE 22 June 2009 b. PLACE (City and State) Wherever, Wherever	
SECTION I - TO BE COMPLETED BY ATTENDING PHYSICIAN OR HOSPITAL PATIENT ADMINISTRATOR			
6. INDIVIDUAL WAS <input type="checkbox"/> OUT PATIENT <input type="checkbox"/> ADMITTED <input checked="" type="checkbox"/> DEAD ON ARRIVAL		7. NAME OF HOSPITAL OR TREATMENT FACILITY Wherever Medical Treatment Facility <input type="checkbox"/> CIVILIAN <input checked="" type="checkbox"/> MILITARY	
8. HOUR AND DATE ADMITTED 171130JUN11		9. HOUR AND DATE EXAMINED 171200JUN11	
10. NATURE AND EXTENT OF <input type="checkbox"/> INJURY <input type="checkbox"/> DISEASE <input checked="" type="checkbox"/> RESULTING IN DEATH (Explain) Single GSW to head			
11. MEDICAL OPINION: a. INDIVIDUAL <input type="checkbox"/> WAS <input checked="" type="checkbox"/> WAS NOT UNDER THE INFLUENCE OF <input type="checkbox"/> ALCOHOL <input type="checkbox"/> DRUGS (Specify): b. INJURY <input type="checkbox"/> IS <input checked="" type="checkbox"/> NOT LIKELY TO RESULT IN A CLAIM AGAINST THE GOVERNMENT FOR FUTURE MEDICAL CARE. c. INDIVIDUAL <input type="checkbox"/> DOES <input checked="" type="checkbox"/> DOES NOT HAVE DOCUMENTED HISTORY OF MENTAL DEFECT OR DISEASE d. EVIDENCE <input checked="" type="checkbox"/> DOES <input type="checkbox"/> DOES NOT INDICATE A POTENTIAL MOTIVE FOR SELF-INFLICTED INJURY/DEATH (LEGAL RECOMMENDATION REQUIRED) e. INDIVIDUAL <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT MENTALLY SOUND (Attach Psychiatric evaluation (if appropriate)) f. INJURY <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT INCURRED IN THE LINE OF DUTY. BASIS FOR OPINION:			
12. THE FOLLOWING DISABILITY MAY RESULT <input type="checkbox"/> TEMPORARY <input type="checkbox"/> PERMANENT PARTIAL <input checked="" type="checkbox"/> PERMANENT TOTAL		13. BLOOD ALCOHOL TEST MADE <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	14. NO. OF MG ALCOHOL/100 ML BLOOD N/A
15. DETAILS OF ACCIDENT OR HISTORY OF DISEASE (how, where, when) Deceased was under investigation for sexual harassment. During the investigation, the deceased became very anxious and told others he did not want to face prosecution or his wife before shooting himself hours later. Deceased had no history of disease.			
16. DATE 22 June 2009	17. TYPED OR PRINTED NAME OF ATTENDING PHYSICIAN OR PATIENT ADMINISTRATOR Mental Health Professional		18. SIGNATURE
SECTION II - TO BE COMPLETED BY UNIT COMMANDER OR UNIT ADVISER			
19. DUTY STATION <input checked="" type="checkbox"/> PRESENT FOR DUTY <input type="checkbox"/> ABSENT WITHOUT AUTHORITY <input type="checkbox"/> ABSENT WITH AUTHORITY <input type="checkbox"/> ON PASS <input type="checkbox"/> ON LEAVE		20. HOUR AND DATE OF ABSENCE a. FROM b. TO	
21. ABSENCE WITHOUT AUTHORITY MATERIALLY INTERFERED WITH THE PERFORMANCE OF MILITARY DUTY (Explain in item 30 type of duty missed, hours of duty, and how it did or did not interfere with performance) <input type="checkbox"/> YES <input type="checkbox"/> NO			
22. INDIVIDUAL WAS ON <input checked="" type="checkbox"/> ACTIVE DUTY <input type="checkbox"/> ACTIVE DUTY FOR TRAINING <input type="checkbox"/> INACTIVE DUTY TRAINING		23. HOUR AND DATE TRAINING a. BEGAN b. ENDED	
24. RESERVIST DIED OF INJURIES RECEIVED PROCEEDING <input type="checkbox"/> DIRECTLY TO TRAINING <input type="checkbox"/> DIRECTLY FROM TRAINING			
25. MODE OF TRANSPORTATION	26. HOUR BEGINNING TRAVEL	27. DISTANCE INVOLVED	28. NORMAL TIME FOR TRAVEL
29. DUTY STATUS AT TIME OF DEATH IF DIFFERENT FROM TIME OF INJURY OR CONTRACTION OF DISEASE <input type="checkbox"/> PRESENT FOR DUTY <input type="checkbox"/> ABSENT WITH AUTHORITY <input type="checkbox"/> ABSENT WITHOUT AUTHORITY			
30. DETAILS OF ACCIDENT - REMARKS (If additional space is needed, continue on reverse) (Attach inclosures as necessary) Master Sergeant Bank was under investigation for sexual harassment. His weapon was not taken away as there was no change in his mood or behavior. However, during the investigation he is told that all of the devices will be searched and his mood immediately changes because he knows what the search will uncover--proof of adulterous affairs with multiple civilian and military women (including one subordinate who said it was against her will) and thousands of pornographic images and videos of female Soldiers. A few hours later, he tells some junior Soldiers that he cannot handle being court-martialed and going to prison as well as having to explain everything to his wife. Master Sergeant Bank says he would rather be dead. A few hours later, he puts his pistol in his mouth and kills himself.			
31. FORMAL LINE OF DUTY INVESTIGATION REQUIRED <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		32. INJURY IS CONSIDERED TO HAVE BEEN INCURRED IN LINE OF DUTY (Not applicable on deaths) <input type="checkbox"/> YES <input type="checkbox"/> NO	
33. DATE 23 June 2011	34. TYPED NAME AND GRADE OF UNIT COMMANDER OR UNIT ADVISER LTC Commander		35. SIGNATURE

Appendix C

Proposed Revisions to Army Regulation 600-8-4¹²¹

AR 600-8-4, para. 3-8e(2)(h)

(h) Evidence regarding the mental competence or impairment of the deceased or injured person, when relevant. In all cases of suicide or attempted suicide, all possible evidence bearing on the mental condition of the deceased or injured person shall be obtained. If no documented mental condition existed at the time of the suicide or suicide attempt, all evidence potentially motivating an impulsive suicide or suicide attempt shall also be obtained. This will include all available evidence about the person's social background, his actions and moods immediately prior to the suicide or suicide attempt, any troubles that might have motivated the incident, and any pertinent examination or counseling by specially experienced or trained persons. Personal notes or diaries of the deceased are valuable evidence. In the case of a death by suicide or a death resulting from an accident involving unusual or suspicious circumstances (for example, a single car motor vehicle accident) or where the cause of death is not clear, obtain the opinion of a mental health officer as to the probable causes of the self-destructive behavior and whether the soldier was mentally sound at the time of the incident. ~~(See para 4-11b.)~~ **In the case of a death by suicide, in which the deceased was accused of misconduct that would have likely resulted in adverse action against the deceased had he not committed suicide and of which the Soldier has been aware when the Soldier committed suicide, obtain the opinion of a judge advocate as to the sufficiency of the evidence that was the basis of the allegations and as to the exposure of that evidence being the proximate cause of the self-destructive behavior. (See para 4-11b.)**

AR 600-8-4, para. 4-11b. Mental responsibility, emotional disorders, suicide, and suicide attempts

Line of duty investigations of suicide or attempted suicide must determine **what motivated the soldier to commit or attempt suicide** and whether the soldier was mentally sound at the time of the incident. The questions of **motive and** sanity can only be resolved by inquiring into and obtaining evidence of the soldier's social background, actions and moods immediately prior to the suicide or suicide attempt, troubles

¹²¹ Author proposed changes to AR 600-8-4 are in bold.

that might have motivated the incident, and examinations or counseling by specially experienced or trained persons. Personal notes or diaries of a deceased soldier are valuable evidence. In all cases of suicide or suicide attempts, a mental health officer will review the evidence collected to determine the bio-psychosocial factors that contributed to the soldier's desire to end his life. The mental health office will render an opinion as to the probable cause of the self-destructive behavior and whether the soldier was mentally sound at the time of the incident. **In all cases of suicide or suicide attempts in which the Soldier was accused of misconduct that would have likely resulted in adverse action against the Soldier had he not committed suicide, a judge advocate will review the evidence in order to determine whether, by a preponderance of the evidence, the deceased committed the alleged misconduct and, if so, whether the exposure of that misconduct provided the soldier with a motive to end his or her life. In these cases, the judge advocate will provide a formal legal recommendation for the deceased's line of duty determination based on an evidentiary and causation analysis.**

B-10. Rule 10

A wound or other injury deliberately self-inflicted by a soldier who is mentally sound is not in line of duty. It is due to misconduct. Suicide is the deliberate and intentional destruction of one's own life. **Whereas the law presumes that a mentally sound person will not commit suicide (or make a bona fide attempt to commit suicide), it also recognizes that reasonable adequate motives for self-destruction can be supplied by the evidence. In all cases in which there is affirmative evidence that the motive for self-destruction was to avoid the consequences of one's own misconduct, the mentally unsound** ~~This presumption prevails until overcome by substantial evidence and a greater weight of the evidence than supports any different conclusion.~~ **should not apply.** Evidence that merely establishes the possibility of suicide, or merely raises a suspicion that death is due to suicide, is not enough to overcome the in line of duty presumption. However, in some cases, a determination that death was caused by a deliberately self-inflicted wound or injury may be based on circumstances surrounding the finding of a body. These circumstances should be clear and unmistakable, and there should be no evidence to the contrary.

Appendix D

Sample Formal Legal Recommendation for Suicide Line of Duty

ABCD-OSJA

30 November 2009

MEMORANDUM FOR RECORD

SUBJECT: Legal Recommendation for Line of Duty Determination:
MSG Bank

1. Purpose: Pursuant to AR 600-8-4, paragraphs 3-2 and 4-11b, the purpose of this memorandum is to make a formal legal recommendation for the line of duty status involving MSG Bank.

2. BLUF: MSG Bank was not in the line of duty at the time of his suicide.

3. Summary of Facts:

a. On 1 November 2009, an AR 15-6 investigation was initiated against MSG Bank for sexual harassment. He was in good spirits and told others he was sure the investigation would be over in a couple days. A few days into the sexual harassment investigation (4 November 2009), a search and seizure authorization was issued for MSG Bank's computer and electronic devices. MSG Bank was told that all of the devices would be searched.

b. According to witnesses, MSG Bank's mood immediately changed when the items were confiscated. A few hours later he told a few junior Soldiers that he could not handle being court-martialed and going to prison, as well as having to explain everything to his wife. MSG Bank said he would rather be dead. Shortly thereafter, he used his 9mm to shoot himself.

c. A subsequent search of MSG Bank's computer and other digital storage devices uncovered proof of adulterous affairs with multiple civilian and military women (including one subordinate who indicated that it was against her will) and thousands of pornographic images and videos of female Soldiers.

ABCD-OSJA

SUBJECT: Legal Recommendation for Line of Duty Determination:
MSG Bank

d. A full version of the facts can be reviewed in the enclosed Investigating Officer's Findings and Recommendations memorandum.

4. Evidence Analysis:

a. The evidence collected by the Investigating Officer is sufficient to prove by a preponderance of the evidence that MSG Bank committed the following offenses:

adultery, inappropriate relationships with subordinates, sexual harassment, and violation of GO #1 by possessing thousands of pornographic images and videos of female Soldiers.

b. The evidence was found on MSG Bank's personal computer and storage devices. All emails were either sent from or received in MSG Bank's email account. On several occasions, MSG Bank provided his CHU location to female Soldiers and civilians. Additionally, in multiple communications, MSG Bank inquired about protection (birth control). Lastly, in one email, MSG Bank said he was sorry to a subordinate Soldier if he did something she did not want him to do.

5. Causation Analysis:

a. A legal review of the evidence indicated that MSG Bank's realization that his wrongful acts were about to be discovered likely leading to serious adverse action against him was the but-for cause of his suicide. Statements from individuals who spoke with MSG Bank before his personal computer and storage devices were confiscated describe MSG Bank as his usual "good-humored" self. He told numerous senior NCOs that the sexual harassment investigation was just a formality to "check the block" and that he would be back to work in just a few days. His mannerisms were such that no one thought to take his weapons from him.

ABCD-OSJA

SUBJECT: Legal Recommendation for Line of Duty Determination:
MSG Bank

b. Then, when the search and seizure warrant was issued, witnesses said they could “almost see a switch being flipped.” Master Sergeant Bank immediately became distraught and pale. That mood continued when he went to dinner a few hours later with a few of his Soldiers. He specifically stated that he could not handle the humiliation of being court-martialed and going to prison or getting kicked out of the Army, as well as having to explain everything to his wife. Shortly thereafter, MSG Bank killed himself. He had no recorded history of mental defects or issues.

6. Legal Recommendation: Pursuant to AR 600-8-4, paragraph 4-11b, the evidence provided by the IO is sufficient to prove by a preponderance of the evidence that MSG Bank committed the alleged misconduct. Additionally, the evidence gathered by the IO is sufficient to demonstrate that the exposure of MSG Bank’s misconduct and his desire to avoid the personal and criminal consequences of that misconduct were the primary factors for his suicide. Therefore, he should be found NOT in the line of duty.

7. Point of contact for this memorandum is the undersigned at 123-4567.

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CUSTOMARY JUSTICE SYSTEMS AND RULE OF LAW REFORM

MAJOR KATHERINE K. STICH^{*}

“Forsake your village, but not its ancient usages.”¹

—Pashto proverb

Introduction

A young U.S. rule of law (ROL) judge advocate (JA) and his Department of State counterpart are partnered with a local judiciary in Afghanistan, seeking to improve its justice system. They are discussing a murder trial with the criminal court’s chief judge in which the defendant was acquitted. The judge tells them that he informed the family of the deceased to take the matter to the local tribe for further redress, as they are unhappy with the outcome. The attorneys are torn: they respect the culture and its capacity for alternative dispute resolution, but feel this may undermine the government’s legitimacy and the very rule of law they are attempting to enable. The judge further explains that the court is overwhelmed by the current caseload and that the judge would like the attorneys to encourage tribal dispute resolution in some cases to alleviate prison overcrowding and trial backlog at least until the judicial system is more robust.

This scenario is important, as today’s service members who are engaged in stability and counterinsurgency operations must be much more than soldiers but must also “facilitate establishing local governance and the rule of law”² in support of not only the host nation but international bodies and even other U.S. agencies.³ While building rule of law is one of counterinsurgency’s main objectives, the focus is often on creating sustainable, “civilian-controlled . . . police, court, and penal institutions.”⁴ However, these institutions are frequently inaccessible, impractical, or malfunctioning for a large majority of the populace while customary justice systems (CJS) can provide an effective alternative,

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¹ S.S. THOBURN, *BANNU OR OUR AFGHAN FRONTIER* 259 (1876).

² U.S. DEP’T OF ARMY, *FIELD MANUAL 3-24, COUNTERINSURGENCY* foreword (Dec. 2006) [hereinafter *FM 3-24*].

³ *Id.* at D-8.

⁴ *Id.*

albeit with potential dangers. For the purposes of this article, CJS refers to those dispute resolution mechanisms outside the formal justice system, including traditional, tribal, religious, indigenous, and informal systems. However, they sometimes possess an official connection to a state by recognition or regulation.⁵

While each is different, “[c]ommon characteristics of [CJS include]

- The problem is viewed as relating to the whole community as a group—there is a strong consideration for the collective interests at stake in disputes;
- Decisions are based on a process of consultation;
- There is an emphasis on reconciliation and restoring social harmony;
- Arbitrators are appointed from within the community on the basis of status or lineage;
- There is often a high degree of public participation;
- The rules of evidence and procedure are flexible;
- There is no professional legal representation;
- The process is voluntary, and the decision is based on agreement;
- They have a high level of acceptance and legitimacy;
- There is no distinction between criminal and civil cases, informal justice systems often deal with both;
- Often there is no separation between [CJS] and local governance structures—a person who exercises judiciary authority through [a CJS] may also have executive authority over the same property or territory; and
- Enforcement of decisions is secured through social pressure”.⁶

This article examines how U.S. rule of law practitioners should, if at all, engage active CJS in post- or in-conflict societies when the host nation does not formally advance their use. I argue that even when not formally recognized by the host nation, to effectively advance the rule of law as a whole, practitioners must be well versed in pluralistic legal

⁵ EWA WOJKOWSKA, *DOING JUSTICE: HOW INFORMAL JUSTICE SYSTEMS CAN CONTRIBUTE* 9 (Dec. 2006), available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf>.

⁶ *Id.* at 16.

traditions and their models, avoid haphazard engagement of CJS, and embrace them as part of the environment. I also contend that this approach is consistent with U.S. policy, Rachel Kleinfeld's second-generation rule of law reform, various social-science theories, and the spirit of current military doctrine. Such an approach is also required from a strategic perspective, as joint design methodology requires commanders and staff to understand the whole of the environment in order to define the problem.

This article considers U.S. policy and U.S. military doctrine and guides, as well as current social-science work pertaining to rule of law and development. In addition, it explains some of CJS risks and benefits, and legal pluralism's potentials and perverse incentives. With this background, I contend that reformers should embrace CJS as part of the social environment while remaining wary of haphazard engagement even in situations when the host nation does not actively advance the informal system. Rule of law efforts in Afghanistan are used as a case-study to help provide a framework of analysis. Finally, this article provides practical, but not nation-specific, considerations for those who find themselves delving into the CJS arena.

Literature Review

While there is no consensus on how to define rule of law, the U.S. Army captures the idea as follows: "Established rule of law refers to the condition in which all individuals and institutions, public and private, and the state itself are accountable to the law. Perceived inequalities in the administration of the law, and real or apparent injustices, trigger instability."⁷

Although this definition allows for the promotion and engagement of innumerable types of justice systems, attorneys at the heart of rule of law efforts often use an institutional, first generational approach. This helps countries build formalized institutions: constructing courthouses,

⁷ U.S. DEP'T OF ARMY, DOCTRINE PUB. 3-07, STABILITY para. 25 (Aug. 2012) [hereinafter ADP 3-07]. An earlier version of this publication previously defined rule of law as "a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles." U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS 1-40 (Oct. 2008) [hereinafter FM 3-07].

drafting regulations, training legal personnel, supporting judiciaries, promoting bar associations, and providing international exchanges.⁸ Unfortunately, such an approach creates a structural problem that prevents reformers from adequately addressing the failures of, and opportunities to improve, the system since they are mentally and perhaps financially committed to formal institutions.⁹ First-generation approaches therefore “limit the conceptual space for treating rule-of-law reform as a cultural or political problem” despite the fact many problems are located “in the broader relationships between the state and society.”¹⁰ Thus, most current rule of law efforts worldwide give CJS little attention despite accounting for approximately 80% of justice rendered in many developing nations.¹¹

Contrary to the first-generational, institution-based approach, Rachel Kleinfeld advances an ends-based approach to rule of law, “which allows reformers to focus on the goals that led them to undertake rule of law reform in the first place.”¹² This approach recognizes that rule of law is formed by “power and culture, not laws and institutions.”¹³ She proposes the following dynamic ends to help define rule of law:

- Governments are subject to laws and must follow pre-established and legally accepted procedures to create new laws.
- Citizens are equal before the law.
- Judicial and governmental decisions are regularized: They are not subject to the whims of individuals, or the influence of corruption.
- *All citizens have access to effective and efficient dispute-solving mechanisms regardless of their financial means.*

⁸ RACHEL KLEINFELD, ADVANCING THE RULE OF LAW ABROAD: NEXT GENERATION REFORM 8 (2012) (citing Stephen Golub, *A House Without a Foundation*, in PROMOTING THE RULE OF LAW ABROAD IN SEARCH OF KNOWLEDGE 105, 108–09 (Thomas Carothers ed., 2006)).

⁹ *Id.* at 9, 10.

¹⁰ *Id.* at 9.

¹¹ Brian Z. Tamanaha, *The Rule of Law and Legal Pluralism in Development*, in 3 HAGUE J. ON RULE L. 3, 4 (2011) (citing Laure-Helene Piron, *Time to Learn, Time to Act, in Africa*, in PROMOTING THE RULE OF LAW ABROAD IN SEARCH OF KNOWLEDGE, *supra* note 9, at 275, 291).

¹² KLEINFELD, *supra* note 8, at 13.

¹³ *Id.* at 15.

- Human rights are protected by law and its implementation.
- *Law and order are prevalent.*¹⁴

While the U.S. Army definition is inconsistent with a second-generation, ends-based definition of rule of law, Kleinfeld's thesis that "the rule of law is not about a set of institutions[, but] it is about achieving a set of ends that determine the relationship between a state and its society" and that helps focus reform efforts in the appropriate direction.¹⁵ An effective way to do so is through indirect work, from the bottom up, through legitimate local actors who share a vision of reform in line with the donors.¹⁶ In other words, allowing a society to change and the populace to hold their government accountable from within.¹⁷ Likewise, her definition is less prescriptive and more wholly encompasses alternative systems by striving for a system in which "all citizens have access to effective and efficient *dispute-solving mechanisms* regardless of their financial means."¹⁸

Similarly, Matteo Tondini succinctly describes the two methods of viewing the relationship between law and society. The first, "autocratic conception of law," is a top-down approach in which the powerful imposes law on their society.¹⁹ Conversely, in the "sociologic" approach, he argues, "law simply emerges from the society as a consequence of people's lives."²⁰ Although focused on customary justice, Deborah H. Isser also recognizes how a focus solely on state systems can lead to "perverse results," especially when "combined with an utter lack of appreciation of the social context of justice."²¹ She therefore offers alternative approaches in line with second generation thinking, taking into account "the broader and more complex social, historical, and political context where they occur."²²

¹⁴ *Id.* at 14–15 (emphasis added).

¹⁵ *Id.* at 212.

¹⁶ *Id.* at 112–21.

¹⁷ *Id.* at 214.

¹⁸ *Id.* at 14, 15 (emphasis added).

¹⁹ MATTEO TONDINI, STATEBUILDING AND JUSTICE REFORM: POST CONFLICT RECONSTRUCTION IN AFGHANISTAN 1 (2010).

²⁰ *Id.*

²¹ Deborah H. Isser, *Introduction: Shifting Assumptions from Abstract Ideals to Messy Realities*, in CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR-TORN SOCIETIES 1, 1 (Deborah H. Isser ed., 2011) [hereinafter CUSTOMARY JUSTICE].

²² *Id.* at 2.

These emerging approaches could be viewed as contrary to reconstruction-and-development's crucial principle of ownership. Researchers Clark Gibson, Krister Andersson, Elinor Ostrom and Sujai Shivakumar stress the need for recipient ownership throughout development to help prevent motivational and informational problems, appropriately align incentives, and effectively use local knowledge and institutions.²³ Ultimately, recipient ownership results in greater responsibility and accountability of a project.²⁴

Likewise, the U.S. Agency for International Development and the U.S. military recognize that host nations, not donors, should "own[]" or drive development priorities for realization of sustainable systems.²⁵ However, while a host nation may own a development program, such as a rule of law program, it may not have adequate knowledge of the challenges faced by its targeted populace.²⁶ Likewise, it may "lack the legitimacy to assume full ownership for peaceful governing processes."²⁷ Therefore, we should look not solely to the government but also to the people as beneficiaries for not only development but also ownership. While this entails intense analysis of how the population addresses collective-action problems, it may result in more sustainable outcomes.²⁸

Nevertheless, a gap remains on how rule-of-law practitioners should, if at all, engage CJS when the host nation—the ostensible "owner"—does not support their advancement. The *Rule of Law Handbook, A Practitioners Guide for Judge Advocates* advances the argument that "despite the fact that they are often viewed as 'local level' issues, the [Judge Advocate (JA)] ROL practitioner must understand that incorporating customary justice systems in the ROL line of operation will require a 'high level' acceptance, not only from the JA's own chain of command, but also from the host nation within which they are working."²⁹ While this guide is concise and practical—although the contents are not "official positions, policies, or decisions of the United

²³ CLARK C. GIBSON ET AL., *THE SAMARITAN'S DILEMMA: THE POLITICAL ECONOMY OF DEVELOPMENT AID* 226 (2009).

²⁴ *Id.*

²⁵ ADP 3-07, *supra* note 7, para. 1-36.

²⁶ GIBSON ET AL., *supra* note 23, at 227.

²⁷ FM 3-07, *supra* note 7, at C-4.

²⁸ GIBSON ET AL., *supra* note 23, at 232.

²⁹ CTR. FOR LAW & MILITARY OPERATIONS, *THE JUDGE ADVOCATE GEN.'S LEGAL CTR & SCH., U.S. ARMY, RULE OF LAW HANDBOOK, A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES* 107 (2011) [hereinafter *ROL HANDBOOK*].

States Government,”³⁰—it is too restrictive of a definition in that it requires host nation acceptance. This is especially true when one realizes that the incorporation of CJS into rule of law efforts does not necessarily require CJS’s advancement. Likewise, there are times when active engagement may be appropriate. This is more apparent when one considers the host-nation as more than merely the current government, but a heterogeneous entity that includes the populace, and rule-of-law as more than institutions but “a relationship between a state and its society.”³¹

I therefore argue that although not explicitly stated, an ends-based approach to rule of law demands reformers recognize the capacity of CJS even when not promoted by the host-nation at the highest levels. While approval from a practitioner’s chain-of-command and interagency coordination is certainly required, the requirement for a host nation’s explicit approval should be qualified. Although U.S. strategy, policy and doctrine do not explicitly elevate this notion, they are consistent with this approach. I further advance that to effectively improve rule of law efforts as a whole, practitioners must become well versed in legal pluralism in which “multiple legal forms coexist”³² and which avoids haphazard CJS engagement and embraces those plural legal forms as part of the environment.

CJS Risks

Despite the overwhelming number of individuals who rely on CJS to provide stability and resolve disputes in their communities, donor and host nations alike are often hesitant to engage CJS, for valid reasons. Even the most ardent supporters of CJS must appreciate its risks if they are to address those risks as a real part of the justice environment. Although some CJS have connections to the formal justice system, most CJS lack accountability on various levels. For instance, such systems normally lack appellate review, and because there is no state-sponsored enforcement mechanism, it is only community pressure that ensures that decisions are carried out. Likewise, the decision maker often lacks formal dispute resolution education and may assume the position based on religious education, lineage, or age. His decisions may therefore

³⁰ *Id.* preface.

³¹ KLEINFELD, *supra* note 8, at 15.

³² Tamanaha, *supra* note 11, at 2.

reflect his personal biases, or even be influenced by bribes.³³ Some decision makers are influenced by power brokers, resolving issues in favor of those with more influence. This can exacerbate problems for the disadvantaged in a society.³⁴

Because CJS are community based, many lack the ability to address disputes beyond the local area. This becomes especially problematic when the issue at hand extends outside the community and another community is also involved. Similarly, complicated issues, such as disputes with the government or large-scale crime, are outside most CJS' capacity.³⁵

Perhaps the most often noted and troublesome issue arising from CJS is that of human rights violations. Such systems, in both form and result, are often inconsistent with American values and that their embrace may have an unintended political component. For instance, because CJS are often found in male dominated societies in which the good of the community regularly trumps individualism, women are normally at a particular disadvantage.³⁶ Indeed CJS resolutions viewed as meeting a communal good may include honor killings and forced, sometimes underage, marriages.³⁷ Although less abhorrent, respondents of both genders are often unrepresented and sometimes not given the opportunity to present evidence.³⁸

Also frightening is the reality that some CJS are administered by enemies of the state. Engaging them could create the appearance that the donor nation unwittingly supports their activities despite the fact those enemies may settle disputes, filling a legal vacuum.³⁹ In either case, a savvy enemy can exploit engagement by a host or donor nation to their advantage.

³³ WOJKOWSKA, *supra* note 5, at 22.

³⁴ *Id.* at 20.

³⁵ *Id.* at 23.

³⁶ *Id.* at 21.

³⁷ Thomas Barfield et al., *The Clash of Two Goods: State and Nonstate Dispute Resolution in Afghanistan*, in CUSTOMARY JUSTICE, *supra* note 21.

³⁸ WOJKOWSKA, *supra* note 5, at 23.

³⁹ David J. Kilcullen, *Deiokes and the Taliban: Local Governance, Bottom-up State Formation and the Rule of Law in Counter-Insurgency*, in THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION 35, 45 (Whit Mason ed., 2011).

Deborah Isser succinctly groups these concerns over support to CJS into two categories. First, some see CJS, and their characteristics, as so far removed from those persons' notions of rule of law that CJS should be disregarded and ultimately dismantled.⁴⁰ Others appreciate CJS' abilities and yet believe that because donor nations are so detached from CJS, donors are unable to effectively engage these mechanisms or that outsiders are only able to advance systems with which they are familiar.⁴¹ However serious the risks, host and donor nations should put equal effort into analyzing CJS' benefits and seeking ways to address CJS as a real part of the justice environment. Recognition of CJS' risks should not result in donor nations outright discounting their benefits, nor donors paralysis in engagement.

CJS Benefits

Although CJS are not without fault, they also possess tremendous advantages, sometimes underappreciated by the host or partner nation. Perhaps most importantly, they are normally viewed as legitimate, as they reflect the community's culture while regulating societal behavior to maintain stability. In other words, they are not top-down driven, and can thus survive unrest when formal systems may falter or fail.⁴² Therefore, because they do not depend on the government, they are often able to endure even when a nation is in conflict.

CJS are less intimidating and more accessible than formal process; they require no special training or skills to access and are procedurally simple. Likewise, they are normally free of charge and physically available to those in rural areas unlike formal systems, which normally require fees and are often only found in a developing nation's cities.⁴³ These factors allow CJS to provide swift justice, a valued commodity in almost every society.⁴⁴

Additionally, CJS can complement a state's formal system, alleviating burden to a docket that is often backlogged, and help limit correctional overcrowding. In so doing, they can aid the nation as a

⁴⁰ Deborah H. Isser, *Conclusion: Understanding and Engaging Customary Justice Systems*, in *CUSTOMARY JUSTICE*, *supra* note 21, at 325, 341.

⁴¹ *Id.*

⁴² WOJKOWSKA, *supra* note 5, at 18.

⁴³ *Id.* at 19.

⁴⁴ *Id.* at 17.

whole, as they often provide a forum for reconciliation, often a much needed commodity in a post- or in-conflict state.⁴⁵ Importantly, where there is some, even unofficial, connection to the formal system, CJS can help indirectly link the local populace to the government, potentially improving its legitimacy.⁴⁶ They also provide a legal safety-net, with their ability to endure future strife within the nation.

Host and donor nations, and their rule of law practitioners, must consider these risks and benefits in depth and in conjunction with their own policies and vision of the future. Ideally, we do so not only using an official host nation narrative but also with an appreciation of the social and local dimension of rule of law to effectively build a strategy in line with our policy and doctrine.

CJS engagement: U.S. Strategy, Policy and Doctrine

*“The government can’t protect you in the desert.” Iraqi Proverb*⁴⁷

The United States recently recognized the importance of CJS, both at home and abroad through its support of the United Nations Declaration on the Rights of Indigenous Peoples. Although not legally binding, and primarily discussed in the United States regarding Native American rights, the U.S. endorsement recognizes non-state institutions. In particular, Article 11 of the Declaration reads:

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their *laws, traditions and customs*.⁴⁸

Similarly, Article 34 reads:

⁴⁵ *Id.*

⁴⁶ Isser, *supra* note 21, at 326.

⁴⁷ Patricio Asfura-Heim, *Tribal Customary Law and Legal Pluralism in al Anbar, Iraq*, in *CUSTOMARY JUSTICE*, *supra* note 21, at 239, 250.

⁴⁸ G.A. Res 61/295, at 5, A/RES/61/295 (Oct. 2, 2007) (emphasis added).

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, *juridical systems or customs*, in accordance with international human rights standards.⁴⁹

Although the United States did not initially support the Declaration when adopted in 2007, its endorsement in 2010⁵⁰ provides insight into the nation's evolving views on CJS, which is helpful to practitioners. It not only highlights CJS' importance but also reminds us that while CJS may seem foreign and difficult to engage, we need not look far to find indigenous systems in our own nation.

Our National Security Strategy (NSS) arguably leaves room for engagement of CJS as well. While it explicitly lists rule of law and human rights as legitimate interests, it recognizes that we “can more effectively forge consensus to tackle shared challenges when working with governments that reflect the will and respect the rights of their people, rather than just the narrow interests of those in power.”⁵¹ Because human-rights violations are perhaps the most contentious issue for both donor and partner nations when considering CJS engagement, these interests may *prima facie* discourage CJS' advancement, especially when the host nation does not support CJS. Yet, in post- and in-conflict societies lacking good governance, security strategies must shift to appropriately fit the society's needs.⁵² While I argue CJS should never be discounted, CJS engagement is even more important when host nation government capacity is lacking or viewed as illegitimate. Not only do CJS have the potential to fill a justice vacuum, through engagement with CJS, they also represent an opportunity to slowly address societal practices that are inconsistent with international human-rights law. Relying solely on formal institutions will not address root societal problems, such as human rights abuse.⁵³

⁴⁹ *Id.* at 9 (emphasis added).

⁵⁰ Press Release, U.S. Dep't of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Dec. 16, 2010), *available at* <http://www.state.gov/r/pa/prs/ps/2010/12/153027.htm>.

⁵¹ NATIONAL SECURITY STRATEGY 37 (2010) [hereinafter NSS], *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

⁵² *Id.* at 26–27.

⁵³ Isser, *supra* note 21, at 342.

It is also arguable that as reformers, U.S. actors are discriminatory if they fail to engage CJS as the integral part of host-nation society that they are, as CJS represent the society that we wish to improve.⁵⁴ Likewise, honest introspection and analysis demonstrates that a lack of accountability exists in many formal systems as well, and often within the nation practitioners are working to assist.⁵⁵ While rule of law practitioners' engagement of CJS may create tension between the donor nation and a host nation that does not recognize their validity, the NSS mandates assurance that fragile democracies meet the needs of their people. Working with not only political leaders but also the populace helps strengthen institutions, such as a rule of law "that respond to the needs and preferences of their citizens."⁵⁶

The 2010 Quadrennial Diplomacy and Development Review echoes the importance for rule of law reform in fragile states, as well as the importance of host-nation ownership. However, it also demands tailored approaches, with efforts committed primarily to projects that are sustainable without continued donor assistance.⁵⁷ At the same time, it recognizes that "[t]o be effective in the 21st century, American diplomacy must extend far beyond the traditional constituencies and engage new actors, with particular focus on civil society. We cannot *partner* with a country if its people are against us."⁵⁸ Accordingly, engaging the populace is necessary, which arguably implies that local ownership is of utmost importance for long-term success. We can therefore conclude that engaging CJS is an appropriate component of ROL operations.

Recent conflicts involving the United States have shown that the U.S. military is implicitly part of rule of law reform.⁵⁹ Doctrine reflects this mission and addresses rule of law, as well as the importance of ownership in Field Manual (FM) 3-07, *Stability Operations*, Army Doctrine Publication 3-07, *Stability*, and FM 3-24, *Counterinsurgency*. While FM 3-07 states "ownership implies relying on the host nation to establish and drive the development priorities," it also indicates that the

⁵⁴ WOJKOWSKA, *supra* note 5, at 13.

⁵⁵ Barfield et al., *supra* note 37, at 182.

⁵⁶ NSS, *supra* note 51, at 38.

⁵⁷ U.S. DEP'T OF STATE, LEADING THROUGH CIVILIAN POWER: THE FIRST QUADRENNIAL DIPLOMACY AND DEVELOPMENT REVIEW 154 (2010), available at <http://www.state.gov/documents/organization/153108.pdf>.

⁵⁸ *Id.* at viii (emphasis added).

⁵⁹ KLEINFELD, *supra* note 8, at 24.

“host nation leads this unified effort with support from external donor organizations.”⁶⁰ At its core, however, “ownership begins with and is focused on the people. It is founded on community involvement. This is fundamental to success, since the host-nation government may not exist or may lack the legitimacy to assume full ownership for peaceful governing processes.”⁶¹

Therefore, while advancement of programs not in line with the host nation’s desired end-state are often misguided, failing to engage civil society - including its informal institutions, such as CJS - is also ill-advised. Opportunities exist to advance projects, such as human rights promotion, as well as to learn in detail, through narratives, the societal importance of retribution, reconciliation, and other legal attributes. Attentiveness to these “ethically constitutive stories” is important, not only to truly understand a people, but their systems, politics, and ultimately their future.⁶²

Even if the CJS is not formally advanced or otherwise connected to the government, by understanding that system, rule of law practitioners can still help better adapt the formal rule of law system to best reflect the society. This is consistent with the second-generation notion that “rule of law is best seen as a relationship between a state and its society.”⁶³ Conversely, by focusing merely on institutions, “the United States implicitly limits its tool kit for catalyzing change.”⁶⁴

This approach is also consistent with FM 3-24, *Counterinsurgency*. While ultimate host-nation ownership remains an underlying theme, there is also the recognition that:

In periods of extreme unrest and insurgency, [host nation (HN)] legal structures—courts, prosecutors, defense assistance, and prisons—may cease to exist or function at any level. Under these conditions, counterinsurgents may need to undertake a significant role in the reconstruction of the HN judicial system in order to establish legal procedures and systems to deal with

⁶⁰ FM 3-07, *supra* note 7, at C-4.

⁶¹ *Id.*

⁶² ROGERS M. SMITH, STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP 15 (2003).

⁶³ KLEINFELD, *supra* note 8, at 15.

⁶⁴ *Id.* at 11.

captured insurgents and common criminals. During judicial reconstruction, counterinsurgents can expect to be involved in providing sustainment and security support. They can also expect to provide legal support and advice to the HN judicial entities.⁶⁵

Therefore, a policy requiring host-nation approval to incorporate CJS into rule of law efforts should be qualified. There are times when an intervening nation may find CJS are the most capable, legitimate entity to fill a justice vacuum created by unrest, especially during the initial and middle stages of a counterinsurgency.⁶⁶ As the maturation of counterinsurgency requires different approaches, it may also call for different levels of host-nation ownership.

In some cases, CJS may be the instrument of power “to reduce the support for an insurgency,”⁶⁷ as it could provide stability and an alternative to insurgent influence over the populace. This is especially important in a developing nation with a fledgling government, as “counter-insurgency techniques mirror the character of the state that uses them.”⁶⁸ If the government’s character or identity has yet to be established, adopting a bottom-up approach using characteristics of societal institutions, such as CJS might build legitimacy among the populace.

While the section on customary justice in the *Rule of Law Handbook* grows with nearly every publication, indicating recognition of CJS importance, it requires buy-in from the host and donor nation prior to engagement.⁶⁹ The authors should be commended, as this is seemingly the only publication with guidance on how to address such an issue. Although the recommendation is generally sound, and extensive coordination between coalition partners, agencies and the host nation is essential, U.S. military doctrine recognizes there are exceptions to this general principle. Field Manual 3-24 reads “attaining that (rule of law) end state is *usually* the province of [host nation] authorities, international and intergovernmental organizations, the Department of State, and other U.S. Government agencies, with support from U.S. forces in some

⁶⁵ FM 3-24, *supra* note 2, at D-3; U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 13-62 (May 2014) [hereinafter FM 3-24].

⁶⁶ *Id.* at 13-67.

⁶⁷ *Id.* at 13-66.

⁶⁸ Kilcullen, *supra* note 39, at 42.

⁶⁹ ROL HANDBOOK, *supra* note 29, at 107.

cases.”⁷⁰ This is not to discount the need for coordinated efforts; their importance cannot be overstated. However, there are times, when after thorough evaluation, engaging CJS is necessary even when not officially advanced by the host nation.

This notion is captured in FM 3-24’s explanation of a key rule of law principle that “a government that derives its powers from the governed and competently manages, coordinates, and sustains collective security, as well as political, social and economic development. This includes local, regional, and national government.”⁷¹ When the government’s reach is restricted, local CJS may be the only form of stability or system of representation communities may have. Failing to acknowledge their ability may allow the enemy to exploit an otherwise ungoverned area. Therefore, CJS recognition is not fundamentally contrary to enabling rule of law. In fact, it can assist the state and ultimately build government legitimacy even when not officially supported by the host nation.

For example, although Iraq had not officially incorporated CJS into its legal system, U.S. detainee releases in Iraq were often facilitated by tribal guarantors, who helped reintegrate them into society.⁷² This not only encouraged a local rule of law but began to link the central government with remote areas.⁷³ Likewise, during the surge, Coalition Forces engaged and empowered tribal leaders to help establish security, and encouraged them to support the new Iraqi government. In some cases, this resulted in tribes capturing insurgents and delivering them to the official justice system, thereby advancing rule of law efforts.⁷⁴

This sort of approach is consistent with the military’s principle of ownership, as “effective rule of law . . . complements efforts to build security. It accounts for the customs, culture, and ethnicity of the local populace.”⁷⁵ This attains the goal of ownership, which “begins with and is focused on the people. It is founded on community involvement.”⁷⁶ Because “building host-nation or community ownership is a delicate and time-consuming process,” it will not only take on a different flavor based

⁷⁰ FM 3-24, *supra* note 65, at 13-61 (emphasis added).

⁷¹ *Id.*

⁷² Asfura-Heim, *supra* note 47, at 239, 271.

⁷³ *Id.* at 241.

⁷⁴ *Id.* at 275.

⁷⁵ FM 3-07, *supra* note 7, at 1-43.

⁷⁶ *Id.* at C-4.

on the operating environment, but it will also evolve.⁷⁷

Even if CJS is not embraced as a stakeholder in the future of a host nation, at a minimum, joint operational design methodology demands we understand the environment.⁷⁸ Any system that attempts to provide order in a given area of operations must be appreciated, as people seek safety and security.⁷⁹ Joint doctrine also requires commanders and staff to define the problem.

Defining the problem extends beyond analyzing interactions and relationships in the operational environment It identifies areas of tension and competition—as well as opportunities and challenges—that commanders must address to transform current conditions to achieve the desired end state. Tension is the resistance or friction among and between actors. The commander and staff identify the tension by analyzing the context of the relevant actors' tendencies, potentials, and the operational environment.⁸⁰

In operational environments with CJS, such tension, competition, opportunity and challenge are likely to exist—with each other, with the formal government, or both. While CJS may or may not be envisioned as part of the desired end state, military practitioners must be attentive to their existence and address them when building a strategic plan.

Therefore, while national strategy, policy, guidance and doctrine do not specifically address this issue, those authorities are consistent with the thesis that CJS cannot be ignored. At best, disregarding CJS results in uninformed decisions. And at worst, it risks missing potential opportunities to assist a nation in flux.

⁷⁷ *Id.* at C-5.

⁷⁸ JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATION PLANNING, at III-8 (2011) [hereinafter JP 5-0].

⁷⁹ Kilcullen, *supra* note 39, at 41.

⁸⁰ JP 5-0, *supra* note 78, at III-12.

Scholars from various disciplines including sociology, economics, and political science also support such engagement. Clark Gibson, Krister Anderson, Elinor Ostrom and Sujai Shivakumar effectively address the pitfalls of development, and they provide a framework to assist those involved in development aid while recognizing that ownership is the key to sustainable growth.⁸¹ They also recognize partner-and-recipient institutions are often at fault for development efforts' failure to thrive, and they provide descriptions of the collective action problems that are prone to arise at various levels.⁸² They challenge us to conduct institutional analysis on the action arena to best assess ability for true growth as well as perverse incentives that may be lurking in the environment.⁸³

In every situation, detailed knowledge of the problem is desired. Therefore, along with other reformers, rule of law practitioners should ask, "what rules or norms have been used in this cultural tradition in the past that may be the source of modern rules that resonate with beneficiaries as fair and can be understood easily?"⁸⁴ The CJS are an important source of this information. This approach demands engagement with CJS to ensure even formal rule of law efforts are not misguided because they are disrespectful to tradition or culture, or are otherwise ineffective for the environment at hand.

In other words, reformers must be politically astute and not always indiscriminately accept one narrative as representative of the entire host nation even if the narrative is provided by the government. A "logics" approach may help reformers who are striving to better assess the many actors and their multicentric practices.⁸⁵ This method of social analysis⁸⁶ helps "characterize and critically explain the existence, maintenance, and transformation of concrete practices."⁸⁷ The approach thus allows reformers to more clearly view narratives using three different lenses: social, political and fantasmatic. The first, social logics, "characterize practices by setting out the rules, norms, and self-understandings

⁸¹ GIBSON ET AL., *supra* note 23, at 5.

⁸² *Id.*

⁸³ *Id.* at 5–6.

⁸⁴ *Id.* at 46.

⁸⁵ Jason Glynos, *Ideological Fantasy at Work: Toward a Psychoanalytic Contribution to Critical Political Economy* 5 (Ideology in Discourse Analysis, Working Paper Series No. 23, 2008).

⁸⁶ *Id.* at 4.

⁸⁷ *Id.*

informing the practice” (the what) while political logics “account for the historical emergence and formation of a practice by focusing on the conflicts and contestations surrounding its constitution” (the how) and “fantasmatic logics help account for the way subjects are gripped by a practice” (the why).⁸⁸ Thus, actors have a more concrete method to help view a society from various perspectives and hopefully understand narratives with multiple layers.

Applying this type of analysis to rule of law reform one might find, for instance, a government’s social logic may describe a formal judicial system. At the same time, opposing political logics may depict governance that includes formal institutions at odds with, or at least occupying the same jurisdiction as, informal ones. While all are important, political logics can “emphasize the dynamic process by which political frontiers are constructed, stabilized, strengthened, or weakened and disarticulated,”⁸⁹ allowing for a more clear vision or strategy for change. Likewise, fantasmatic logics can help reformers recognize why actors may be seemingly enslaved to a particular, established practice, unwilling to gravitate away from their norm,⁹⁰ whether it be from those in the formal institutions, CJS participants who view the government as illegitimate, or even reformers with an unhealthy hesitation towards non-Western views.

Practitioners must also recognize that obstacles abound with host-nation institutions. Perverse incentives hamper partner nations’ decision making, especially those with weak institutions.⁹¹ Often, proffered top-down “solutions” fail to truly address the needs of the majority of the populace, or the true beneficiaries. Instead, they favor the elite and focused aid around development at higher levels, ultimately failing to reach the masses.⁹² Matters are exacerbated in nations with poor institutions who “may use their authority against those who are trying to create productive opportunities for themselves and others.”⁹³ This can result from motivational and informational problems.⁹⁴ In other words, the host-nation policy makers’ assessment may be flawed due to perverse

⁸⁸ *Id.* at 5.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ GIBSON ET AL., *supra* note 23, at 49.

⁹² *Id.* at 51.

⁹³ SUJA SHIVAKUMAR, *THE CONSTITUTION OF DEVELOPMENT: CRAFTING CAPABILITIES FOR SELF-GOVERNANCE* 37 (2005).

⁹⁴ GIBSON ET AL., *supra* note 23, at 54–57.

incentives or corruption, aggravated by their own fragile state. The donor must seek ways to overcome this issue; ignoring players in the environment, such as CJS, when conducting rule of law reform will only hinder information needed to best address the situation. This compounds the problem, as “perverse incentives thrive in the absence of information.”⁹⁵

Likewise, while direct rule’s “scope and penetration” may provide a central government with “income, revenue and power,” it is not without its pitfalls.⁹⁶ For instance, traditional leaders can become threatened and disrupt attempts at nation building if not incorporated into the state’s future. The government must then deal not only with the financial burden of building and maintaining functioning institutions but also with potential upheaval from community leaders.⁹⁷ Although indirect rule, which arguably may incorporate local justice systems, is not without fault, in societies that place great emphasis on the group as opposed to the individual, an indirect system may be more effective as group solidarity can facilitate order, loyalty and control.⁹⁸ While no formula exists to precisely determine optimal institutions for a given society, we should recognize that failing to work with and within the *current* environment will likely result in perverse outcomes and often additional unrest in the future.⁹⁹

Perhaps the most important development lesson gleaned from this research is to place beneficiaries at the forefront. This requires one to first determine the true beneficiaries, some of whom may be removed from official governmental relationships, as their sense of ownership is important. Therefore, “supporting research on indigenous institutions, norms and local knowledge systems (also) provides essential understanding for helping to build contemporary institutions on the healthy roots of earlier normative systems used to solve collective action problems. This requires, as well, that donors rethink their own role.”¹⁰⁰ In the rule of law arena, this demands engagement with CJS, as they are

⁹⁵ *Id.* at 230.

⁹⁶ Michael Hecter & Nika Kabiri, *Attaining Social Order in Iraq*, in ORDER CONFLICT AND VIOLENCE 43, 47 (Stathis N. Kalyvas et al. eds., 2008).

⁹⁷ *Id.*

⁹⁸ *Id.* at 49.

⁹⁹ Jack L. Snyder & Leslie Vinjamuri, *Preconditions of International Normative Change: Implications for Order and Violence*, in ORDER, CONFLICT, AND VIOLENCE, *supra* note 96, at 378, 393.

¹⁰⁰ GIBSON ET AL., *supra* note 23, at 232.

indigenous institutions and often the justice norm, and they serve as a local knowledge system.

Donors must recognize, however, that their very presence alters the environment to varying extents.¹⁰¹ This can be, but is not necessarily, problematic for development. The application of complexity theory to social science, and by extension development, recognizes the world as becoming, or “consisting of multiple temporal systems, many of which interact, each with its own degree of agency—is a world in which changes in some systems periodically make a difference to the efficacy and direction of others.”¹⁰² This notion of emergent causality recognizes a “condition is affected by external forces that infect, invade, or infuse it and by activation within itself of previously untapped capacities of self-organization,” and “[s]ometimes the initial trigger comes from outside, spurring a new response of self-organization inside that succeeds or fails. Often the two processes interact in an intimate way.”¹⁰³ Therefore, although we should not be naive to the fact that our presence alters the environment, it can also serve as a catalyst for opportunity.

Consequently, while practitioners may feel disillusioned by their ability to facilitate rapid change using bottom-up reform, they should not be disheartened, as “they have leverage—money, media attention, diplomatic pressure, the ability to bring together like-minded reformers in different countries to share ideas.”¹⁰⁴ However, this possibility of emergent change is limited by a failure to engage. Applying this theory to rule of law programs demonstrates the potential of CJS to effect change in a positive manner for the society as a whole.

Although there are significant risks, when we realize “local level institutions may be operating effectively already,” we disregard their value at our own peril.¹⁰⁵ Nevertheless, navigating this seemingly unfamiliar world presents its own challenges to practitioners and policy makers alike. While apprehension of the unknown is understandable, an attempt to appreciate and approach the realm of CJS in a foreign society is required for effective rule of law advancement.

¹⁰¹ Hector & Kibiri, *supra* note 96, at 58.

¹⁰² WILLIAM E. CONNOLLY, *A WORLD OF BECOMING* 27 (2011).

¹⁰³ *Id.* at 171.

¹⁰⁴ KLEINFELD, *supra* note 8, at 32.

¹⁰⁵ GIBSON ET AL., *supra* note 23, at 38.

Understanding Legal Pluralism's Potentials and Perverse Incentives

Given the abundance of CJS in many post- or in-conflict nations, engaging in the rule of law arena requires an understanding of legal pluralism. While many practitioners view rule of law through a Western lens, we must recognize that developing nations often operate in a state of legal pluralism, or in a “context in which multiple legal forms coexist.”¹⁰⁶ In other words, legal pluralism is a fact we must embrace; rule of law efforts take place in nations that lack basic or effective rule of law institutions but often possess other non-state methods of dispute resolution.¹⁰⁷ These multiple systems, which can exist in one “jurisdiction,” may overlap and have positive or negative effects on one another.¹⁰⁸ Customary systems, among other types of systems, are recognized as one of the categories of law that can exist in a social arena.¹⁰⁹ Therefore, practitioners and scholars should address CJS as part of rule of law reform efforts in a pluralistic society.

Although practitioners may initially feel overwhelmed or a sense of distaste when forced to navigate or intervene in a legalistically plural society, it may help to remember that historically such societies were the norm, not the exception.¹¹⁰ Likewise, we need not look far to find evidence of private institutions securing the general populace at

gated communities, universities, places of public entertainment (theme parks, concerts, sporting events), public facilities (libraries, schools), shopping malls, corporate headquarters, many small businesses, and even public streets (neighborhood watch). Privately owned and run (for profit) penitentiaries are handling an increasing number of prisoners. Many private organisations [sic] and institutions promulgate rules that apply to their own activities and to others within their purview. In situations of dispute, many parties chose (or are required) to bypass state court systems seen as

¹⁰⁶ Tamanaha, *supra* note 11, at 2.

¹⁰⁷ *Id.* at 2–3.

¹⁰⁸ *Id.* at 9.

¹⁰⁹ Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 397, 397 (2008).

¹¹⁰ *Id.*

inefficient, unreliable, too costly or too public, resorting instead to arbitration or private courts.¹¹¹

However, understanding that legal pluralism exists in a given society is not enough, nor is the next step of recognizing the fact that informal systems should not be ignored. Careful analysis of an individual system is also required. This includes appreciating a given CJS's norms in relation to its cultural and historic context, recognizing the realities, capacity and limitations of the actors in the environment, and the relationship between the formal and CJS.¹¹² While proper analysis of each of these factors is crucial to evaluating a nation's current and potential future legal landscape, given the focus of this paper, the often complex interaction between systems is of most interest as it is likely the most unfamiliar.

Brian Tamanaha describes multiple ways in which a formal system may interact with a competing system.¹¹³ First, a government may remain neutral towards several informal systems.¹¹⁴ Similarly, the state may recognize the strongest competing system.¹¹⁵ The others may be intentionally or unintentionally ignored.¹¹⁶

Another option for interaction is a state's condemnation of a system or practice while at the same time place not prohibiting it.¹¹⁷ This can occur for various reasons ranging from an inability to efficiently act, to sympathy.¹¹⁸ Likewise, the state may endorse an outside institution but provide no efforts to advance it, and possibly covertly repress it.¹¹⁹

Next, a government may "absorb" another system through explicit recognition, such as through acknowledgment of arbitration decisions as binding. This approach has several functions. It provides the state some control over competing systems, reaps the benefits the other has to offer, and avoids some conflict with a powerful unofficial system.¹²⁰ A

¹¹¹ *Id.* at 386–87.

¹¹² Isser, *supra* note 21, at 327.

¹¹³ Tamanaha, *supra* note 109, at 403–04.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 404.

multitude of hybrids are also possible; the government may codify or regulate CJS norms and systems, or other similar incorporation.¹²¹ Similarly, state recognition coupled with financial or coercive support to customary systems is another method of incorporation.¹²²

Finally, the state may make efforts to suppress and eliminate competing systems. Some scholars label this abolition.¹²³ However, this course of action is incredibly difficult to achieve, especially when the alternative enjoys deep societal roots.¹²⁴

Multiple lessons are gleaned when one recognizes these and various other state and CJS interactions may occur. At the most basic level, we are sensitized to the idea that CJS and formal systems may co-exist, and in multiple frameworks.¹²⁵ We are thus better able to accept, explore, and engage multiple systems in a given jurisdiction.¹²⁶ Reformers are also able to recognize that “like any other system of law, (CJS) is not just a set of rules but a deeply contextual and socially embedded regulatory system.”¹²⁷ They may compete both with the government and with each other¹²⁸ adding to instability.

Practitioners and policy makers are also able to better discern what incentives may drive a government to approach a CJS in a particular manner, thus providing a more informed, nuanced approach to rule of law efforts. Models of how these systems can interact provide options, rationales, and warnings of potential pitfalls for those advising governments in transition. However, given the multitude of potential hybrids, any proposed “solution” will be unique, as “power and culture, not laws and institutions form the roots of a rule-of-law state.”¹²⁹ Likewise, whatever approach is taken will be grounded in the “messy

¹²¹ WOJKOWSKA, *supra* note 5, at 28. See also Brynna Connolly, *Non-State Justice Systems and the State: Proposals for a Recognition Typology*, 38 CONN. L. REV. 239 (2005); *Briefing: Non-State Justice and Security Systems*, DEP’T FOR INT’L DEV., May 2004, <http://www.gsdrc.org/docs/open/ssaj101.pdf>.

¹²² Tamanaha, *supra* note 109, at 404.

¹²³ WOJKOWSKA, *supra* note 5, at 25.

¹²⁴ Tamanaha, *supra* note 109, at 404.

¹²⁵ Tamanaha, *supra* note 11, at 7.

¹²⁶ *Id.* at 14–15.

¹²⁷ Isser, *supra* note 21, at 327.

¹²⁸ Tamanaha, *supra* note 11, at 8.

¹²⁹ KLEINFELD, *supra* note 8, at 15.

realities that constitute the post-conflict justice landscape”¹³⁰ and will continue to affect reform efforts.

Embrace as Part of the Social Environment

Representative of a society and with overlap and relationships to the state, CJS must be acknowledged as part of this messy social and political environment. While modifying governmental “legal institutions may be a poor means to have an impact on problems that are actually societal or cultural,”¹³¹ I argue CJS may have the ability to make real impact, as they reflect a community’s culture while regulating societal behavior to maintain stability. Kleinfeld advances the theory that “one of the most effective methods for affecting the power structure is by supporting civil society” such as NGOs, business, religious groups, etc.¹³² I would add that CJS also possess the impetus to “change their own societies, from the inside, with local knowledge and local legitimacy.”¹³³ Like other parts of civil society, they will also “last long after outside reformers leave”¹³⁴ and therefore should be seen as a part of the environment.

Because every social arena is different, so too is every CJS. Therefore, rule of law assessments must expand beyond analyzing formal institutions, codified laws and legislation and take a more sociological approach. In other words, “we need to examine the justice landscape as the population sees and acts in it.”¹³⁵ This approach should be inclusive, recognizing not only the state’s official perception and behavior but that of the general public’s, including minority groups. This may help prevent even those reformers sensitive to CJS from attempting to apply a model that simply does not fit the environment.

Taking this approach will inform practitioners and policy makers on the population’s needs, desires, and vision for the future while likely adding respect for the reformers themselves, and a sense of legitimacy over their efforts. It would not be surprising to see this approach “lead to a greater focus on nontraditional and informal methods of dispute

¹³⁰ Isser, *supra* note 21, at 326.

¹³¹ KLEINFELD, *supra* note 8, at 10.

¹³² *Id.* at 214.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Isser, *supra* note 21, at 341.

resolution that are used, rather than formal systems that are less frequented.”¹³⁶ At the same time, this approach does not have to be to the detriment of improving formal institutions.¹³⁷ As discussed above, there are as many models, and as many hybrids, as there are societies. Likewise, it may merely alter a timeline to appropriately match the nation’s current desires and capacity, allowing time for appropriate bottom-up growth. As Patricio Asfura-Heim observes, the “co-option of certain tribal customary law principles may help reestablish the legitimacy of the state by providing culturally appropriate venues for reconciliation between sectarian factions and by helping reintegrate former combatants. . . . Over time, the creation of linkages with the state system could be used to reduce human rights abuses associated with tribal customs.”¹³⁸

The discussion of an approach tailored for Iraq highlights the principle that “reform strategies need to be grounded in current—and realistic—expectations of institutional capacities and social realities.”¹³⁹ This requires embracing a second generation approach and a willingness to recognize CJS as part of the rule-of-law landscape possessing capabilities likely not found elsewhere. It demands patience and the acceptance of incremental gains, “recognizing the complex and interrelated processes of social change and political and economic development required to reach the ideal.”¹⁴⁰ Ultimately this method responsibly addresses rule of law as a whole, not just as formal institutions available to a few. It is also more responsive to the citizenry, as it addresses societal needs, ultimately advancing the state situation in the long-term and possibly better linking the populace to a form of government.¹⁴¹

Embracing CJS as part of the social landscape is beneficial, even if the intent is to avoid their advancement or inclusion as part of a rule of law effort. For instance, in a conflict, “understanding the basic tenets of tribal customs, alliance building, and customary dispute resolution”¹⁴² allows military forces to better navigate the environment, connect with the population, address grievances in a culturally appropriate manner,

¹³⁶ KLEINFELD, *supra* note 8, at 219.

¹³⁷ Asfura-Heim, *supra* note 47, at 241.

¹³⁸ *Id.*

¹³⁹ Isser, *supra* note 21, at 347.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 361.

¹⁴² Asfura-Heim, *supra* note 47, at 275.

and possibly partner with local leaders.¹⁴³ Where CJS exist, they must be considered as part of the human terrain, crucial to understanding the populace, the enemy, and their sentiments and motivations. Without such appreciation, commanders' situational awareness is severely limited.

On the other hand, commanders' ability to appreciate and possess some understanding of customary systems can help highlight complex relationships between the enemy and the general population, as well as determine who truly may be irreconcilable.¹⁴⁴ It may assist in understanding when and how solatia or condolence payments are culturally appropriate¹⁴⁵ and how to determine land-ownership issues in nations lacking official documentation.¹⁴⁶ Likewise, where formal rule of law institutions are deficient and policy allows, forces savvy to the CJS may consider releasing detainees to the local leader who is then responsible for the individual's future behavior.¹⁴⁷

Avoiding Haphazard Engagement

Reformers who find it wise to directly engage CJS must still be wary of haphazard engagement. As with the formal system, benevolent outside assistance or engagement with CJS can also have perverse outcomes. This is not to dismiss interventions with uncertain results but to reflect upon them "periodically to improve the chance that they do not pose more dangers or losses than the maxims they seek to correct."¹⁴⁸

For instance, although the practice of ba'ad, or the exchange of a woman to another tribe as part of a settlement is offensive to many in Western societies, we cannot fail to recognize that it is more than just abusive; it serves a social function.¹⁴⁹ It is a "form of compensation and a means of establishing a bond between the families."¹⁵⁰ This is not to suggest an acceptance of these or other violations of basic human rights

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 276.

¹⁴⁵ *Id.* at 278.

¹⁴⁶ Major Michael C. Evans, *Influencing the Center of Gravity in Counterinsurgency Operations: Contingency Leasing in Afghanistan*, ARMY LAW., Feb. 2012, at 28.

¹⁴⁷ Asfura-Heim, *supra* note 47, at 279.

¹⁴⁸ CONNOLLY, *supra* note 102, at 165.

¹⁴⁹ Isser, *supra* note 21, at 334.

¹⁵⁰ *Id.*

standards but to understand their place in a given society, and how to best approach them in places where the emphasis is on the good of the community, as opposed to the individual.¹⁵¹ Demanding and attempting to enforce immediate change to such a practice is not only likely to fail, but if successful, it can create a vacuum of remedies in the dispute-resolution mechanism.

There are also times when placing too much reliance on CJS can be dangerous. Intense, rapid changes to a society, such as that which often occurs during and post conflict, can tax CJS capacity. For instance, technological advances make it difficult for laypersons to identify violent criminals, and population influxes stress communities' ability to provide effective CJS.¹⁵² Therefore, a CJS' capacity must be evaluated in its given state to avoid unintended consequences; there is no blanket answer. For example, in some interventions, CJS may well be more capable of handling even serious cases than the formal system after a conflict although it may be in conflict with the formal system's policy.¹⁵³

In an attempt to mitigate such dangers and avoid haphazard engagement, viewing "both customary and formal justice systems as parts of a larger organic justice landscape in which different rule systems interact"¹⁵⁴ can help provide options for assistance. A transitional strategy that allows flexibility to meet current challenges may be the best approach in some situations. For instance, an option for parties to agree to take even serious cases, such as rape or murder, to a CJS may allow justice and rule of law to be served, even while formal institutions advance. Nevertheless, such potential policies must be evaluated and tailored to meet the situation at hand.¹⁵⁵

Some scholars, even those in favor of CJS, highlight that a hazard for both the donor and host nation is that CJS engagement has the "potential for destroying the very good it is trying to recognize."¹⁵⁶ That is, they are flexible and represent the values of the society, and are technically voluntary and strive for acceptable solutions that represent the best

¹⁵¹ *Id.*

¹⁵² *Id.* at 332, 333.

¹⁵³ *Id.* at 333.

¹⁵⁴ *Id.* at 336.

¹⁵⁵ Stephen C. Lubkemann, Deborah H. Isser & Philip A.Z. Banks III, *Unintended Consequences: Constraint of Customary Justice in Post-Conflict Liberia*, in CUSTOMARY JUSTICE, *supra* note 21, at 229, 230.

¹⁵⁶ Barfield et al., *supra* note 37, at 188, 189.

interest of the community as a whole. Imposing stringent rules or close connections to the state or donor nation may disrupt the system and negate its benefits as the addition of an agency or mandate alters the landscape, even if the change is imperceptible to the outside eye. Again, looking to the beneficiary's needs and desires for the future is essential, as is recognizing the potential for unintended consequences if practitioners are to engage CJS responsibly.¹⁵⁷

Yet another possible unintended consequence of CJS engagement comes from the enemy's hands in an in-conflict society. In some counterinsurgencies, the enemy sets up shadow governments, including their own courts, to translate "local dispute resolution and mediation into local rule of law, and thus into political power."¹⁵⁸ The enemy may be better able to provide a semblance of justice than the state and, sometimes, even address civil concerns and perform administrative duties, such as issuing identification.¹⁵⁹

Because even legitimate local leaders can be influenced by the enemy, practitioners may inadvertently and unknowingly engage a CJS on the periphery. While there may be benefit in such engagement, it should be calculated. When it is not, a savvy enemy can exploit that activity in various ways. Insurgents may target traditional leaders attempting to bolster CJS, as their activity is counter-productive to the enemy's.¹⁶⁰ Similarly, a sophisticated narrative can highlight mishaps, indicate that outside forces are actually working against the host-nation government, or argue that outside influence is not assistance but interference with their culture, religion or society, etc.

Therefore, rule of law practitioners who engage CJS must be cautious and avoid haphazard engagement, as the most well-intentioned assistance with CJS can also have unintended consequences. In other words, it is not a panacea. While scholarly research helps practitioners better understand the complexity of CJS within an environment, it is difficult to envision without a case study. Such analysis of a rule of law effort allows concrete examples of the challenges and benefits practitioners and the populace can both face.

¹⁵⁷ *Id.*

¹⁵⁸ Kilcullen, *supra* note 39, at 45.

¹⁵⁹ *Id.*

¹⁶⁰ Barfield et al., *supra* note 37, at 172.

Afghanistan

*[T]he strengthening of traditional dispute resolution at the local level is one of the most efficient and effective ways to achieve the kind of security and stability that can enable transition of responsibility to the Afghan government and its forces, and protect our own core national security interests.*¹⁶¹

—Brigadier General Mark Martins

Rule of law efforts in Afghanistan provide a worthy case study in the role of CJS in a developing nation's environment. While societies' varying and nuanced intricacies prevent any single intervention from being used as a template in other locations, the Afghanistan experience may help practitioners and policy makers alike reflect on ways to better approach the next challenge.

As discussed, a more appropriate approach to rule of law development requires analyzing a given CJS's norms in relation to its cultural and historic context, recognizing the realities, capacity and limitations of the actors in the environment, and the relationship between the formal justice system and CJS.¹⁶² This will allow practitioners to see "customary and formal justice systems as parts of a larger organic justice landscape in which different rule systems interact."¹⁶³ Likewise, second-generation reform advances the theory that "the rule of law is not about a set of institutions[, but] it is about achieving a set of ends that determine the relationship between a state and its society" and helps focus reform efforts in the appropriate direction.¹⁶⁴ In other words, effective rule of law reform requires work from the bottom-up; practitioners should strive to allow, or possibly nudge, a society to change, and the populace to hold their government accountable from within.¹⁶⁵

In the case of Afghanistan, where historical and cultural context is so important, judicial history must first be unraveled to effectively intervene in the rule of law arena. Afghanistan's legal history is "rich and

¹⁶¹ Brigadier General Mark Martins, *Rule of Law in Iraq and Afghanistan?*, Remarks at Harvard Law School, HARV. NAT'L SEC. J. (Apr. 18 2011), <http://harvardnsj.org/2011/04/rule-of-law-in-iraq-and-afghanistan/>.

¹⁶² Isser, *supra* note 21, at 327–28.

¹⁶³ *Id.* at 336.

¹⁶⁴ KLEINFELD, *supra* note 8, at 212.

¹⁶⁵ *Id.* at 214.

layered,”¹⁶⁶ and over the ages, a significant portion of Afghanistan’s populace was essentially untouched by government. Geographical separation created a high state of local autonomy even once communication and road networks improved.¹⁶⁷ Prior to 1923, when its first constitution was written, the law of the land was a mix of sharia and pashtunwali, with dispute resolution conducted by shuras and jirgas rather than formal government institutions.¹⁶⁸ Thus, both religious and social influences have historically significant importance, of varying degrees depending on location, within the country.¹⁶⁹

These traditional influences continued after the 1923 constitution, and they discouraged meaningful change; efforts to bring rule of law to rural areas were met with disdain, and those efforts were seen as an “arbitrary imposition of authority.”¹⁷⁰ In part, this is what helped the system keep an “indigenous character, never coming entirely under the European legal influence.”¹⁷¹ For example, because Sharia does not allow attorneys to represent criminal defendants, the bar remained small even after 1925 when the monarchy promulgated a criminal code and the government began training Islamic judges.¹⁷² Such codification began “undermining their authority at the tribal and village level” and ultimately traditional leaders “pushed the quasi-constitutional monarchy to its downfall in 1929.”¹⁷³

A new constitution recognizing Islam as the official state religion, and a requirement that decisions respect Sharia was adopted in 1931.¹⁷⁴ In 1964, the constitution was again revised, softening this religious stance somewhat, and while Sharia principles still applied, strict conformity to Sharia was not required as statutory law became more prevalent.¹⁷⁵ Nevertheless, conflict between the two continued; societal

¹⁶⁶ Susanne Schmeidl, *Engaging Traditional Justice Mechanisms in Afghanistan: State-Building Opportunity or Dangerous Liaison*, in *THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION* 149 (Whit Mason, ed. 2011)

¹⁶⁷ Barfield et al., *supra* note 37, at 163.

¹⁶⁸ TONDINI, *supra* note 19, at 31.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 31–32.

¹⁷³ *Id.* at 35.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

discord prevented a more secular judiciary despite the efforts of educated elites.¹⁷⁶

In 1973, King Zahir Shah was replaced in a coup by Prime Minister Mohammad Daoud, who was not assisted by the tribes.¹⁷⁷ As a result, the division between progressive elites and the more traditional population grew even further. The new administration intended its 1977 constitution to balance the Sharia and secular law, but Daoud was overthrown before its implementation.¹⁷⁸ In 1980, under communist influence, the constitution eliminated both sharia and Islam as the state religion.¹⁷⁹ While women's rights grew dramatically, including in the justice sector, the population remained unhappy with the new system, and the 1987 constitution reintroduced Islamic principles.¹⁸⁰

By 1992, the Afghan justice system was again unstable, with little court access. In response, the populace relied upon sharia and customary law to maintain order. By 1996, the Taliban's rise brought a harsh version of sharia to the forefront, but gave people the option of choosing between the local or state system to resolve disputes.¹⁸¹ The 1964 Constitution was reinstated, with the addition of newly formed Hoqooq offices, which were intended to mediate civil disputes.¹⁸² They attempted to resolve cases of first impression referred to them by the community, using "statutory/religious law and informal dispute resolution mechanisms."¹⁸³ If the issue was not resolved, it could be sent to a formal court.¹⁸⁴ However, the criminal law arena suffered greatly, with the Lawyers' Association, which once boasted 5,000 members, closed (and was not reopened until November 2001).¹⁸⁵

Despite changes to the leadership, code, constitution, and practice, the formal court structure actually remained fairly stable through these regime changes. There was a "bi-partition of national courts, which were divided into general courts, including the Supreme Court, the Court of

¹⁷⁶ *Id.* at 36.

¹⁷⁷ *Id.* at 36–37.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 39.

¹⁸⁰ *Id.* at 36–37.

¹⁸¹ *Id.*

¹⁸² *Id.* at 43.

¹⁸³ Isser, *supra* note 21, at 327.

¹⁸⁴ *Id.* at 39.

¹⁸⁵ *Id.* at 38.

Cassation, the High Central Court of Appeal, provincial courts and primary (district courts) and specialized courts, consisting of juvenile courts, labour courts, and other specialized courts established by the Supreme Court in case of need".¹⁸⁶

Such detailed history may not be readily available at the start of an intervention. Even now, after nearly thirteen years of intervention, few hard statistics exist to support detailed analysis of Afghanistan's judicial history.¹⁸⁷ However, responsible rule of law practitioners and policy makers must attempt to glean as much background as possible about the host-nation's judicial past. Without it, understanding the present, let alone envisioning a future, will be uninformed and haphazard at best. Likewise, it is even more important when hard data is lacking to appreciate such history in light of the social context and recognize the realities, capacity, and limitations of the actors in the environment.¹⁸⁸

In 2001, although the Bonn Agreement had been signed, the applicable law was unclear to many citizens, attorneys and even judges. Tensions between institutions did not help matters, nor did early attempts at rule of law reform, which lacked a coordinated, strategic vision among donor nations and the Afghan government.¹⁸⁹

Reflecting on these historical and recent accounts, one recognizes that even as formal rule of law grew and morphed, because the majority of the populace did not have access to the justice system, the informal system remained strong. The state of almost constant unrest within the nation exacerbated this situation, and CJS filled the vacuum left by the lack of governance. Even those with access to the formal system distrusted it and often viewed it as illegitimate.¹⁹⁰

To further complicate matters, various types of CJS exist within Afghanistan. While ethnic groups possess similar CJS traditions, all are somewhat different as they represent the community and its culture, with some more willing to interact with state authorities when available.¹⁹¹ One can also not cleanly separate the state and CJS: judges from the formal system routinely seek the advice of mullahs or local elders on

¹⁸⁶ *Id.* at 39.

¹⁸⁷ *Id.* at 43.

¹⁸⁸ *Id.* at 327.

¹⁸⁹ Barfield et al., *supra* note 37, at 180–81.

¹⁹⁰ *Id.* at 160.

¹⁹¹ *Id.* at 169.

Sharia, district governors held significant power in dispute resolution, and the civil mediation Hoqooqs functioned in something of a middle ground, making decisions on cases only referred by the district governor.¹⁹²

From the Western point of view, CJS in Afghanistan has significant weaknesses. Almost universally, Afghan CJS suffer from human rights abuses, and given its voluntary nature, actors can sometimes chose to ignore the system or its decision.¹⁹³ Similarly, disputes affecting larger interests than those contained within a CJS sphere of influence can frustrate the system.¹⁹⁴

Given its history, one should not be surprised to find the current formal Afghan justice system in a similar state. Courts still lack legitimacy with the populace, and it is estimated that 80% to 90% of disputes are handled by CJS—some cases referred to the informal system by formal-system officials.¹⁹⁵ This historical lack of legitimacy causes the formal system, even with assistance, to face an uphill battle, especially when Afghans have a long-standing distaste for government intervention into personal matters.¹⁹⁶ Such distrust remains pervasive and enduring, despite Taliban influence, and “a shortage of local resources resulting from years of warfare, drought, and the influence of armed political groups,” hindering CJS.¹⁹⁷ Even in light of these challenges, the populace remains committed to their local system with its emphasis on “community reconciliation.”¹⁹⁸ Understanding such an “ethically constitutive story”¹⁹⁹ as one of many pieces of Afghan politics could have allowed a more inclusive and perhaps effective approach to rule of law at the outset.

However, “since 2001, international efforts to reform Afghanistan’s justice sector and establish the rule of law in the country have, until

¹⁹² Mette Lindorf Nielsen, *From Practice to Policy and Back: Emerging Lessons from Working with Community-Based Justice Mechanisms in Helmand, Afghanistan*, in PERSPECTIVES ON INVOLVING NON-STATE AND CUSTOMARY ACTORS IN JUSTICE AND SECURITY REFORM 162 (Peter Albrecht, Helene Maria Kyed, Deborah Isser and Erica Harper eds., 2011).

¹⁹³ Barfield et al., *supra* note 37, at 179.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 160–61.

¹⁹⁶ *Id.* at 182.

¹⁹⁷ *Id.* at 172.

¹⁹⁸ *Id.*

¹⁹⁹ SMITH, *supra* note 62, at 15.

recently, focused almost entirely on strengthening state institutions, including the Supreme Court, the Ministry of Justice, and the Attorney General's Office (among others)."²⁰⁰ For much of the intervention, a first generation, "courts, cops and corrections" approach was the norm. Unfortunately, these efforts were largely unsuccessful.²⁰¹ While there is no single reason for the lack of success, "insufficient donor attention," "poor coordination," and "Afghans' unfamiliarity with, or resistance to, state justice institutions generally" are cited as contributing factors.²⁰² At a minimum, the last factor could have been predicted given the historical and social context of Afghanistan.

While the U.S. Institute of Peace began research on Afghan CJS in 2002, active support did not begin until 2006 with the initiation of select Commissions on Conflict Mediation (CCMs) to resolve issues referred by Provincial Governors.²⁰³ During this time, it became abundantly clear that the formal system's capacity was severely lacking.²⁰⁴ By 2008, the Afghan National Justice Sector Strategy and National Development Strategy required "the government to adopt a policy on the Afghan state's relations with nonstate dispute resolution councils" in part to "harness the strengths offered by community-led dispute resolution",²⁰⁵

In 2009 the United States became actively involved, with efforts designed to connect CJS and the formal system and build district councils with the ability to resolve community issues.²⁰⁶ Both military and civilian international leaders recognized that CJS engagement was required to provide rule of law, at least in the near-future; the state system was not adequately developed to support the populace's needs.²⁰⁷ By mid-2010, one of the four pillars of the Department of State's Rule of

²⁰⁰ NOAH COBURN & JOHN DEMPSEY, INFORMAL DISPUTE RESOLUTION IN AFGHANISTAN 2 (Aug. 2010), *available at* <http://www.usip.org/publications/informal-dispute-resolution-in-afghanistan>.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ U.S. AGENCY FOR INT'L DEV., AFGHANISTAN RULE OF LAW STABILIZATION PROGRAM (INFORMAL COMPONENT) ASSESSMENT FINAL REPORT 13, 27–44 (2011) [hereinafter FINAL REPORT], *available at* http://pdf.usaid.gov/pdf_docs/PDACT372.pdf.

²⁰⁴ LIANA SUN WYLER & KENNETH KATZMAN, AFGHANISTAN: US RULE OF LAW AND JUSTICE SECTOR ASSISTANCE 16 (2010) [hereinafter AFGHANISTAN: US RULE OF LAW AND JUSTICE SECTOR ASSISTANCE], *available at* <http://www.fas.org/sgp/crs/row/R41484.pdf>.

²⁰⁵ COBURN & DEMPSEY, *supra* note 200, at 4.

²⁰⁶ FINAL REPORT, *supra* note 203, at 13.

²⁰⁷ COBURN & DEMPSEY, *supra* note 200, at 5.

Law Strategy was to “provide security and space for traditional justice systems to re-emerge organically in areas cleared of the Taliban and engage closely at the grassroots level to ensure dispute resolution needs in the local communities are being met.”²⁰⁸ This recognition of CJS was of significant importance, as a national survey in Afghanistan in the same year reported a *decrease* in formal-system use and in *increase* in CJS despite previous efforts to the contrary.²⁰⁹

Spring 2010 brought the development of USAID’s Rule of Law Stabilization (Informal Component) (RSL-I)²¹⁰ program with its goal “to help decrease instability and neutralize anti-GIRoA [Government of the Islamic Republic of Afghanistan] influence in targeted areas in Afghanistan’s southern and eastern regions through strengthening the ability of Community-Based Dispute Resolution (CBDR) processes to resolve disputes and raise the population’s awareness of the law and legal rights.”²¹¹

Specifically, “RSL-I objectives are:

- Strengthen the ability of CBDR processes to resolve disputes and provide justice in order to provide functional alternatives to Taliban courts and formal justice mechanisms that are currently ineffective.
- Raise the populations’ awareness of their constitutional and legal rights.
- Improve central and sub-national capacity to reform and foster legitimate and reliable delivery of ‘traditional’ justice to build confidence in the government and neutralize anti-GIRoA influence.
- Support recognized community leadership structures to reinforce traditional stabilizing systems.
- Encourage gender equality and reduce the prevalence of human rights abuses during CBDR processes that resolve disputes and provide justice.

²⁰⁸ WYLER & KATZMAN, *supra* note 204, at 19.

²⁰⁹ *Id.* at 13.

²¹⁰ FINAL REPORT, *supra* note 203, at 15.

²¹¹ *Id.* at 5.

- Map CBDR structures in order to determine linkages between CBDR and GIROA and strengthen those linkages.

The priorities of RLS-I are to:

- Increase women's access to and participation in dispute resolution;
- Establish and support communication networks of community elders that reinforce traditionally stabilizing leadership structures;
- Facilitate opportunities for community leadership to increase their understanding and access to CBDR;
- Create linkages between the state justice sector and CBDR;
- Provide targeted populations with information concerning their constitutional and legal rights and CBDR processes;
- Increase citizens' access to criminal defense services.”²¹²

Various strategies have been implemented in an attempt to meet these goals.²¹³ First, respected Afghans such as professors and mullahs provide training for village elders on topics pertinent to local CJS, and at the same time, those now-trained elders network with peers, exchanging and socializing the ideas that were shared with them.²¹⁴ Perhaps surprisingly, feedback from participants was overwhelmingly positive.²¹⁵

Second, in an attempt to overcome the Western bias against CJS due to its often discriminatory nature, conversations regarding women's roles in dispute resolution are encouraged. While female participation in CJS is often low, it varies greatly in Afghanistan, and the idea of improved

²¹² *Id.* at 13–14.

²¹³ While various rule of law programs overlap, the United States has the lead in CJS in Afghanistan, with funding from the State Department, Bureau of International Narcotics and Law Enforcement Affairs and USAID. *Id.* at 13. Likewise, DoD's Rule of Law Field Force (ROLFF), supports Rule of Law efforts “in otherwise non-permissive areas of Afghanistan.” WYLER & KATZMAN, *supra* note 204, at 23.

²¹⁴ FINAL REPORT, *supra* note 203, at 13.

²¹⁵ *Id.* at 20–22.

equality is socialized by example to other areas, with the hope rights are improved.²¹⁶

Third, “the project is helping to promote the practice of preparing a written record of the [Alternative Dispute Resolution] decision and registering it with the respective State authority whether huqooq for civil, family court or judge. As well, the Tribal Elders keep a copy and a copy of the decision is given to disputants.”²¹⁷ While some dislike state involvement in CJS, many take the opposite stance, appreciating the legitimacy and recognition it obtained.²¹⁸ It appears the program, despite varying perceptions, “strengthened and standardized the interface between the informal and formal justice sectors. . . .”²¹⁹

Finally, Community Cultural Centers (CCCs) were developed to serve as a “change agents” and “legal information centers.”²²⁰ While they initially focused on the formal system, they now also address the informal system. However, it appears this component of the effort has not been overly fruitful.²²¹

While results from the RLS-I program after approximately one year were tentative, overall they appear positive. Those findings range from the political and security based (“CBDR can quickly ‘fill a justice gap’ in a recently pacified area and thereby prevent Taliban justice from regaining a foothold”) to the social (“communities in targeted areas have embraced the project’s objectives and activities”) and even include incremental human rights gains (“CBDR can provide concrete opportunities for female empowerment, but significant challenges remain.”).²²²

This evolution to include CJS in the U.S. rule of law strategy in Afghanistan is not without controversy. While some view it as essential to the counterinsurgency (COIN) strategy, with the International Security Assistance Force (ISAF) turning to tribal elders for detainee release advice and encouraging state and local leaders to corroborate on

²¹⁶ *Id.* at 23, 24.

²¹⁷ *Id.*

²¹⁸ *Id.* at 22, 23.

²¹⁹ *Id.* at 22.

²²⁰ *Id.* at 24.

²²¹ *Id.* at 25.

²²² *Id.* at 57.

decisions,²²³ others in the international arena, including donors, are fearful of human rights abuses.²²⁴ There are also concerns that “increased attention to the nonstate justice system could divert much-needed resources away from assistance to the state courts and other state institutions of justice” and that it may be constitutionally prohibited as the Afghan Constitution prevents cases from being jurisdictionally excluded from a court.²²⁵ Therefore, “the importance in Afghanistan of customary justice mechanisms is increasingly widely recognized, although their part in an overall ROL strategy is still under debate.”²²⁶ However, adopting a broad, ends-based, second generation approach can help focus reforms “desired by the local population” which in turn will likely lead to a greater focus on nontraditional and informal methods of dispute resolution that are used, rather than formal systems that are less frequented.²²⁷

These recent efforts are admittedly “one of the first times a donor project has focused entirely on supporting the organic development of the informal or justice sector in Afghanistan.”²²⁸ However, hindsight indicates that the inclusion of CJS from the beginning of operations when even conceptualizing rule of law efforts in Afghanistan likely would have been helpful. The history, both pre- and post-2001, indicate that although difficult to navigate, rule of law efforts cannot ignore CJS in their planning even if it is merely to make a well-informed decision not to engage. Although not appropriate in every intervention, it must be carefully researched, analyzed, and considered if policy makers advocate effective rule of law reform from the bottom-up, allowing a society to change and the populace to hold their government accountable from within.²²⁹

While likely a good rule of thumb, a complete prohibition on CJS engagement when the host nation—the ostensible “owner”—does not support their advancement is short-sighted. As displayed by Afghanistan’s long and short term history, the true beneficiaries (the population) may possess better insight into the future of the justice

²²³ COBURN & DEMPSEY, *supra* note 200, at 5.

²²⁴ WYLER & KATZMAN, *supra* note 204, at 18–19.

²²⁵ COBURN & DEMPSEY, *supra* note 200, at 6.

²²⁶ ROL HANDBOOK, *supra* note 29, at 83.

²²⁷ KLEINFELD, *supra* note 8, at 219.

²²⁸ FINAL REPORT, *supra* note 203, at 5.

²²⁹ KLEINFELD, *supra* note 8, at 214.

system.²³⁰ As demonstrated, this notion is not in conflict with current military doctrine,²³¹ and it can actually help link the populace to the government.²³² Likewise, the United States has precedent for such intervention prior to explicit host-nation approval from the perhaps unintended use of such a system to serve our claims process²³³ to the overt development of Commissions on Conflict Mediation in 2006.²³⁴

Practical Considerations

Once the decision is made to include CJS in a rule of law effort, engaging an unfamiliar CJS can be a daunting task. However, some practical considerations and recommendations are captured for others in the arena. Embracing Kleinfeld's second-generation method of thought,²³⁵ and the need for an understanding of legal pluralism,²³⁶ specific area research is implicitly necessary if we are to avoid haphazard engagement.

The first, and perhaps most obvious, course of action is the need for extensive research. Time-constrained environments coupled with the minimal amount of rule of law funding dedicated to research can discourage the practitioner.²³⁷ However, appropriate research can be invaluable. It should focus on the populace as the true beneficiaries²³⁸ and take into account their narratives even if data is lacking. Those truly interested in reform should also look outside their regular sphere of influence; scholars should engage with practitioners and vice-versa, and seek perspectives from fields outside their own.²³⁹ As seen with the Afghanistan case study, most states' judicial history is rich, and it can lend insight to future rule of law reform.

Research, however, is only fruitful if projects are adapted to the specific circumstances in which they are carried out. Like the political

²³⁰ Barfield et al., *supra* note 37, at 181.

²³¹ FM 3-24, *supra* note 65, at 13-66.

²³² FINAL REPORT, *supra* note 203, at 22.

²³³ Evans, *supra* note 146, at 28.

²³⁴ FINAL REPORT, *supra* note 203, at 13.

²³⁵ KLEINFELD, *supra* note 8, at 9.

²³⁶ Tamanaha, *supra* note 11, at 2.

²³⁷ Isser, *supra* note 21, at 343-44.

²³⁸ KLEINFELD, *supra* note 8, at 219.

²³⁹ Isser, *supra* note 21, at 344; KLEINFELD, *supra* note 8, at 220.

and social, the justice landscape is ever-changing based on actors' and institutions' capabilities and capacities.²⁴⁰ Therefore, while another intervention's success should be considered, it should not serve as a template; local dynamics are always at play and have real effects.²⁴¹ For instance, the use of a guarantor program similar to that used in Iraq may or may not be beneficial to another area.²⁴² Reformers should expect hybrids, both of pluralistic models of state and CJS relationships and their linkages, as well as prior successful interventions.²⁴³

The use of local national intermediaries often appears the most beneficial manner to engage foreign CJS. Not only do they provide access to current information and narratives, but as seen in Afghanistan, foreigners can sometimes be viewed with suspicion, and a grass-roots appearance is likely more "cost effective and increases the likelihood of making lasting changes."²⁴⁴ However, while situation dependent, incremental changes can result in significant advancement in the long run. For instance, in an attempt to make CJS decisions "more transparent, sustainable, and predictable, recording and archiving cases can assist greatly."²⁴⁵ This is more likely to happen, however, if "voices for change within communities" are used, as opposed to foreign interveners directly.²⁴⁶ Such voices are also more likely to serve as human rights advocates, as they understand the social purposes of offensive practices and may be able to explore other alternatives more efficiently.²⁴⁷

The simple act of encouraging communication can also pay dividends. Discussion between state and CJS authorities can resolve jurisdiction issues, educate each other and possibly reduce tensions.²⁴⁸ At the same time, attempting to force change through re-education instead of allowing it to emerge with the benefit of education can be met with disdain by CJS leaders. CJS possess the ability to change, but because they reflect the community, change is often understandably

²⁴⁰ COBURN & DEMPSEY, *supra* note 200, at 12–13.

²⁴¹ JOHN DEMPSEY & NOAH COBURN, TRADITIONAL DISPUTE RESOLUTION AND STABILITY IN AFGHANISTAN 5, 10 (Feb. 2010), *available at* <http://www.usip.org/publications/traditional-dispute-resolution-and-stability-in-afghanistan>.

²⁴² Isser, *supra* note 21, at 362.

²⁴³ *Id.*

²⁴⁴ COBURN & DEMPSEY, *supra* note 200, at 19.

²⁴⁵ *Id.* at 15.

²⁴⁶ Isser, *supra* note 21, at 355.

²⁴⁷ *Id.* at 353–55.

²⁴⁸ COBURN & DEMPSEY, *supra* note 200, at 16.

slow. Therefore, goals should be realistic and incremental.²⁴⁹ Similarly, opportunities for CJS leaders to engage with each other can prove fruitful for facilitating the exchange of ideas.²⁵⁰

It is also crucial that relationships are built and evaluated between the donor nation and trusted agents in the community to ensure as situations change and develop, aid is appropriately disseminated even at the lowest level.²⁵¹ Given the reality of local dynamics, reformers must recognize the potential for perverse incentives to form in the CJS arena as well. For instance, salaries, buildings, and other “financial rewards” have the potential to “undermine the very aspects of traditional justice that make it legitimate.”²⁵²

Finally, practitioners have a responsibility to each other. Too often, interventions and their outcomes are not captured or shared for others to evaluate.²⁵³ When it is, it does not always reflect the “political, social, and economic variables that underlie the policies and determine their impact.”²⁵⁴ Scholarly thought by academics and practitioners alike is required to improve our chances of successful rule of law intervention.

Conclusion

While thoughts on rule of law reform are progressing and more nuanced approaches advanced, there is still resistance to, and fear of, the unfamiliar. This is especially true when the host nation does not explicitly advance CJS despite a history of an effective informal system. Ideally, all reforms would have the backing of the populace, political leadership, and those working in the justice system.²⁵⁵ A second generation ends-based approach that sees rule of law as “a relationship between a state and a society”²⁵⁶ leaves room for those instances when the government does not implicitly support CJS. I argue when using an ends-based approach to rule of law, practitioners cannot ignore CJS even

²⁴⁹ Isser, *supra* note 21, at 347.

²⁵⁰ FINAL REPORT, *supra* note 203, at 21, 22.

²⁵¹ DEMPSEY & COBURN, *supra* note 241, at 4.

²⁵² COBURN & DEMPSEY, *supra* note 200, at 5.

²⁵³ Isser, *supra* note 21, at 364.

²⁵⁴ *Id.* at 365.

²⁵⁵ Matteo Tondini, *From Neo-Colonialism to a ‘Light-Footprint Approach’: Restoring Justice Systems*, 15 INT’L PEACEKEEPING 237, 241 (2008).

²⁵⁶ KLEINFELD, *supra* note 8, at 15.

when not formally recognized by the host nation. United States policy, military doctrine, and social science theories are either consistent with this notion or explicitly support this approach.

However, adoption of such a method requires reformers to become well versed in pluralistic legal traditions and their models, embrace them as part of the environment, and avoid haphazard engagement. Most likely, socializing this change will require effort from more than just practitioners in the field. While there is a call for emphasis on foreign and comparative law, this focuses on the need for education in host nation criminal law and procedure²⁵⁷ and does not entirely capture CJS, which accounts for the overwhelming majority of justice rendered in many developing nations.²⁵⁸ An educational focus on legal pluralism may better serve practitioners who do not know where they may next find themselves operating.

Similarly, while U.S. policy and military doctrine are consistent with the thesis that policy makers cannot ignore CJS even when such systems are not formally recognized by the host nation, specific doctrinal changes to encompass informal mechanisms and this particular issue are appropriate. Likewise, as practitioners continue to navigate rich and pluralistic legal environments, they owe it to each other to document their successes and failures.²⁵⁹ Doing so may not only assist current peers but also future generations who may struggle to find information on a nation's judicial history and assess future policies or interventions.

²⁵⁷ Captain Ronald T.P. Alcala, *Vanquishing Paper Tigers: Applying Comparative Law Methodology to Enhance Rule of Law Development*, ARMY LAW., Mar. 2011, at 5, 5.

²⁵⁸ Tamanaha, *supra* note 11, at 4.

²⁵⁹ Isser, *supra* note 21, at 364.

**THE THIRTY-FIRST CHARLES L. DECKER LECTURE IN
ADMINISTRATIVE AND CIVIL LAW***

MAJOR GENERAL THOMAS J. ROMIG, USA RETIRED¹

* This is an edited transcript of a lecture delivered on May 8, 2013 by Major General (Retired) Thomas J. Romig to members of the staff and faculty, distinguished guests, and officers attending the 61st Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. The lecture is in honor of Major General Charles L. Decker, the founder and first Commandant of The Judge Advocate General's School, U.S. Army, in Charlottesville, Virginia, and the 25th Judge Advocate General of the Army.

¹ Thomas J. Romig became the 21st Dean of Washburn University School of Law and Professor of Law in July 2007. A native of Manhattan, Kansas, Dean Romig most recently served as deputy chief counsel for operations and Acting Chief Counsel for the Federal Aviation Administration (FAA).

Before joining the FAA, Dean Romig served four years as the 36th Judge Advocate General of the United States Army with the rank of Major General. He led and supervised an organization of more than 9,000 personnel, which was comprised of 5,000 active and reserve military and civilian attorneys and more than 4,000 paralegal and support personnel spread throughout 328 separate offices in 22 countries. He oversaw a world-wide legal practice including civil and criminal litigation, international law, administrative law, labor and employment law, environmental law, claims, and ethics compliance.

During his career, Dean Romig was assigned to the 18th Airborne Corps and the 82d Airborne Division as a Military Intelligence Officer; the 2d Armored Division, where he prosecuted criminal cases and served as Chief of Criminal Law and Chief of Legal Assistance; and the Judge Advocate General's School, where he taught International Law. His significant military positions included: Chief of Army Civil Law and Litigation and Chief of Military Law and Operations, both in Washington, D.C. His other military legal assignments included Chief of Planning for the JAG Corps; Staff Judge Advocate for 32d Army Air Defense Command in Europe; and Staff Judge Advocate for U.S. Army V Corps and U.S. Army forces in the Balkans.

He earned a bachelor's degree in social sciences from Kansas State University and was commissioned through the Army ROTC program. After serving six years as a military intelligence officer, he was selected for the Army Funded Legal Education Program, and he graduated with honors from the Santa Clara University School of Law, where he served as an editor on the *Santa Clara Law Review* and as a member of the Honors Moot Court Board.

Throughout his career, Dean Romig has received numerous awards and recognition, including the following: United States Army Distinguished Service Medal; United States Army Legion of Merit; and United States Army Meritorious Service Medal (five awards); United States Senate Tribute for Military Service, Congressional Record June 14, 2005; Kansas Senate Resolution #1833, March 2006, for Distinguished Military Service; Kansas House Resolution #6021, March 2006, for Distinguished Military Service; Hungarian Ministry of Defense Distinguished Military Service Award; Santa Clara University School of Law Alumni Association Special Achievement Award; and Kansas State University ROTC Distinguished Alumni Award. He retired from the United States Army Judge Advocate General's Corps in October 2005 after thirty-four years of service.

Thank you everyone and thank you Luis [LTC Rodriguez, Chair, Administrative and Civil Law]. This has been a terrific opportunity for my wife, Pam, and me to come back to the regimental home of the Judge Advocate General's (JAG) Corps here in Charlottesville. This is truly a special place, and this is only the second time we've been back to Charlottesville and to the JAG School since I retired in 2005. So this is a very special time for us.

I want to publicly thank General Darpino and her staff for their outstanding efforts in arranging my coming here, and particularly their persistence in the shadow of the congressional sequester. I heard today how it was done, and I am in awe of their ability to work the system and get the right results—so that's great. I especially want to thank Lieutenant Colonel Rodriguez and Major Candace Beshers for their efforts in getting us here and for all of their work.

Luis and I go back a little ways. I remember a different time when we were flying in a small plane to a military base in rural Colombia to meet with members of the Colombian JAG Corps. As we began our approach, I noticed we started something that was akin to the death spiral of a plane that has been shot down. And, of course surprised, I turned and looked at Luis, and I said, "What the . . . ?" Luis says, "No problem, sir, we do this so the FARC can't shoot at us as much if we come in like this"—the FARC being the Colombian rebels.

There are amazing things that our great JAG Corps does, and our people do. The places you go, the things you do are amazing. Many people never hear about it, but you always make a difference for our country and for the world we live in. Our nation has asked so much of all of you over the last ten to eleven years, and you have never let our country down. So, as I said, I'm always amazed at what you do, and I want to thank you for your service to our country.

In June 2009, the Kansas Bar Association awarded Dean Romig its Courageous Attorney Award. The Kansas Bar Association created the Courageous Attorney Award in 2000 to recognize a lawyer who displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession. The Courageous Attorney Award was presented to Dean Romig for his time as the Judge Advocate General of the Army when he took the position that waterboarding and other extraordinary methods of interrogation were in violation of the Geneva Conventions and the Uniform Code of Military Justice. This award is only given in those years when it is determined that there is a worthy recipient.

Well, thanks for inviting us back and giving me this opportunity to speak to you. It's always dangerous to have a retiree back because they tend to tell war stories. I will not fail in that obligation. As you heard, I'm a dean of a law school. I've been dean for nearly six years. There's no surprise that my background is a little different than the average law dean in academia. When I arrived at the job in 2007, I started looking around, and I wanted to get some insight into the job.

So I picked up the phone, and I called a colleague who had been a dean a couple of times and asked what happened on the first day of his first time as dean. He told me that when he arrived, he started going through his desk. In the top drawer he found three envelopes. And they all were labeled for the new dean; each had a number on it, 1, 2, 3. Each of them said, "open only upon a certain event." The first one said "the first major crisis," the second one said "the second major crisis," and the third one said "the third major crisis."

Well, he went along for about six months to a year, and everything was going swimmingly. He was popular with everybody, but suddenly something happened and the honeymoon was over. So with trepidation he went to that drawer and opened the envelope. And sure enough, it gave him the answer to the problem, it said: "blame the last dean." He did it and it worked. And so things went along well for another six months to a year, and again another crisis. He went back to the desk, opened that second envelope; and sure enough there was a solution: "appoint a committee to study it." He did that. The committee is still studying the problem, and the issue went away in the minds of everybody complaining. He was doing well. He's now into his third or fourth year, and there have not been a lot of crises.

More time passed and as sure as death and taxes, the next major crisis occurred. He thought, this is great; I will get the third envelope and the problem will go away. He opened it and read: "prepare three envelopes."

Well, the life of a dean can be interesting, and you learn very quickly you have a multitude of constituencies. In the question-and-answer period of this lecture, I will be happy to answer any questions you might have about that because we have a number of retired or former Judge Advocates who are out teaching at law schools, and we have some who are deans. I would be happy to talk about that.

Well, I'm going to give you a little of my background, and then I will talk about the time period just after 9/11 when I became the Judge Advocate General (TJAG) of the Army. I will talk about some of the major challenges and issues that we dealt with during that time, starting with military commissions; then the creation of the Legal Center here at the school; followed by the interrogation policy working group and what all occurred in that effort; then concluding with several topics that are all related to the role and the independence of TJAG and the JAG Corps.

As I said, retirees—they come in and tell war stories. You're going to hear some war stories. There's an old Chinese saying—actually it's a Chinese curse—that translates to “May you live in interesting times.” Well, these were certainly interesting times that I'm going to talk to you about. After I am done discussing those, I will open it up for questions, and I trust the topics that I will have talked about will provide fertile ground for questions. I'll generally limit my mentioning of names of people to only those I consider the good guys and gals. As to the others, I will only mention them by their positions at the time.

Now, a little of my background relevant to the issues that I will discuss. Prior to becoming a JAG officer, I served almost six years as a military-intelligence officer. I had served in an airborne infantry battalion in an airborne brigade, in the 82d Airborne Division at Fort Bragg, North Carolina. One of the jobs I had before I went to the 82d, was at 18th Airborne Corps, where I supervised a small unit of interrogators. Now, these were people who had years, in some cases decades, of experience. They were senior non-commissioned officers (NCOs) and senior warrant officers. Almost all of them had experience in Vietnam and during the Cold War. Some of them even had experience in the Korean War. And they would get together and talk when they were not working. They would talk about ideas on interrogation and techniques they said worked and those they said did not work. They had pretty strong feelings about what worked and what did not work in interrogation. I remember them saying over and over again, torture will get any answer you want, but you'll never know what the truth is. That left an impression on me.

I had many great opportunities when I became a Judge Advocate, and one of those opportunities in my career was to teach for three years here at the JAG School in the International Law Department. I had the privilege of being here and helping in the development of the concept of Operational Law under the leadership of Colonel Dave Graham. Dave is

the same Dave Graham who is the civilian executive director here at the Legal Center and School. The areas of international law that I focused on and that I taught were Law of War and Operational Law. Among the subjects I taught in the Law of War were war crimes and military commissions. Little did I know how important that experience would become later in my career.

Well, moving to 2001, in the early summer of 2001, I learned that I had been selected to be the next TJAG. And I immediately reached out to a group of people who I called my brain trust to begin thinking about things we ought to do for the JAG Corps. What were the needs of the JAG Corps? What were the things that we would like to push forward and try to make happen? This was important because I'm very much aware that if you don't set a plan at the beginning, you will suddenly be in the middle of all the little details of life in your job, and you'll never get to accomplish very much other than keeping your head above water.

So we were starting to lay out a plan. And that group included Dave Graham; Cal Lederer, who's now the Assistant Judge Advocate General for the Coast Guard; Dan McCallum, who I selected to be my First Executive Officer; Chuck Pede; and a number of the division chiefs in the Office of the Judge Advocate General. We looked at developing a list of goals and objectives. Among the objectives we were hoping to accomplish in my four years was to create a legal center here at the JAG School—and I'll talk more about that. In conjunction with creating a legal center, we wanted to expand the physical layout of the JAG School. We didn't get that one accomplished, but it's still being worked, and that has been a desire of TJAGs and Commandants at the school for a number of years.

We also wanted to bring enlisted training into the JAG School, and I'll talk a little bit about that. We wanted to expand the operational-law positions or billets in our Army operational units at the brigade level. We wanted to expand the capabilities of CLAMO, the Center for Law and Military Operations. These were just some of the goals that we had before I was sworn in as TJAG.

This was a time when we also had a new administration in Washington, D.C. They were trying to get their feet on the ground; and many of us had very high hopes that this would be a good time for the military. We had a returning Secretary of Defense who had served as

Secretary of Defense in the 1970s. We had a Vice President who had been a Secretary of Defense during the Gulf War of 1990–91.

Now, there were two things—at least two things—that caused some concern for us. The first involved the new Secretary of Defense. He had announced before he really even came on board and saw what was happening that he was going to trim the fat from the military. He had released a multi-page document that he called his rules that he had developed over time in his career and that had guided him in his career. One of the things on that list of rules was the following: “Beware of lawyers, they’re like beavers, they dam up progress.” Well, we were wondering where that was going to go.

The second concern involved the Department of Defense (DoD) General Counsel. He had previously been the Army General Counsel from 1990 to ’93 and had been involved in a controversial attempt to subordinate TJAG and the JAG Corps to the General Counsel of the Army. We hoped that this individual would have learned from that experience and that we would have good relations with the service general counsels and the DoD General Counsel.

The Senate confirmation process can be very slow, as many of you know, so on September 11, 2001, I was still awaiting confirmation. After 9/11, everything sped up incredibly. They began confirming the backlog of nominations, and I was confirmed on the 28th of September, 2001.

Something that you all might not be aware of for the first time in the Corp’s history, at least as far as I am aware, we had two swearings in. We had the first, official swearing-in on the 1st of October and the second formal swearing-in on 11 October. The Chief of Staff of the Army is normally the person who swears in TJAG. He was very busy after 9/11. He could not do it until the 11th of October. So we scheduled the formal swearing in on the 11th of October, 2001. At the time, I was being told by Administrative Law and Criminal Law folks that there were certain statutory actions that could only be done by a congressionally confirmed TJAG. But because we were at war (although not a congressionally declared war, there was no doubt in Washington that after the attacks of 9/11, we were at war) and we had no idea what was going to happen next, we needed to have the official swearing in as early as possible.

So we decided that we were going to have a swearing-in ceremony on that Monday, the 1st of October. We brought in a group from the OTJAG front office as witnesses and Major General John Altenburg, the Acting Judge Advocate General, swore me in as the 36th Judge Advocate General of the Army on Monday, October 1, 2001. I continued to wear the rank of a brigadier general even though I was authorized by position and act of Congress to wear two stars. I did this because it might have been an embarrassment to the Chief of Staff if I had been walking around as a two-star when he was going to do a two-star ceremony for me. So at the official ceremony on the 11th of October, thirty days to the day after 9/11, the Chief of Staff swore me in officially. As I said, I'm not aware of two swearings-in being done in the past; but there was a very good reason for us doing it. We didn't know what was going to happen in the war on terror, so we wanted to be prepared.

The next issue, the first really big issue was the military-commissions issue. This has been a hot topic lately. It's been a hot topic off and on for a number of years. It started for me on the 13th of October; two days after the Chief swore me in as TJAG. It was a Saturday—and I received a phone call at home from the Deputy General Counsel of the DoD. He said he had an extremely sensitive matter he had to discuss with me and could he come to our house and talk to me about it? We met in our kitchen. He explained that the DoD had been requested by the White House to explore options for prosecuting Al Qaeda personnel captured on the battlefield in Afghanistan. He said that they were leaning toward using military commissions, and if that happened, most likely, the Army would be given that mission. Many of you, I'm sure, know the Army has a history of trying military commissions in previous wars and conflicts. The first military commissions we used were in the Revolutionary War and the last time immediately after World War II.

He asked whether the Army had files and records on these military commission cases and could we begin a very quiet investigation/research project looking into past cases. They wanted historical precedents and were interested in how the cases were actually tried. What he did not tell me at the time was that the Justice Department and the State Department were also working on this same thing. He told me I could only tell one person about this. I looked at him and I said, "You expect me to go out and do all of this research when we were gearing up for war. I told him that wasn't going to work; I've got to have more people involved." He said, "Okay, you can tell a couple of people."

The first person I talked to was Dave Graham, who was our Chief of International Law. We decided that the right person to run this effort was Colonel Larry Morris, who was our Chief of Criminal Law and a great trial attorney. We thought we were going to have to try these cases, and we wanted our best lead trial person putting this together and probably being our Chief of Prosecution. So we started with a small group initially—we named it The Tiger Team. It quickly mushroomed into a much larger group of people. It included active-duty folks and reserve-component folks, and toward the end, we brought in members from the other services to be involved in this.

We discovered a huge number of records and documents in the Army's historical storage facility in Suitland, Maryland. We began sending reports to the DoD General Counsel and providing them information on specific cases. I never made it out to this place in Suitland, Maryland, but I did see *Raiders of the Lost Ark*. At the end of that movie, you have that scene where they're taking this thing in a box down this long hallway, and there are storage shelves on both sides, and it just goes on forever. That was my image of Suitland, Maryland. I don't know if that was what it was like or not. The DoD General Counsel was particularly interested in a file that we had on the Nazi Saboteurs cases, *United States v. Quirin*.² It was a WWII military commission case that went to the United States Supreme Court in 1942.

In the middle of November 2001, I received a call from the DoD General Counsel, who said, "We have a document that we're reviewing on the weekend." This was not unusual. After 9/11, we were working 24/7, we had people working all the time in the Army Operations Center, supporting the Army and JAG's working in support of the DoD General Counsel, so it wasn't unusual. But he said I could only have one person look at the document. Well, it was obvious I wanted our lead person who was working on the military commissions looking at the document, and that was Larry Morris.

So when Larry arrived, he was told that he could not take notes on it, that he couldn't have a copy of it; he had to review it, make comments, but he could come back if he wanted to. After reviewing it and making a few comments, he left the General Counsel's office and called me. We had prearranged that he was going to come to my house, and we were going to go over what it was and go from there. So Larry came over, and

² *Ex parte Quirin*, 317 U.S. 1 (1942).

since he wasn't allowed to take notes, he had to recite the document from memory. He said the draft appeared to be a document that was to be signed by the President of the United States at some future date and that among other things—and he said the document did a lot of things—but among other things, it established the military commissions.

What was alarming to us, alarming to Larry and to me, was that it appeared to adopt the military-commissions process from 1942, the *Quirin* case.³ It totally ignored the fact that the military-justice system had advanced tremendously in the sixty years since 1942. The current military-justice system has substantially more procedural and substantive due process rights than our system had at that time in World War II. The Uniform Code of Military Justice and the *Manual for Courts-Martial* had not even existed in World War II.

Larry went back and provided those comments to them. Monday was Veterans Day. Tuesday, to our surprise, the President signed and issued the military order that established the military commissions. They had ignored all of our comments, all of our advice; all they wanted, apparently, was a rubber stamp. The specific rules—one of the things that gave us hope—the specific rules for the military commissions were to be promulgated by the Secretary of Defense. So we held out hope. We thought we could get our comments heard and suggested changes implemented during the process of getting the rules approved by the Secretary of Defense. So we began a process of proposing rules and procedures with the other services and the DoD General Counsel. Attorneys from the Department of State came over to work with us. There was a group of attorneys from the Department of Justice; several of them from the Office of Legal Counsel, which is the policy wing of the Department of Justice. They set legal policy for the Department of Justice and the federal government. Also attending some of the meetings was either the Counsel to the President or the Counsel to the Vice President. I learned very quickly that the Counsel to the Vice President was an extremely powerful individual and that most of the legal justifications up to that point for the war on terrorism had either gone through him or had been crafted by him. I also learned he apparently had antipathy for uniformed lawyers—his aversion to uniformed lawyers dated back to when he was the DoD General Counsel in 1992.

³ *Id.*

There were some incredible proposals that were raised by the civilian counsel that we worked with, particularly from a guy from the Office of Legal Counsel, Department of Justice, who was on leave from a law school in California. He seemed to think that the military-justice system was a criminal system that had few protections and was geared toward having quick convictions. He seemed to think that we merely ran them in one side of the court house as the accused and out the other side as convicted.

What was weird about this was he didn't seem to know anything about our system of military justice, but he was the guy to whom the DoD was deferring. I'll never forget a conversation I had with him where he likened the enemy today—this was in 2001—the enemy today, Al Qaeda, to the Indians of the Old West. He said they were tried by military commissions in the 1870s; and they, too, were stateless people. I told him that was 140 years ago and that we had advanced a little bit since that time. But beyond that, we had treaties with the Native Americans, Indian nations, they were not stateless people. So even his facts weren't correct.

I argued that we needed to use a system that reflected the practice of military justice as it is today. Sure, there would have to be some changes, particularly on evidence, hearsay, and other things like that, because you're taking evidence on a battlefield. Having said that, there is no need to throw out the whole system. I told him that every military commission in history basically adopted the practice and procedures existing in military law at the time. Well, that was falling on deaf ears.

We worked on the process and procedures from the 13th of November until mid-March of 2002. Some of the early proposals—we had people in the international-law division who were working this at the lower working-group level, and they were coming back with things that were being proposed that would just turn your hair white; I think that's what happened to me. They were draconian, and they were shocking. It was suggested, for example, that shifting the presumption of innocence to a presumption of guilt with the accused having to prove that they were innocent would ensure convictions. I had no doubt of that, but that's not the way the system works. Fortunately, that one failed fairly quickly.

They also wanted to be able to convict with a standard of proof that was less than beyond a reasonable doubt. That's the standard, as you all know, we use in criminal cases across the United States. They wanted a

preponderance of evidence, or fifty-one percent, or something that guaranteed that even in the shaky cases, they would get convictions. They wanted to limit the accuseds' ability to see evidence against them. They did not want to allow civilian counsel at all in the military commissions. Even though, as I pointed out to them, in World War II, all of the people tried at military commissions had the option of having civilian counsel, and many of them did.

While we were able to get some due process back into the commissions, the process was still flawed. At this time, there was truly no independent military judge. That was probably one of the biggest, flaws—the lack of an independent military judge who ruled on all questions of law. Under the proposed procedures, the admissibility of the evidence could be ruled on by a majority vote of the commission if one member disagreed with the opinion of the Judge Advocate. Evidence could still be presented without the accused being present.

The appellate process—at first there wasn't going to be any appellate process; and when the appellate process was granted, it was going to be very limited. Initially, there was going to be a review panel. This was a group of four old friends and acquaintances of the Secretary of Defense, who appointed them. They had no knowledge of the military-justice system as it existed today, and most of them didn't have any military experience before that. I attended their swearing in. They ranged in age from sixty-three to eighty-five. Each of them was given a temporary rank of major general. This group was composed of a former attorney general, a former transportation secretary, a former congressman, and a former state chief justice of that state's Supreme Court. Fortunately, that review panel was never used.

The Army was still in the lead. We had a group of about thirty to forty, as I said, active-duty and reserve-component people on The Tiger Team working and working hard, and we were moving forward prepared to have trials. We were probably overly optimistic looking back on it, but we were moving very fast, and we were hoping to have something tried in 2002. This was very early in 2002, so we thought in six to nine months or more, we could get it done.

We were then told that we were moving too fast. The DoD wanted to use the detainees more for intelligence gathering and not for trials. It became obvious that we were not going to have any trials for several years because of that. We kept pushing for trials, though, because that

was our mission. We thought it would work. Because of that, and the focus on intelligence, the DoD General Counsel decided to transfer the running of the military-commissions effort from the Army to his office, the DoD General Counsel's Office.

Initially, the overall supervision was placed under a civilian who had never tried a criminal case, never tried a military case, never tried a civil case; he had never tried the case in his life. It was approximately five-and-a-half years later before the first case was tried. It involved David Hicks, an Australian. You may remember that there was a pretrial agreement in which he pled guilty. He was convicted pursuant to his pleas and returned to his home in Australia the next month.

Today we are looking at trials of some of the key figures in Al Qaeda. We have a great team working toward this end. We have always had good people working on the military commissions. We have a great prosecutorial team today led by Brigadier General Mark Martins. There have been a couple of Military Commissions Acts: in 2006 and 2009; and each act made improvements on the military-commission processes and procedures. It would have been amazing if we had in 2001 and 2002 what we have today. If we would have had all the changes in the first year, our military-commissions effort would have had much more credibility both internationally and domestically. I am convinced we would have gone forward with trials, and we would not have had the kind of outrage and outcry that we have seen in the civilian bar in the United States and the international bar about what we were doing. We missed an opportunity; it is unfortunate.

I'm not sure that they will work today—and this is just my humble opinion—I'm not sure the military commissions are the right forum given their recent history and all the criticism of military commissions. Federal courts have shown that they can try these kinds of cases without much controversy, without the controversy we've seen around the military commissions. I am a believer in military commissions; I just wish the changes we had pushed for had been adopted. If they had been adopted, we would all be proud of what we had created. Well, that is one of the topics.

Now let's move on to the creation of the Legal Center here at the JAG School. As I have mentioned, that was one of the goals that I was thinking about, what I was hoping to do as TJAG. That all seemed feasible before 9/11; after 9/11, it seemed much less feasible. After 9/11,

the total focus of the Department of Defense and the Army was on homeland defense against terrorism and preparation for the war against al-Qaida and the Taliban in Afghanistan. Resources were reaching their breaking point. Part of this was because of the operational tempo and the missions and part of it was because the Secretary of Defense would not let the Army expand to meet the challenges. I'll talk a little more about that in a minute.

I came to the conclusion that the normal process of staffing and manpower justifications would not work if we wanted to create a Legal Center at the JAG School. The normal approval process would guarantee we would never have a legal center; it was too slow and cumbersome for it to work for us after 9/11. So the question was: how do we get this accomplished?

In the beginning of 2002, I decided that if we wanted to get it done quickly, the answer was to go directly to the Chief of Staff of the Army. If the Chief bought into it, the Secretary of the Army would buy into it, and we could have a center up and running.

General Rick Shinseki was the Chief of Staff at the time. I knew him from Europe, and I knew that when he served as the U.S Army Europe Commander in Europe, he relied very heavily on an Army colonel who was his Executive Officer. That individual had retired and had become an SES, Senior Executive Service, serving as a special assistant to the Chief of Staff of the Army. His name was John Gingrich and the word on the staff was nothing significant went to the Chief without John approving it first. So in early 2002, I approached John. I explained what we wanted to do. His first question to me was: "How does this help the war fighter?" The second question was: "Does this provide a reach-back capability?"

Now, I need to give you a little background on what was going on. The Army leadership, as I told you, had been told by the Secretary of Defense that the Army was not going to grow despite an ever increasing, operational tempo. The active Army was about 480,000 at the time. So we had to figure out, the Army had to figure out, how do you leverage what we have to accomplish the mission? How do we leverage the non-deployable base, the institutional Army, to support the war fighters? That personnel cap would become a very significant issue once we went into Iraq, both in the invasion and the occupation. By the way, we were told for months, "Don't use the word occupation, it's not an occupation."

Well, by operation of law, it was an occupation. That was just kind of the tenor of the times.

Interesting side note: there were these caps, caps on the forces in theater, caps on the size of the Army and Army staff. As they always wanted to come up with some humorous explanation of what was going on, they called it the Secretary of Defense's Lab Experiment, and we were the mice.

As I stated, it led to a number of challenges; but one of these actually became an opportunity for us for the Legal Center, and that was the idea of "Reach Back." Reach Back had been a very hot topic among the Army leadership, and it was believed that it would be a force multiplier. It was believed you could deploy with fewer forces and with fewer support staff within the deployment, and you could get that staff support from stateside or from offices in other areas outside of the theater of operation. Well, that was a theory. I will tell you, I did not buy into the idea that we could deploy with fewer JAGs and paralegals, but I did buy into the idea that "Reach Back" could provide a significant assistance to those deployed.

As I said, reach back was a hot topic. The interesting thing was it was one of those, "I'll know it when I see it ideas." Everybody talked about it, but very few people seemed to know very much about it. We did; we had already talked about it. We had the capability, at least a growing capability, in CLAMO; we had our lessons-learned capability, which fed into the support for reach back. So we just needed more resources so we could do it in near real-time for our forward-deployed JAGs. I told John, "Yes, we have a reach-back capability." We are going to expand that capability with the Legal Center; it's going to be one of the lynchpins of the Legal Center. And all of that was true. So John said to move forward, he would get it to the Chief and we will get this done.

Certainly CLAMO and its reach-back capability—was a key part of the Legal Center, but it was not the only part. We had a number of things going on that we needed help with. The Army was making rumblings about reorganizing again. In the past, the JAG Corps had often played catch-up on reorganizations. We traditionally had one or two people here at the JAG School who did force structure and doctrine; usually it was only one individual. Sometimes if they were lucky, we had one person for the active side and one person the reserve-component

side. The section was called Doctrine, Developments, and Literature. It had the unfortunate acronym of DDL or “Diddle.” I knew about this unheralded group from my time at the JAG School and then my time as a plans officer at Personal, Plans, and Training Office. Our JAG effort in working force structure and doctrine was grossly understaffed. There were stories from the past—it’s kind of incredible—about times when we didn’t adequately cover a force structure meeting and a year or two later the new force structure document would come out, and the JAG Corps was cut several dozen positions.

We were usually lucky to be able to get them put back in to the structure, but we’d sometimes have to engage one of the general officers to go and work the issue. As I said, we’d get it back into the document, but this was not a model of force-structure planning you would want to rely on. We knew the Army was in a time of high operational tempo. We knew the Army was reorganizing. We had to have a robust capability here at the Legal Center to work force structure and doctrine, or we were going to get our clock cleaned, so to speak, in the reorganization of the Army. Given the imperative to reorganize and the high operational temp, we knew that we would not have the luxury of playing catch up later. We did not get the Legal Center up and running a moment too soon because within a little over a year of 9/11, the redesign of the modular force, the brigade combat teams, was being done and in the final stages. We started filling key positions at the Legal Center in the Summer of 2002.

In the past, the way we provided legal support in a division was we consolidated all JAG assets at the division headquarters; we would detail trial counsel down to the brigades. The problem was that the Army was going to cut the division headquarters, and we wouldn’t have that capability to detail JAG’s down to the Brigades. So with our robust team in doctrine and combat developments we had here at the Legal Center, we provided the Army a plan for putting two JAG spaces in each of these combat brigades. And we ended up growing the JAG Corps in this process. So it was a big success.

I also wanted to include our enlisted training here at the JAG School, and the Legal Center and School would do that. Our enlisted training, Advanced Noncommissioned Officer Course and Basic Noncommissioned Officer Course, had always been at the Adjutant’s General School, Fort Jackson, South Carolina, and before that, at Fort

Benjamin Harrison, Indiana. We were considered part of the Adjutant General's school, and I always bristled at that when I heard that.

I remember one of our Corps' Sergeants Major, Howard Metcalf, used to say the JAG Corps was a family, but it was a dysfunctional family. I never knew what Howard meant by that until we finally incorporated enlisted training into the Legal Center and School with the establishment of an NCO Academy. Howard came to me with a big smile, gave me a hug, and told me that the JAG family is no longer dysfunctional. So it was important, and it was something that we needed to do.

In addition to bringing enlisted training into the LCS, I also wanted to create some civilian positions. We needed the civilian positions for continuity. This would help us build upon existing relationships with the University of Virginia. When we changed the school leadership every two to four years, that didn't allow for the establishment of long-term relationships like we would like to have had. So those civilian positions were a very important thing here at the Legal Center and School, something that we needed to get documented. Virtually every branch school had civilian positions at their schools. The other branch schools also had a historian; we didn't have a historian. We needed a historian to be able to document the successes of the JAG Corps; that was one of the positions I felt very strongly about. Thankfully, we do have a historian now, Mr. Fred Borch.

Probably one of the most controversial decisions I made in regard to the Legal Center was the decision to move a brigadier-general slot from Washington, D.C., down here to Charlottesville. In hindsight it seems like a no-brainer, but at the time, it was a scary proposition for a number of people. We had three brigadier generals in Washington, D.C. One was in the Pentagon as the Assistant JAG for Military Law and Operations, and we had two at the U.S. Army Legal Services Agency. One was the Assistant JAG for Civil Law and Litigation, and the other was the Commander of the Legal Services Agency. I was convinced that having two brigadier generals at the U.S. Army Legal Services Agency made us a prime target for losing a brigadier general. We knew that DoD was looking for brigadier-general positions that they could move into deployable units. We were a sitting duck. Therefore, part of the package I submitted to the Chief of Staff included moving a brigadier general from Civil Law Litigation, closing that position out, and moving it down here to the JAG School. By the way, all the other branch service

schools had general officers—virtually all of them had general officers as commandants of their schools. As such, the Army leadership was already very familiar with having brigadier generals in charge of branch schools.

When the JAG retired community learned of this proposed move, several of the more senior ones contacted me with comments like, “What the heck are you doing, have you lost your senses?” They were convinced that any movement of a brigadier general would result in the loss of that position. There was also a little angst among the brigadier generals. They wondered whether being assigned outside the Washington, D.C., area would be perceived as the JAG Corps equivalent to the old Soviet treatment of exiling dissidents to Gorky. They didn’t want to go to Gorky, so I had to convince them that this truly was very important for the JAG Corps and the Army.

I remember briefing General Jack Keane, the Vice Chief of Staff of the Army at the time, about the Legal Center. When I mentioned moving one of our brigadier generals, he turned and commented, “What took you guys so long?” To him, it was obvious.

So we sold the Legal Center on how it was going to enhance legal support to the war fighter, and we were going to do it without growing the JAG Corps and without generating any cost. That was going to be a bit of a challenge.

We secured the Secretary of the Army’s approval in the summer of 2002 and began moving resources, where we could, from other JAG accounts to get us started. We needed something on the ground right away. We couldn’t wait until the permanent positions showed up; we couldn’t wait until the brigadier general moved down here; we needed to get some of this going. So we reached out to the best people we could find who were available and moved them to the Legal Center. These were people who could grow and expand the concept of the Legal Center; people who could leverage the breadth of possibilities for the JAG Corps, turning this institution into the center for strategic thinking, strategic legal thinking, and legal learning for the Army.

The brigadier general new commandant of the Legal Center and School was assigned in the summer of 2003. That’s when we had the official stand-up of the Legal Center and School, but we had the Legal Center going before that official stand-up. More than a year later, the

Department of the Army issued new orders formally recognizing what had already been in existence and had been serving the JAG Corps and the Army.

Looking back on my time as TJAG, I believe this may have been the most important decision and action, in a long-term sense that I made. I believed at that time there was potential for this to be a very significant game changer for the JAG Corps. Today I'm convinced of that.

Turning to the Pentagon's Interrogation Policy and Working Group. In the early days of dealing with detainees—I'm talking about 2001 and early 2002—there was a bifurcated effort to interrogate detainees. On the one side, you had the criminal investigative task force that was charged with gathering evidence for the military commissions. And then you had, on the other side, the interrogation effort with the goal of gaining intelligence, run by the intelligence community, overseen directly by the DoD.

The investigative task force for military commissions was overseen by the Army CID; and we had a much closer tie to what was going on with that group. The intelligence interrogation group reported directly up to the DoD General Counsel's office, and we didn't have close ties with them at all. As I stated, it became clear that trials were not going to happen any time soon. Because of this, the criminal investigative task force took a second seat to anything that was happening. Intelligence was what everybody wanted, and they wanted to squeeze that out of the detainees at Guantánamo.

In late October, early November in 2002, there were some inquiries from Guantánamo about authorizing new techniques of interrogation. This request went from Guantánamo to the Southern Command to the Joint Chiefs of Staff Legal Office. The Joint Chiefs of Staff Legal Adviser staffed the request with service TJAGs.

The tasking from the Joint Chiefs of Staff was very short-fused, and it went to our International Law Division. Our Chief of International Law, Colonel John Ley, and his Deputy, Lieutenant Colonel Greg Baldwin, were the ones who worked this. They worked these issues just about the whole time I was TJAG, and they took a very hard line on interrogation processes and procedure. We should all be thankful that they did. In my opinion, John Ley and Greg Baldwin are unsung heroes. Colonel Ley sent a very strong response back, saying the proposed

techniques were not legal under the Law (neither the UCMJ nor international law). Well, that was the last we heard about it until early December when the Navy General Counsel raised the issue with the DoD General Counsel at a joint meeting of TJAGs and General Counsel.

The Navy General Counsel, Alberto Mora, indicated that his Chief of NCIS, like the TV show, said that the Secretary of Defense had authorized some very disturbing interrogation techniques that clearly crossed the line of legality—waterboarding being one of them on the list. He indicated that waterboarding was being held in abeyance—the accompanying legal opinion said it was legal but was being held in abeyance. We learned that, as I said, there had been an opinion, an initial legal opinion from the DoD General Counsel, that all of the techniques were legal. The Navy GC sent a written request to the DoD General Counsel to withdraw the legal opinion and to have the Secretary of Defense withdraw the authorization of the new interrogation techniques. Alberto Mora was the only political appointee who I knew who stood up for the rule of law and did not seek to appease the politicians above him.

In early January of 2003, the DoD General Counsel acquiesced, after talking to the Secretary of Defense, and established a DoD working group to look at interrogation techniques and procedures. DoD had a whole spectrum of techniques running from the normal interrogation procedures in the field manual all the way to the most extreme. Each service had a team of JAGs working on the issues to analyze the proposals from the standpoint of international law, domestic law, and military law.

The Air Force General Counsel was appointed head of this Interrogation Policy Working Group. She, incidentally, had never served in the military and had no background in military or international law but rather was a political appointee. As we reached the end of January and early February of 2003, it was clear that service JAGs were going to take a hard line on this. The enhanced techniques, as they were called, were not legal.

Two other interesting things happened then after we voiced our opinions about this but hadn't put them in writing yet. First, the DoD General Counsel invited the Secretary of Defense to come to speak to the TJAGs and the General Counsel. In that meeting, he told us how important what we were doing was and that it was going to set the standard for interrogation techniques for decades to come as we fought

international terrorism—this new kind of enemy we were fighting. Well, we thought this was a little strange because it assumed we were going to approve some of the proposed enhanced interrogation techniques.

The next thing that happened—and it was within a week of this meeting—we were asked to meet with the Deputy for the Under Secretary of Defense for Policy. The Undersecretary of Defense for Policy had been put in charge of all detainee operations. I can say this because it's been said publicly a number of times, this individual, the senior individual, was the guy who General Tommy Franks, who led the invasion into Iraq, called the dumbest, expletive deleted, guy on the face of the earth. I heard an interview with colonel retired Larry Wilkerson recently; he said the same thing. With this guy heading all detainee operations, it was no wonder we had problems.

His deputy appeared to be in his mid- to early-30s; and we were told he was a lawyer, so we're dealing with a lawyer. Folks, you have to picture this: you have all the service TJAGs and the Staff Judge Advocate to the Marine Corps Commandant in the room. All of us were in our mid-50s; all of us had twenty to thirty-plus years of military service, much of it operational. We were ushered into this room where this politically-appointed kid begins to lecture us about "needing to wake up and smell the coffee, it is time to take the gloves off."

As I sat through that, I kept watching my Marine counterpart because I thought he was going to rip the guy's head off. We left that meeting with two observations: First, these guys were acting like cowboys. I trust you all know what I mean when I say that. And I hate to say that because I'm from a state, Kansas, that has lots of cowboys. It gives cowboys a bad name. And second, if this message of taking the gloves off was going out to the field, there might be real problems ahead.

The next thing that happened in early February was that the DoD General Counsel told us that there was a highly classified and extremely sensitive opinion from the Office of Legal Counsel, Department of Justice, that we needed to read. It was about the powers of the President in time of war. He reminded us that we couldn't copy it, we couldn't take notes on it, we could just read it, and he emphasized it was binding on us as legal precedent, binding on the federal government. It was written by that same guy I had talked to a year before about military commissions, the "Indian Wars" guy. It was amazing in the breadth and scope of powers it attributed to the President in time of war as the

Commander in Chief. It said the President, in time of war, cannot be constrained by international law or domestic law; in other words, the President in time of war was not bound by law. The actions that he deems necessary as the Commander in Chief were above the law.

Additionally, it said, anyone who acted in furtherance of the Commander in Chief's actions and decisions would be immune from prosecution. This is what really got us fired up. Soldiers who tortured or abused prisoners or detainees or used any of the enhanced interrogation technique under the authority of the President would be immune from prosecution. Two very big problems with this: First, it is questionable if there's any court in the United States or internationally or under military law that would buy that as a defense. I think the answer is absolutely no. We all knew from history that the defense of superior orders was not a defense if the individual otherwise knew the acts would be illegal. It's not a defense to illegal orders. The second problem is if we as a country allowed this to happen, we'd have just lowered the bar on the standard of treatment for our own Soldiers, sailors, airmen, and marines if captured in some other country in the future war.

Each TJAG submitted a very strong dissent to the opinion of the Office of Legal Counsel. Our opinions were classified Secret and were not declassified until late 2004 or early 2005 when a bipartisan group of senators, John Warner, John McCain, Lindsey Graham, and Carl Levin, demanded that they be declassified and released at the peril of not getting any more confirmations. After we submitted our written opinions, we were told by the DoD General Counsel that the Secretary of Defense had considered our opinions and decided to withdraw the working-group report. A year-and-a-half later, we learned the report had not been withdrawn and that our objections were nowhere to be seen on the report. Furthermore, we learned that the report had shown up at Guantánamo and other locations.

Turning to the role and independence of TJAG and the JAG Corps. There were several, really four, related issues. The first two happened in early 2003; and that was the attempt to change the selection process for TJAG and the assistant, now called the Deputy TJAG, and the subsequent attempt to civilianize the majority of the Army JAG Corps.

In January 2003, as we were beginning this process of the Interrogation Working Group, I received a strange phone call. It was from the Chief of GOMO. GOMO is the General Officer Management

Office. He said he had received a proposed legislative change for the Army statute governing the selection process for TJAG and The Assistant Judge Advocate General. He said the action did not appear to have been staffed through TJAG. He wanted to make sure we knew about it because he knew once it got to the Chief of Staff of the Army, I was going to be summoned and asked about it. I said, "I haven't seen it, send it to me." You can imagine how we felt.

We looked at this thing, and it was either a major oversight on somebody's part or an attempt to slip it by us. When we received the proposed action, it was clear the change would weaken the board-selection process, requiring the selection board to select at least three people for each position, not in priority order. Then the Secretary of the Army would select from that group, whomever he or she wanted. Now, that may sound innocuous, it may sound like no big deal, but in the tenor of the times there was a clear chance that the positions could be politicized. Looking at it from the most problematic standpoint, nothing would stop the general counsel or the Secretary of the Army from interviewing all three of these individuals, six for the two different positions, with a view to finding who's the most cooperative, who's the most pliant of the candidates.

This was already happening at the DoD level with the candidates for Lieutenant General. They were being interviewed by the Secretary of Defense. This had never been done before, at least according to wisdom of the time. The Secretary of Defense required the services to send multiple candidates to be interviewed for each position. The joke among those going up for these interviews was they had to do their orals with the Secretary of Defense—the equivalent of an academic defense of a dissertation. I heard that many of the interview questions involved their views and opinions on things that could be characterized as political.

Word about these interviews had gotten out as they had been reported in the newspapers. When I was visiting the United Kingdom, several senior British officers asked me what I thought about the Secretary of the Defense's attempt to politicize the Army's senior officer corps. Because of what was happening, I knew there was a risk, and a potential danger for the JAG Corps.

The first thing I did is have our Ad Law lay out the pros and cons of the current procedures and proposed change. I also sought the opinions of the brigadier generals. They all thought it was a bad idea, particularly

those who were in the working group and challenging positions proposed by the DoD.

At my next meeting with the General Counsel, he didn't raise anything about it, so I raised it with him. I told him I was surprised, especially since we had not been asked for our opinion or at least given a heads up about it. He acted surprised at my bringing it up, but he quickly got over it and said that was going to be the Army position and that was that. I told him I didn't agree with him and we'll see. The meeting ended.

At my meeting with the Chief of Staff, I gave him the history of the selection process. I gave him the pros and cons of both, and he asked me what I recommended. I recommend not changing the process. I started to tell him why. He stopped me and said, "because it could politicize the legal advice he relied upon." The Chief indicated that he was not inclined to support the change.

He told GOMO that he wasn't going to support the change. They then informed the General Counsel's Office that the Chief wasn't going to support it. This was the middle to the end of February. Not more than a handful of days later, I was summoned to the Army General Counsel's Office.

What I am about to describe could only be described as a surreal experience. Without going into the full details of the conversation, the General Counsel said I did not support him on the proposed change of the TJAG and TAJAG the selection process, so he was going to limit my authority. He stated that he was going to take down the uniformed JAG Corps by 1,000 spaces; we were at the time about 1,480. He was going to civilianize those positions and move those civilian attorney positions under him, directly under him. He said the JAG Corps would be limited to doing its statutory duty of military justice and maybe some operational law. He indicated that the Secretary of the Army currently had a special assistant who was charged with finding uniformed staff positions that could be civilianized so those positions could go to the war fighters; and he, the GC, was going to present a gift to this individual. Well, I tried to reason with him. I said TJAG had a statutory role to give independent legal advice to the Army leadership. I further argued that if Congress wanted to change it during the Goldwater-Nichols reorganization in 1986, they could have subordinated TJAG to the general counsel, but Congress did not. It fell on deaf ears. He went on to say that on any

legal matters in the Army, TJAG had to follow the General Counsel's lead, regardless of the issue. He said that the Army was going to become like the Navy where there were fewer uniformed lawyers and a large number of civilian lawyers who were under the GC.

He stated that his goal was to complete this conversion by the 1st of October; we were now at the end of February. I knew pretty well that wouldn't happen that quickly; but if the Secretary of the Army supported it, we were going to be in deep trouble. As I left the meeting, I had visions of the JAG Corps being decimated for what were really petty, silly, wrong-headed reasons.

After discussing it with the JAG Corps leadership, I sent an e-mail to the Chief, the Vice, and the Army G1 apprising them of this proposed action. This was the first of several e-mails back and forth with the Chief on this subject that occurred from February through June. The Chief and the Vice were immediately supportive of the JAG Corps. The Chief engaged the Secretary of the Army. And it appeared, because of where we were in preparing for the Iraq war, that this wasn't going to be on the fast track, that some of it might happen, but the Army was very busy, and it probably wasn't going to happen right away.

This meeting with the General Counsel occurred one week before I signed the memo challenging the interrogation working groups, specifically challenging and questioning the legal opinion that justified the proposed enhanced interrogation techniques. We'd been voicing our concerns since the beginning, in January. Both of these initiatives—changing the selection process and civilianizing the JAG Corps—were launched during a time when we were vigorously challenging what the DoD was trying to do in the way of changing the law. Was there a connection? I don't know. But it became even more curious at about the same time, the Air Force General Counsel convinced the Secretary of the Air Force to republish an Air Force order that she had drafted, that subordinated the Air Force TJAG to the Air Force General Counsel for all purposes except UCMJ. Sound a little familiar? And even in the area of the UCMJ, the Air Force General Counsel could become involved in, examine, or review any case that she wanted. You can imagine the Air Force wasn't very happy about this.

Back to the Army. Two things happened that brought this whole process to a screeching halt. First, it was when the war in Iraq kicked off. JAGs were suddenly deploying. In addition, at every field and

operational level, JAGs were in demand, and they were very busy helping soldiers to deploy. Because of all of this, nobody was thinking about cutting JAG positions at that time. The second thing that happened was in April, the end of April. The Secretary of the Army was fired by the Secretary of Defense. This caused the whole plan with the special assistant who was looking at civilianizing positions to be shelved until the new Secretary of the Army came on board.

You would have thought this would put a stop to all of this; but if you had thought that, you would have been wrong. The Army General Counsel decided to take his proposals on the road to tell Army JAGs and civilian attorneys what he was going to do. I learned about this because we started getting lots of e-mail; I still have some of these. One JAG colonel who e-mailed me said, after explaining what the General Counsel had said, if the JAG Corps doesn't take this seriously, we're going to get rolled.

The biggest venue for one of these talks was the Army Materiel Command Annual Conference. The Army General Counsel laid out his plan. He said the former Secretary of the Army had supported it, supported the concept and the execution, and that the person rumored to become the new Army Secretary was none other than the sitting Air Force Secretary. It seemed that the Secretary of Defense wanted somebody in the Army job who could reign in the Army leadership. It wasn't just the JAG Corps; it was the rest of the Army leadership too. This was the same Air Force Secretary who signed the order to subordinate the Air Force JAG Corps. The Army General Counsel was absolutely giddy about this; he couldn't wait.

Well, these chats that the Army General Counsel was having on visits to the field really started to take a strange turn. Again, I learned this from e-mails from the field. He would address the captains in the audience and tell them that if they wanted to stay on active duty and make it a career, they might make colonel; and if they were really, really lucky, they might make two stars; or they could be like him, spend five years in the Army JAG Corps, get out, go into business, make some money, and then come back as the Army General Counsel as a four-star lawyer; four stars always beat two stars he would say. This was a reference to a protocol equivalent that is afforded certain civilian positions. The GC often mentioned to me that he was a four-star.

I was concerned that this was going to have an effect on our retention of captains as this word spread that the Army was going to be downsized. The implication was that there was going to be no future in the Army JAG Corps for promotions, etc. So I raised this with the Chief of Staff of the Army, and he raised it with the Acting Secretary of the Army. I later learned that the Acting Secretary of the Army had told the Army General Counsel to knock it off, but he continued to do it for a couple more months, still thinking there was going to be a new Secretary of the Army to come in who would support what he wanted to do.

The *Army Times* published an article about the Army General Counsel's plan with supporting comments from an unnamed DoD official. The *Legal Times* published an article about both the Army and the Air Force General Counsel's attempts to subordinate and diminish the authority of TJAGs and the roles of the JAG Corps. The rumor of the Air Force Secretary coming to the Army never happened. So for eighteen months, we had a former infantry officer as the Acting Secretary of the Army. His name was Les Brownlee, and he was a straight shooter. And he really appreciated the Army JAG Corps for what it did for the Army. By September the plan to civilianize was dead.

A final note on this bizarre chapter occurred in November/December of 2007. The Bush Administration was winding down. The Obama Administration had been elected; they were putting together their team. I was settling into my deanship in Kansas when I received an e-mail from Charlie Savage, a Pulitzer prizing-winning reporter for the *Boston Globe* at the time, now with the *New York Times*. He wanted to get my opinion on a draft DoD instruction that the DoD General Counsel was trying to get approved. The new instruction would have required that—there are two elements of this—appointment or promotion for any judge advocate at O6 or below had to have coordination with the service General Counsel before it went forward. And for those promotions above O-6, flag or general officers, coordination had to be done with the DoD General Counsel before it could move forward.

Well, this was already being done for legal sufficiency of the promotion board process. It was being also done for any background checks that needed to be done for issues that would cause concern in the confirmation process. So since this was already being done, what was the intent of this language? Why would the JAGs be the only ones singled out, the only branch of the Army singled out for this? Given what we had been through, the answer was pretty clear. I told Charlie

what I thought of it, and I gave him the names of several other retirees he could get in touch with. I was also in touch with the Army leadership and told them what I was doing and learned what they were doing. Long and short of it is, because there was such an outcry both in the media and internally, the DoD General Counsel dropped the proposal and the General Counsel was gone in a month.

Related to these two were the issues of the independence of the JAG Corps and the TJAGs for legal advice and the issue of making the TJAG a three-star. All of these attempts to control the JAG Corps caused a lot of controversy in the media, caused letters and e-mails to Congress. We were unofficially contacted by staffers from the Senate Armed Services Committee who were concerned that the intent of the statute enabling our ability to give independent legal advice was being harmed; and they wanted our take on it. This was after all the intent of TJAG statute. The statute, 10 U.S.C. Section 3037, says that TJAG—this is the Army statute—serves as a legal advisor for the Secretary of the Army and all other officers and agencies of the Department of the Army. It goes on to say, TJAG shall direct the members of the JAG Corps in the performance of their duties. Those were two provisions that none of the other TJAGs had in their statute.

The Army general counsel's statute merely said that there will be a civilian general counsel appointed and the Army general counsel shall perform such functions as the Secretary of the Army may prescribe. There was nothing in the statute that subordinated TJAGs to the General Counsel; but Secretary Army Order No. 1, Section 10, establishes the General Counsel as the Chief Legal Officer of the Department of the Army.

This position of superiority in the Army was first established in a General Order in 1975. It lays out a number of responsibilities for the general counsel, some of which are clearly separate. Originally, the general counsel was going to run the business aspect of the Army, but this General Order moved it over into some of the operational side, a lot of the operational side. It said such things as the general counsel will provide technical supervision and technical guidance to all Department of the Army attorneys and legal officers, and it would supervise administering Department of the Army legal services. Sounds like there might be a conflict with the statute here.

It would not take a genius to figure out who wrote all of these provisions: someone in the General Counsel's office. It's a little self-serving if your boss has these powers, you've got them too. Each Secretary of the Army is given a slate of General Orders to be republished. That is often done without much change. The General Order, by the way, lists that the Army JAG Corps is in the same category as the legal offices of the Army Materiel Command and the Army Corps of Engineers, which are very small legal offices. This is just silly. They don't advise the Secretary of the Army or the Chief of Staff of the Army. They don't oversee legal advice and operations spread across the full scope and breadth of the Army. They are focused in their narrow functional areas.

They are both supervised by a two-star equivalent civilian attorneys. And you have a General Counsel Office with a four-star, a three-star, and a couple of two-star equivalents. Well, there's an inequity here that is obvious to a blind man. The Senate Armed Services Committee decided that TJAGs needed more statutory protection.

So in 2004 the Senate passed an Amendment to section 3037 making TJAG a three-star. In the Conference Committee, where differences are ironed out between the House and Senate, the provision elevating TJAG to three-star was removed, and the language changed from "TJAG will be appointed in the regular grade of major general" to: "shall not hold a grade lower than Major General," giving the Army the option; if they wanted to raise the rank of TJAG, they could.

It added, "no officer employee of the Department of Defense may interfere with the ability of the Judge Advocate General to give independent legal advice to the Secretary of the Army Chief or the Chief of Staff of the Army or members of the Army leadership and Judge Advocates assigned or attached in the field performing duty with military units; no one shall interfere with their ability to give independent legal advice to commanders." Everyone thought that this would be enough to satisfy those concerned without elevating TJAG. Well, they were wrong.

In 2005, the Senate again passed an amendment elevating TJAG to three-star. Again in Conference Committee, the language was removed. On both occasions, either the Secretary of Defense or his General Counsel went directly to the Chairman of the House Armed Services Committee and requested that the language be removed; changing the

rank was not going to happen. This continued as long as the House was controlled by that party.

Following the change in the control of the House in 2006, the 2007 National Defense Authorization Act changed the TJAG's grade to lieutenant general. It was passed and sent to the President. The President signed it in January 2008. And the Army's first Lieutenant General TJAG was confirmed in December 2008 and promoted that same month, Lieutenant General Scott Black.

Why was elevating TJAG to Lieutenant General so important? Well, there are a bevy of reasons. I had the opportunity to lay some of these out for a congressionally appointed review panel that was charged—this was in 2005—with studying the relationship between the military department GCs and TJAGs. This was known as the 574 Panel. I have no idea what the other 573 were.

So I gave them some background on this. The Judge Advocate General had been elevated from Brigadier to Major General in the early 20th Century. At that time the rest of the Army, the rest of the Army staff, were one-stars. Currently, virtually all of the primary and special staff are three-stars; their deputies are two-stars. In the four years I was TJAG, I witnessed four positions go from two-star to three-star because the Army was trying to upgrade them. They were the Chief of the Army Reserve, the Chief of the Army Guard, the Army Budget Officer, and the Assistant Chief of Staff for Installation Management—all elevated to three-star. The staff officer I worked most closely with in my four years was the Inspector General. He was a three-star, and his position had been that for several decades.

The military, as we know, is a rank-conscious organization. I saw after 9/11 that there would be three-star level meetings, and TJAG may or may not be invited and may or may not even know about them. That was the key, knowing about them. If we knew about them and thought it was something we needed to attend, we generally could force our way in, but why should we have to force our way in? So at times we didn't have a presence at the table. The higher one's rank is, the more difficult it becomes to ignore that person.

It even made a difference in some of the little things. If you wanted to get a helicopter out of the national Capitol region to go somewhere, if you were a three-star, you could just order it up, sign the justification; if

you were a two-star, you had to go to the Director of the Army Staff to get that. Not a big deal, but it is one indication. Another one, again not a big deal, but if we, the JAG Corps, wanted to reserve the Hall of Heroes for a ceremony, we had to have a three-star approve that because we couldn't do that on our own. So we'd go to the three-star equivalent in the Army General Counsel's Office, and he would authorize it. The bottom line, however, is if it is important to have independent non-political legal advice from uniformed lawyers, then making TJAGs three-stars was essential.

Now in a moment, I'm going to open it up for questions. Many of the issues I've mentioned today remain unresolved; that means they could occur again. The issue of the Army General Counsel possibly moving to control TJAG and the JAG Corps is still out there. That language in the General Order is still there. The interrogation policy on enhanced interrogation techniques has never been declared illegal; it should have been. There was an opportunity to address it when there was an internal Department of Justice Office of Professional Responsibility investigation of the authors of the "torture memos." The investigation report initially found that the authors had "committed intentional professional misconduct" and recommended referral of the report to their State Bar Associations for possible disbarment. In a final review of the report, a senior Department of Justice official changed "intentional professional misconduct" to "exercised poor judgment," thus avoiding referral to their State Bar Associations. The change, I believe was ill-advised and unfortunate.

So, paraphrasing the old saying, "The price for freedom or the price for independence," the ability to give independent legal advice, "is eternal vigilance." And it may fall on one of your shoulders someday that you will have to stand up and protect the JAG Corps and protect what is the statutory intent for the role of the JAG Corps.

I want you to know that you are members of two of the most distinguished and honorable professions in the world: the United States military and JAG Corps. Judge Advocates and our paralegals are known and respected across our country. I encounter this all the time in my travels. Even law professors recognize that JAG lawyers are the epitome of what good lawyers should be. That hasn't always been the case in the past.

Enjoy this time you are in uniform, as it will go by quickly. Once you are off active duty and out of the uniform, it will never be the same. You won't have the same sense of camaraderie and shared purpose—it will never be quite the same.

I will tell you that whenever you decide to leave the military service, your skills and experience will make you invaluable wherever you decide to go. I hope for both you and our great JAG Corps that departure is a long time from now. God bless you and thank you for your service, and God bless this great experiment that we call the United States of America.

Again, thank you for inviting us back. It's great to be back at the home of our great JAG Corps.

**THE THIRTY-SECOND CHARLES L. DECKER LECTURE IN
ADMINISTRATIVE AND CIVIL LAW***

MR. STUART DELERY¹

* This is an edited transcript of a lecture as delivered on February 27, 2014, by Stuart Delery to members of the staff and faculty, distinguished guests, and officers attending the 62d Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. The lecture is in honor of Major General Charles L. Decker, the founder and first Commandant of The Judge Advocate General's School, U.S. Army, in Charlottesville, Virginia, and the 25th Judge Advocate General of the Army.

¹ Mr. Delery was sworn in as the Assistant Attorney General for the Civil Division on August 5, 2013, following confirmation by the U.S. Senate. He has led the Division since March 2012.

As the Assistant Attorney General, Mr. Delery oversees the largest litigating division in the Department of Justice. Each year, the Civil Division represents some 200 client agencies in approximately 50,000 different matters. The Civil Division represents the United States in legal challenges to congressional statutes, Administration policies, and federal agency actions. These cases concern federal benefit programs; commercial issues, such as contract disputes, banking, insurance, patents, and debt collection; international trade matters; enforcement of immigration laws; and civil and criminal violations of consumer protection laws. The Division protects the health and safety of Americans by defending cases related to national security and by enforcing protections for the safety of food and medicines. Finally, the Civil Division recovers billions of dollars for taxpayers through affirmative litigation, such as its enforcement of federal consumer-protection laws and its record-setting efforts under the False Claims Act, including cases targeting health care fraud, financial fraud, and fraud against the military.

Since joining the Civil Division, Mr. Delery has focused on cases involving national security, health and safety, and financial fraud. He also co-chairs several working groups of the Financial Fraud Enforcement Task Force, which was established by President Obama in 2009. In addition, at the Attorney General's direction, Mr. Delery leads the team of Department lawyers coordinating the government-wide implementation of the Supreme Court's decision in *United States v. Windsor*, which struck down Section 3 of the Defense of Marriage Act (DOMA).

Mr. Delery joined the U.S. Department of Justice in January 2009 as Chief of Staff and Counselor to the Deputy Attorney General, and later served as Associate Deputy Attorney General. From August 2010 until March 2012, Mr. Delery served as Senior Counselor to the Attorney General. Before joining the Department of Justice, Mr. Delery was a partner in the Washington D.C. office of the law firm WilmerHale, where he was a member of the Litigation Department and the Appellate and Supreme Court Litigation Practice Group, and was Vice Chair of the firm's Securities Department. His practice focused on matters involving securities and other financial frauds, internal corporate investigations, and complex litigation in trial courts and on appeal presenting novel questions of constitutional and federal law.

Mr. Delery graduated from Yale Law School and the University of Virginia. He clerked for Justices Sandra Day O'Connor and Byron R. White of the U.S. Supreme Court, and for Chief Judge Gerald B. Tjoflat of the U.S. Court of Appeals for the Eleventh Circuit.

Thank you, Lieutenant Colonel (LTC) [Luis] Rodriguez, for that warm introduction. And thank you, Colonel (COL) [Stuart] Risch, for inviting me here and for your leadership and service.

It is a distinct honor to be here. The Judge Advocate General's (JAG) School is truly a special place, educating and training some of the best and brightest in the military on law and leadership. And it is an even bigger honor to be a part of the legacy of Major General Decker, who not only brought the Army JAG School to Charlottesville but helped make it this incredible place to learn.

I am also pleased to be back in Charlottesville for another reason: I went to college here at University of Virginia (UVA), and I still have fond memories of my time here and a deep appreciation for the opportunities I had here to grapple with difficult questions.

It is more than a bit daunting to see the list of Decker lecturers who came before me, including a Supreme Court justice, other distinguished judges, a U.S. Senator, and Cabinet secretaries. I noted particularly that the Seventh Lecturer was Professor Henry Abraham of UVA, whose undergraduate government course I took. In fact, it was research for his excellent constitutional law and history class that first brought me to the law library here on North Grounds. And that class was one of the things that started me down the path that took me to law school and ultimately to public service.

This distinguished list makes me even more proud to be the first speaker from the Department of Justice (DOJ), and I welcome this opportunity to share a bit of who we are, the work we do—including our work with and on behalf of the military—and, most importantly, how and why we do it.

As LTC Rodriguez mentioned, I have been at the DOJ for five years, the last two as head of the Civil Division—the Justice Department's largest litigating component, with almost 1,000 lawyers and 400 support staff.

Here is a bit of history for you. The Division started in 1933 as something called the Claims Division. A 1951 article about the Claims Division in *The Kiplinger Magazine*, entitled "If You Sue The Government . . .," opened with the following lines:

If you ever get hit by a mail truck and want to collect damages—or if you want to sue your Uncle Sam for almost any other reason—the man you will be up against is a quiet-spoken, pleasant Oklahoman named Holmes Baldrige.

With due respect to my predecessor Mr. Baldrige, no article written about the Civil Division of the 21st century would begin with a case about a mail truck (although those cases still happen). In 1953, Attorney General Herbert Brownell changed the name of the Claims Division to the Civil Division and expanded its duties. Since then, the Division has grown exponentially in size and scope.

Now, I know that this seems like a short time compared to the history of the JAG Corps, which was created by a much more well-known figure, General George Washington, back in 1775. But there are many similarities between what the staff judge advocates and newly created brigade judge advocates in the audience do and what we do. In a sense, we share the hardest legal job: that of a generalist.

Think of the Civil Division like a large law firm with one client—the United States. Other parts of the Justice Department that litigate civil cases focus on specialized areas, like civil rights, or antitrust, or tax. In the Civil Division, we do just about everything else.

So when someone sues the government to challenge a new law or policy, like the health care law or these NSA's surveillance programs, we defend it. When the government is accused of breaching a contract or injuring someone, we defend it. When the government has a claim against someone, like a drug company accused of defrauding Medicare, we bring that suit. And when the government seeks to hold accountable those responsible for the financial crisis, and to protect the safety of the medicines we take and the food we eat, we litigate those cases.

It's an incredible mix. Nearly all aspects of federal government operations and domestic, foreign, and national security policy priorities find their way through our doors and across my desk at one time or another. And we have an annual docket of more than 50,000 active cases.

I have been told that the Civil Division is like the "Admin Law" section of the Army. If an issue is complicated, does not fit squarely in

another section, but you want it to be solved correctly and justly, it has a good chance of coming to us.

And it is through the lens of our work that we have had the privilege and the duty to learn about yours—the critical work of the military and of the intelligence community—the critical contribution of individual servicemembers. And the critical role of those who train and educate them, like so many of you here today.

The Attorney General has consistently identified “combating terrorism and other national security threats at home and abroad”—and using every available and appropriate tool to keep the American people safe—as the Department’s highest priority. What many people don’t know is that the Civil Division plays an important role in meeting this obligation. Of course, other parts of the DOJ—notably the Federal Bureau of Investigation, the National Security Division, and prosecutors in U.S. Attorney’s offices—have critical counter-terrorism and counter-intelligence functions. But national security matters, including those directly involving the military, make up a significant part of the Civil Division’s caseload.

For example, we defend cases brought by detainees challenging the legality of their detention at Guantanamo Bay or in Afghanistan; cases under the Freedom of Information Act seeking documents about national security programs and operations; and even cases seeking to enjoin ongoing military operations. We also represent individual current or former Department of Defense (DoD) officials—including some military officers—when they are sued in their personal capacities for things they have done in their service to the country.

We also use our affirmative authorities, including the False Claims Act, to stop those who not only defraud American taxpayers but also threaten the safety and security of our active duty servicemembers. These include cases ranging from overcharging for transporting military containers in Iraq and Afghanistan to selling dangerous and defective illumination used by the Army and Air Force for nighttime combat and for covert and search and rescue operations.

These cases are among our most important because we know that if we do our jobs well, it will leave you free to focus on your invaluable work protecting our Nation. They are among our most challenging, both because they often involve complex legal issues and because the

evidence often comes from a far-away battlefield or a classified document—obtained under circumstances that don't resemble anything you'd see on the TV show *CSI*. But these cases are also among our most rewarding because at the heart of each is a fundamental interest in protecting the Nation.

So, that is a brief overview of what the Civil Division does. But what I really want to share with you today is how we do what we do. The process. Both the process you see and the process you don't. What challenges we face. And what might surprise you about how we tackle many of these tough legal and policy issues.

How do we approach this privilege of representing the government in court? Like all lawyers, our touchstone is what is in the best interest of our client. And for us, the client is always the United States. But advancing the interests of the United States in court is a lot more complicated than representing a private individual or company.

On the one hand, the foundation of our legal system is the adversarial process. The taxpayers and the government acting on their behalf deserve a zealous advocate just like the parties on the other side. On the other hand, though, when your client is the United States, your goal is not just to win the case before you or to advance every argument you can.

As just one example, our cases usually involve the actions of a particular part of the government—like a cabinet agency. Certainly, we afford weight to the views of that agency, based on its expertise and institutional history, as we work to formulate the position of the United States in the case. But the agency that has been sued may not be the only agency—or even the principal agency—with an interest in the legal question.

This is one of the main reasons that the Attorney General has generally been given control of the federal government's litigation. Our obligations as DOJ lawyers include evaluating the long-term interests of the United States and conducting litigation accordingly—looking beyond the case at hand or what a particular official might prefer right now. And consistency is important. A single client agency's desires cannot and do not necessarily determine government-wide litigation interests.

The same is true as we decide when to take an appeal. When you are in private practice and your client loses, deciding whether to appeal is pretty straightforward. Indeed, most of the time, there's little downside to trying if the client can afford it. But the United States is a repeat player. We don't appeal every case we lose. And often, it is not a question of *whether* to appeal but *which case* to appeal to best pursue the legal issue on behalf of the government.

To inform these litigation judgments, we consult widely in what government lawyers call the "interagency"—a process deeply rooted in deep history. Indeed, one of the earliest examples involved a debate about the constitutionality of the First Bank of the United States. Then Secretary of State Thomas Jefferson argued against it; Treasury Secretary Alexander Hamilton argued in favor; and ultimately President Washington decided, agreeing with Hamilton. As a UVA alumnus, it is risky for me to side against Jefferson—particularly here in Charlottesville—but I think history and Supreme Court precedent have taught that Washington, informed by that vigorous debate, got this right.

So, on a daily basis, we find ourselves working across the government to ensure that many (often disagreeing) voices are heard—trying to forge consensus on the right path forward where we can, or preparing to make difficult decisions when consensus is not possible.

It is not the story often heard about government—that various components, often with differing points of view and mandates, are discussing, collaborating, and working through the hard questions. But it is the story I see come to life every day. And it is a process that we at the DOJ take seriously in representing the United States in court. We have to make sure that no issue is left unconsidered and that all stakeholders feel that they are heard. The result is legal debates of startlingly high quality, and ultimately better decision-making and credibility with the courts.

Now, this kind of collaboration and debate is even more critical in national security cases, where both security and liberty interests are at stake and the pressure to get it right is particularly high.

As you well know after more than a decade at war, we face real threats from those who would do us harm. At the same time, as the President and Attorney General have made clear, the rule of law is central to our national security efforts.

In 2009, at a speech at the National Archives in the presence of the Constitution and our other founding documents, the President emphasized that “[w]e uphold our most cherished values not only because doing so is right, but because it strengthens our country and it keeps us safe. Time and again, our values have been our best national security asset.” The Attorney General similarly said that “[w]e do not have to choose between security and liberty—and we will not.” And as Supreme Court Justice Sandra Day O’Connor put it a decade ago: “It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”

But it is one thing to say in the abstract that we must balance these interests in protecting the country from very real threats and upholding our bedrock legal values. It is quite another to do the work of balancing them in practice. And one of the places where the government is called upon to do just that is in litigation concerning military matters.

Federal courts have long recognized that their role is appropriately limited in matters of national security and that the judgments of Congress and the President in that area are deserving of special deference. Article I gives Congress the authority to “provide for the common Defence,” “[t]o raise and support Armies,” “[t]o provide and maintain a Navy,” and “[t]o make Rules for the Government and Regulation of the land and naval Forces.” And of course, Article II makes the President the Commander-in-Chief. Because of these broad grants of authority, and the courts’ own institutional limits, the Supreme Court has cautioned:

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

Indeed, just yesterday, in a case called *United States v. Apel*, the Supreme Court observed again that judges are not experts in military operations.

The result has been a set of doctrines that preserve a range of discretion for military decision-making. For example, Article III courts generally are limited in their ability to review what goes on in court-martial proceedings (except through ultimate Supreme Court review at the end of the military justice process). And servicemembers generally cannot sue their leaders for injuries they suffer in the course of their military service.

On the other hand, courts are called upon to enforce the Constitution's guarantees, and Congress and the executive branch must conduct military affairs subject to the Constitution's commands. The Supreme Court repeatedly has confirmed a role for the judiciary, emphasizing that "[w]e of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires . . . deference." As Justice O'Connor put it in the *Hamdi* case, "[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

Let me give a few examples drawn from our Civil Division docket to illustrate how the DOJ and the courts have dealt with this balance.

First, detention. In the Civil Division, we are currently defending against approximately ninety habeas corpus petitions brought by detainees held at Guantánamo Bay, and that number is down from where it was a few years ago. The President has stated that it would be in the best interests of the United States to close the facility but that we will not release lawfully-detained individuals who endanger the American people. So, in the meantime, our job is to defend the legality of military detention there.

This is an area where courts have made clear that they have a role: the Supreme Court held in 2008 that the habeas right extends to DoD detainees at Guantánamo, and thus that courts may review the legality of the detention. Since that decision, the government advanced and the courts accepted a legal standard: in part, that an individual may be detained under the 2001 Authorization for Use of Military Force if he was part of al Qaida, the Taliban, or associated forces at the time of his capture. This standard was developed in collaboration with lawyers across the government, including JAG officers. It is informed by and consistent with the laws of war.

While the courts test the military's authority to detain individuals, they have also recognized that their meaningful judicial review must take account of these unique circumstances. The evidence that we present in these cases often comes from a battlefield half a world away. Courts have agreed with the government on a number of procedural issues, such as the admissibility of hearsay evidence. And they have emphasized that the determination whether a person is part of al Qaida should be made on a case-by-case basis using a functional approach.

Beyond Guantánamo, we have successfully defended against extending habeas rights to detainees held in Afghanistan, an active theatre of war where, as many of you well know, the DoD provides detainees robust review.

Second, use of force. Over the years, courts have resisted attempts by individuals (including individual members of Congress) to challenge decisions by the President to launch military operations, whether in Vietnam or Somalia or Libya. In a recent example, in December 2010, the U.S. District Court for the District of Columbia dismissed a suit by the father of Anwar al-Aulaqi (a U.S. citizen who the Department of the Treasury had designated a global terrorist) in which he claimed that his son was a potential target of attack and sought to have the court intervene in and regulate the decisions that might lead to such an attack. While issues surrounding the government's use of lethal force are undoubtedly of the utmost public concern, the court agreed with the Department that (among other things) these types of claims pose the complex policy questions concerning the use of force overseas that courts are not well-suited to resolve.

But the fact that the courts may not be the place to address these critical issues does not mean that the executive branch is free from oversight. Indeed, the President explained last year, "Not only did Congress authorize the use of force in the 2001 AUMF, it is briefed on every strike that America takes" outside of Iraq and Afghanistan.

Third, transparency. It is no surprise that Americans want to know more about what their government does in their defense. At the same time, some activities are properly classified for a reason: they are only effective if our adversaries don't know about them. The President has made clear that we must craft an appropriate balance between transparency and national security.

It is in this context that the Civil Division defends lawsuits under the Freedom of Information Act, as well as other types of cases, that seek information related to some of the Nation's most closely guarded secrets. In these matters, the litigators do not control the decisions about classification. Instead, the responsible officials—often at the DoD—carefully analyze the various interests at stake and decide what information can be shared publicly and what must remain classified, consistent with national security and foreign policy considerations. The Civil Division's job is to defend those determinations in court.

One legal doctrine that protects sensitive national security information in civil litigation is the state-secrets privilege. The Attorney General established a policy in 2009 to provide a more formal review within the Department prior to its use. The DOJ will defend an assertion of the privilege in court only if disclosure of information reasonably could be expected to cause significant harm to national security. We will attempt to allow cases or claims to proceed whenever possible. We will never defend an assertion of the privilege to cover up official wrongdoing or to prevent embarrassment to government officials or departments. And each assertion of the state-secrets privilege is subject to a rigorous, formal process that requires serious consideration by officials at the highest levels of the DOJ—and of the agencies whose information is at issue.

All of these situations are complicated. All of the legal questions are difficult. And all of these cases require the DOJ litigators to consult widely with DoD and other national security agencies to arrive at a position that best furthers the interests of the United States.

As I have said, most of our time in the Civil Division is spent litigating on behalf of the United States or advising on potential litigation. But sometimes we are pressed into service in unusual ways—but where interagency collaboration is still invaluable. I would like to turn briefly to one of those: our role in implementing the Supreme Court's decision last year in *United States v. Windsor*, where the legal and policy questions have an immediate, tangible impact on the lives of many Americans, including servicemembers and their families.

To recap: Section 3 of the Defense of Marriage Act defined marriage for federal purposes as between individuals of the opposite sex. That meant federal benefits and obligations that are based on marriage were not available to same-sex married couples. Consistent with the DOJ's

general practice of defending duly-enacted statutes, the Civil Division defended Section 3 of DOMA when it was challenged.

However, in 2011, the President and the Attorney General concluded that classifications based on sexual orientation warrant heightened constitutional scrutiny—and that Section 3, as applied to same-sex married couples, was unconstitutional. The President instructed the DOJ not to defend Section 3 in such cases.

The issue ended up before the Supreme Court, which ruled in *Windsor* that Section 3 was unconstitutional. That landmark ruling meant that thousands of same-sex married couples would be treated with the same dignity as all other married couples under federal law—a powerful step forward in the fight for equal justice under the law.

But the Supreme Court decision did not just flip a switch. The decision had to be made real; the words on the page had to be turned into action so that married couples receive the critical benefits to which they are entitled. So the President directed the Attorney General to oversee government-wide implementation of the decision and emphasized that it be carried out swiftly and smoothly. The Attorney General then asked me to lead the effort to ensure that all government agencies complied with the decision as quickly and carefully as possible.

Since June of last year, I've been privileged to lead that interagency process. We established a team at the DOJ, with attorneys responsible for outreach to agencies across the government—and there are a lot—to work with their general counsels and policy staff to review relevant statutes, regulations, and policy statements, and to decide what each agency needed to do to comply with *Windsor*.

Of course, there have been significant challenges. The task is enormous, with more than a thousand statutory provisions and regulations to be carefully analyzed. Moreover, the task is government-wide, which means working with innumerable institutional cultures and, often, learning the language of entirely foreign areas of law and policy. And, perhaps most importantly, the task requires us to ensure that same-sex marriages are recognized appropriately, not just in policy statements on paper in Washington but when individuals walk into federal offices across the country.

Despite these challenges, we have made a lot of progress in a relatively short period of time. But few have worked as quickly as the DoD. As you well know, yours is an enormous agency with many regulations and rules implicated by *Windsor* that needed to be identified, reviewed, and updated. But with the full support of the Secretary of Defense, we worked closely with the Office of the General Counsel and the Acting Undersecretary for Personnel and Readiness to make quick work of it.

Last August, the Secretary of Defense issued a memorandum to all military departments stating that, consistent with the Supreme Court's decision, "[i]t is now the Department's policy to treat all married military personnel equally." The Secretary went on to outline a new policy allowing military personnel in same-sex relationships—but stationed in jurisdictions where they could *not* marry—to take administrative leave to travel to another jurisdiction and get married.

That decision was a demonstration of the DoD's supreme commitment to "taking care of its people" and ensuring that every person who puts on a uniform is treated the same—as are their loved ones. This echoes the principled position behind the repeal of "Don't Ask, Don't Tell" in 2010: that those "who volunteer to serve our Nation . . . should be treated with equal dignity and respect, regardless of their sexual orientation."

In September 2013, following Secretary of Defense's policy announcement and, just a few short months after the Supreme Court's decision, the DoD extended hundreds of benefits to same-sex spouses. Principal among them, and perhaps the truest example of the DoD's commitment to implementing the promise of the Court's ruling, was the decision to issue DoD identification cards equally to same-sex and opposite-sex spouses. I don't have to tell you that the identification card is the gateway to DoD services for dependents, providing family members base access, legal and financial counseling, some health benefits, all Morale, Welfare, and Recreation privileges, and so much else. One could say it makes you a part of the DoD family.

Unfortunately, many years ago, the Defense Enrollment Eligibility Reporting System was programmed to prevent issuance of an identification card to a spouse of the same sex. While the DoD has always been the global leader in technological innovation in combat and intelligence capabilities, I'm told that, like the DOJ, when it comes to

information-technology fixes for administrative systems, things proceed at a much more leisurely pace. But, in this situation, the DoD developed a technological fix for the identification card system in less than six months, and rolled it out at every American military base worldwide simultaneously.

In doing so, the DoD continued its commitment that, while you are serving, you do not have to worry about your family back home. And its commitment to ensuring that all servicemembers should be treated as equally as possible.

This implementation process unfolded in similar fashion across the federal government and is a tribute to the power of collaboration and a demonstration of the ability of government to act quickly and efficiently. So many agencies, like the DoD, rolled up their sleeves and dug in—to make sure that the promise of the *Windsor* decision becomes real.

Our successes in all of these areas would not have been possible without the tremendous cooperation and assistance we have received from our DoD colleagues. This partnership between the DOJ and our Armed Services is highlighted by the fact that, for more than twenty years, the Army has detailed one of its own to work in and with the Civil Division as a Fellow, including the current Judge Advocate General of the U.S. Army, General Flora Darpino, who served as the Fellow in 2004–2005, and later was the Commander of this school, as well as your own Colonel Sharon Riley, who followed General Darpino as a Fellow and is currently head of the Legal Center here. Our current Fellow from the Army War College, Colonel Tony Febbo (who is here with us today), has been a tremendous asset and wonderful colleague this year.

I would like to close with a final observation: it is critical for those of us on the civilian side of the government who deal with the military to do more to understand its culture and traditions, its unique needs and pressures. The Supreme Court has noted that the military is “by necessity, a specialized society separate from civilian society,” and that it has, “by necessity, developed laws and traditions of its own during its long history.”

This has certainly been true over the past decade, as our all-volunteer force has deployed repeatedly to fight two wars. I have often thought about a statement that former Secretary Gates made a few years ago. He said,

[W]hatever their fond sentiments for men and women in uniform, for most Americans the wars remain an abstraction. A distant and unpleasant series of news items that does not affect them personally. Even after 9/11 . . . for a growing number of Americans, service in the military, no matter how laudable, has become something for other people to do.

This issue is an important issue for us to confront in society as a whole. But it has special resonance for government lawyers if we are to be effective in doing our job to represent the interests of our men and women in uniform.

And that is why I believe that interactions between the military and civilian leaders at the DoD and those of us at the DOJ are so important. Given the role we play in defending actions of national security agencies, including the military and intelligence community, we need to bridge any divide between DOJ lawyers and our clients. It is why we value the Army Fellows we have in the Civil Division each year. And it is why I appreciate the invitation to be here today.

Thank you very much, and I would be pleased to take some questions from this very distinguished group.

THE GENERALS: AMERICAN MILITARY COMMAND FROM
WORLD WAR II TO TODAY¹

REVIEWED BY MAJOR JAMES G. ARGENTINA JR.*

*War is . . . an act of violence to compel our enemy to do
our will. The political object is the goal, war is the
means of reaching it, and means can never be
considered in isolation from their purpose.*²

Post-World War II U.S. Army generals lack strategic vision because senior generals and civilian leaders were reluctant to remove ineffective generals from command. This fostered a culture of mediocrity among career-oriented officers in the U.S. Army. In *The Generals: American Military Command from World War II to Today*, Thomas Ricks argues that the U.S. Army's personnel-management policy for promotion and command selection since World War II lacks the quick hook, based on personal accountability, that General George C. Marshall used to shape the general officer ranks during World War II.³

Ricks begins *The Generals* by introducing the central figure of the book, General Marshall, through his interaction with General John "Black-jack" Pershing in World War I.⁴ General Pershing had a policy of swift relief of command for misconduct, which was well within the American military tradition dating back to the Revolutionary War.⁵ Ricks believes that producing innovative, strategic-minded, and

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¹ THOMAS E. RICKS, *THE GENERALS: AMERICAN MILITARY COMMAND FROM WORLD WAR II TO TODAY* (2012). Since 1982 Ricks has covered U.S. military activities in Somalia, Haiti, Korea, Bosnia, Kosovo, Macedonia, Kuwait, Turkey, Afghanistan and Iraq. Thomas E. Ricks, WASH. POST, <http://www.washingtonpost.com/wp-dyn/content/linkset/2006/07/06/LI2006070600612.html> (last visited Oct. 28, 2014). He was a beat reporter for the *Wall Street Journal*, where he was a beat reporter for seventeen years, and then wrote for the *Washington Post*, where he is now a special military correspondent. *Id.* While at the *Washington Post*, he was a part of the team that won the 2002 Pulitzer prize for their coverage of the U.S. counteroffensive against terrorism. *Id.* In addition, Ricks has authored several books about the U.S. military, including, *FIASCO: The American Military Adventure in Iraq*. *Id.*

² CARL VON CLAUSEWITZ, *ON WAR* 75, 82 (Michael Howard ed., Peter Paret trans., 2d ed. 1984).

³ See RICKS, *supra* note 1, at 11, 451–53.

⁴ *Id.* at 20–24.

⁵ *Id.* at 22.

visionary generals in the Army requires a “Marshallian” approach⁶ to personnel management. Scouting for young, talented officers,⁷ promoting officers based on results and ahead of peers and superiors if necessary,⁸ and firing officers and generals who fail to produce results⁹ were the hallmarks of General Marshall’s system of personnel management. This system rewarded aggressive, adaptable, and capable team players.¹⁰

Moving from merely covering military actions, Ricks has ventured into analyzing its leadership and the management of its force. *The Generals* takes the reader on a historical journey from the point of view of the generals and the civilian leaders running the wars. Ricks provides a critical look at leadership, personnel management, generalship, civil-military relations, and strategy in the U.S. military. He spent four years researching American generalship from World War II to the present, which culminated in this book.¹¹ Mr. Ricks uses anecdotes, battle studies, and quotes he gathered from oral histories, historical military documents, books, articles, operations plans, and journals, just to name a few sources, to pepper the reader with examples of what he believes works and does not work when it comes to effective military generalship.

Robert H. Scales, a retired U.S. Army Major General and former Commandant of the U.S. Army War College, agrees with Ricks’s “basic observation about the current lack of strategic generalship”¹² in his review of *The Generals*. He also believes Ricks starts a useful discussion “about what constitutes great military leadership in today’s world and how the armed services can foster it.”¹³ However, General Scales is quite critical of the way Ricks relays this point and does not agree that firing generals is the reason why the U.S. military has been successful.¹⁴

⁶ *Id.* at 11.

⁷ *See id.* at 24.

⁸ *See id.* at 35.

⁹ *See id.* at 18.

¹⁰ *Id.* at 11, 451–53.

¹¹ *Id.* at 8.

¹² Robert H. Scales, *The Quality of Command: The Wrong Way and the Right Way to Make Better Generals*, 91 FOREIGN AFF. 137, 143 (2012).

¹³ *Id.* at 141.

¹⁴ *Id.* at 137–38.

For example, General Scales takes exception with the way Ricks treats Army generals as compared to U.S. Marine Corps (USMC) generals in order to advance the theme of the book that the Army's leaders lack strategic vision due to a decline in the advancement of dynamic, cooperative, and creative leaders to the top posts in the Army.¹⁵ In particular, General Scales believes that Ricks has a service bias based on his choice to highlight both the Marine leader's success at Chosin Reservoir in Korea and the Army leader's failure.¹⁶

While his assessment about Ricks's service bias may be correct, General Scales misses the point and focus of this part of the book, which was to juxtapose General Douglas MacArthur's failures in leadership, poor generalship, abominable civil-military relations, and lack of strategic vision with General Marshall's successes in these areas. By treating USMC Major General O. P. Smith well by touting the Marine's triumph at the battle at the Chosin Reservoir, Ricks expertly illustrates the traits of what he considers to be a good general. In addition, he shows how the poor leadership of General MacArthur eroded the "Marshall approach to generalship," which trickled down through the Army ranks and cost needless lives.¹⁷ Ricks then devotes the next chapter to Lieutenant General Matthew Ridgeway's tour in Korea and hails him for turning the Korean War around.¹⁸

Ricks advances two important reasons for the turnaround in Korea. The first reason was that General Ridgeway understood and agreed with President Harry S. Truman's strategic plan for the war and dedicated himself to achieving this goal.¹⁹ On the other hand, General MacArthur did not agree with that strategic goal and instead of following orders, he decided to advance his own agenda in Korea.²⁰ The second reason was that General Ridgeway did all of the things a general should do in order to be successful. He visited the battle space, conducted face-to-face meetings with subordinate commanders to assess them and the situation, visited the South Korean president for political reasons, and relieved commanders who were not performing to standard.²¹ This again was in stark contrast to how General MacArthur was conducting himself.

¹⁵ *See id.* at 140.

¹⁶ *Id.*

¹⁷ RICKS, *supra* note 1, at 122, 175.

¹⁸ *See id.* at 176–91.

¹⁹ *Id.* at 180.

²⁰ *Id.*

²¹ *See id.* at 179–89.

General MacArthur ran the Korean War from Japan, visiting Korea only occasionally,²² disobeying orders from the President,²³ and assigning those officers who were personally loyal to him to combatant commands.²⁴

This lack of generalship and dysfunction between military and civilian leadership would prove toxic in the post-Korean War Army, which was struggling to find its identity amid the backdrop of a nuclear era that saw the Air Force expand rapidly and the Navy unveil its first nuclear-powered submarine.²⁵ General Maxwell Taylor, the Army Chief of Staff in 1955, reorganized the Army into smaller “battle groups” with the idea that they would operate in a more dispersed environment and take the place of the USMC’s historical role of fighting the small wars.²⁶

Ricks points out that General Taylor later stepped down as the Army Chief of Staff, as he felt underappreciated by President Dwight D. Eisenhower, and he published a bitter critique of President Eisenhower’s defense policies.²⁷ General Taylor was the opposite of General Marshall, according to Ricks, in that he became a highly politicized officer and used his relationship with the President as his base of power.²⁸ This would personally serve General Taylor well because he eventually assumed the role of military advisor to President John F. Kennedy and then became the Chairman of the Joint Chiefs, the American ambassador to South Vietnam, and a consultant on the war to President Johnson.²⁹ General Taylor led the way on intervening in Vietnam and shaping the approach to the conflict, which was in tune with his vision for a new small-wars Army.³⁰

“In 1961, . . . Taylor’s misbegotten Pentomic concept was being hastily dropped by the Army”³¹ and the generals who would run the war in Vietnam—General William Westmoreland and General William DePuy. Taylor would revert to World War II tactics despite the

²² *Id.* at 127.

²³ *Id.* at 180.

²⁴ *Id.* at 127.

²⁵ *Id.* at 206–07, 215.

²⁶ *Id.* at 208–09.

²⁷ *Id.* at 219–20.

²⁸ *Id.* at 219.

²⁹ *Id.* at 220–21.

³⁰ *See id.* at 221–23, 228–29.

³¹ *Id.* at 219.

warnings that this environment required counterinsurgency operations.³² Although General Westmoreland and General DePuy were seen as opposites when it came to intelligence and tactical prowess,³³ they both lacked the strategic vision to fight the war in front of them. In 1989, General DePuy would confess that he was “deficient at the next level up” and that this failure came at a cost.³⁴ He would also note that in the Army of 1972, “the atmosphere was somewhat poisonous, characterized by vociferous loss of confidence in the Army leadership.”³⁵

Ricks later credits General DePuy for rebuilding the Army by “correctly read[ing] the trend in military operations towards more sophisticated weaponry, and the implications of that for raising and training a force.”³⁶ This led to the development of five new, revolutionary weapons systems within the Army, which was a part of the next generation of sophisticated weapons systems in the other services that led, in turn, to the swift tactical victory in the 1991 Gulf War although would not help to translate this victory into a long-term strategic success.³⁷

While General DePuy was rebuilding the Army’s firepower and doctrine on how to employ it,³⁸ Major General John Cushman was trying to rebuild the Army’s professional ethic and to teach the officers how to think.³⁹ General DePuy and General Cushman did not see eye-to-eye on the way forward for the Army.⁴⁰ “The result of this feud between generals was that the Army’s rejuvenation would be tactical, physical, and ethical, but not particularly strategic or intellectual.”⁴¹ This occurred because General DePuy cancelled the third Leavenworth symposium on ethics in April 1976 (General Cushman’s symposium) and General DePuy’s fingerprints were all over the 1976 edition of 100-5 while General Cushman’s were notably absent.⁴² Rick’s implies that both approaches were correct. General DePuy’s focus on tactics and

³² *Id.* at 224–27, 236–39, 241, 248, 267–74, 342.

³³ *Id.* at 241, 250.

³⁴ *Id.* at 250.

³⁵ *Id.* at 330.

³⁶ *Id.* at 339.

³⁷ *Id.* at 335, 339, 386–87.

³⁸ *Id.* at 342, 345.

³⁹ *Id.* at 341, 343, 347–48.

⁴⁰ *See id.* at 341–50.

⁴¹ *Id.* at 349.

⁴² *Id.* at 341, 347–48

firepower ideas were good for the short term, while General Cushman's direction in thinking and ethics would have been good for the long term strategic health of the Army.

This is where Ricks gets it wrong. As he points out, "the failure to consider the end of the [1991 Gulf War] . . . was a lack of guidance from Washington."⁴³ Ricks condemns those he would hold responsible. "Ultimately, this was a failure of civilian leadership . . ."⁴⁴ Ricks also casts blame for the problems at the beginning of the war in Afghanistan on General Tommy R. Franks and for the Iraq war in 2003 on both Generals Franks and Ricardo Sanchez and believes that it was a failure in accountability that allowed these generals to remain in charge.⁴⁵ However, he acknowledges that the civilian leadership erred in their thinking on Iraq and that the mission was never clearly defined because of the hasty decision to invade with false information.⁴⁶ He later quotes a military historian, Sir Michael Howard, who notes that most leaders get it wrong at the beginning of a war, but the advantage goes to those who can adjust and learn from their mistakes.⁴⁷

If war is waged by civilian leadership and the generals are the stewards of that political will,⁴⁸ how could the lack of a strategic goal and direction by civilian leaders be a fault in strategic thinking on the part of generals? "What Mr. Ricks doesn't explain . . . is how the Taliban and Saddam could have been overthrown and both countries pacified without the miscalculations and unexpected outcomes that plague even the best of military leaders in all wars."⁴⁹

Ricks makes a compelling argument throughout *The Generals* that the Army would be better served by reverting to General Marshall's system of ruthlessly weeding out those who fail to perform instead of continuing with the current model of firing only those who commit misconduct or personal indiscretions.⁵⁰ What he overlooks with this simple solution is

⁴³ *Id.* at 383.

⁴⁴ *Id.*

⁴⁵ *Id.* at 410–11.

⁴⁶ *Id.* at 400–01, 450.

⁴⁷ *Id.* at 450.

⁴⁸ See CLAUSEWITZ, *supra* note 2, at 605.

⁴⁹ Andrew Roberts, *A Few Good Leaders of Men: No Military Leader Can Be Expected to Win Without Bloodshed.*, WALL ST. J. (Oct. 28, 2012, 3:22 pm ET), <http://online.wsj.com/article/SB10000872396390443675404578056953261004898.html>.

⁵⁰ RICKS, *supra* note 1, at 360.

that the authority for relieving senior generals has shifted from the chiefs of service to the civilian secretary of defense.⁵¹ In addition, he does not address whether the difference in a draft force versus a volunteer force plays a role in the competency level of generals and officers; Ricks misses an excellent opportunity to more fully analyze his premise that Army general leadership is lacking.

Ricks concludes *The Generals* with suggestions for changes to the Army through the lens of the Marshall system. He posits that the military should conduct a post-war assessment of its generals to learn the lessons of Afghanistan and Iraq, similar to the study conducted after Vietnam.⁵² Ricks also suggests that the way the military trains officers and generals how to think should be examined and tailored to meet the strategic needs of the changing threat to America.⁵³ He challenges the military to adjust personnel policies to discourage the best and the brightest officers from leaving the service because of the perception that mediocre people stay in and advance, thereby denying better performers the ability to skyrocket to the top because they must wait their bureaucratic turn.⁵⁴

This thought-provoking and entertaining book about U.S. military generalship certainly raises questions worth reflecting on. What can the military learn from the personnel management of the past drawdowns? How can the military continue to adapt to a changing and more complex enemy in a dynamic political climate fueled by the instantaneous dissemination of information? By highlighting the failures in strategic thinking by top U.S. military commanders and their civilian overseers, Mr. Ricks starts a useful discussion about what direction the U.S. military should take to cure the lack of strategic thinking among generals and their civilian leadership while awaiting the next war. High-level military leaders would do well to add this to their professional reading lists; and the judge advocates advising leaders would be wise in picking up a copy themselves. After all, understanding commanders, the history of command, and past leadership failures serve to highlight where a judge advocate can be most helpful to a commander.

⁵¹ Scales, *supra* note 12, at 138.

⁵² RICKS, *supra* note 1, at 455.

⁵³ *Id.* at 459.

⁵⁴ *Id.* at 450, 457.

**1493: UNCOVERING THE NEW WORLD COLUMBUS
CREATED¹**REVIEWED BY MAJOR A. JASON NEF^{*}

*They were doing the work of the centuries. They were
agents of humankind's unending quest to enlace its most
far-flung members in a single skein, a journey whose
endpoints the travelers have rarely been able to
anticipate.*²

I. Introduction

In 1492, the world changed forever when Columbus stumbled across the Americas and inadvertently introduced globalization to the world.³ The changes that followed this historic event remain with us over five hundred years later. The significance of Charles Mann's *1493* is the perspective it gives of that history. The author offers a broad view of the scale and scope of the changes brought by the sudden "turbulent exchange of goods and services that today engulfs the entire habitable world."⁴ At its heart, *1493* is about globalization, a well-worn topic. Yet it stands out from other writings with its focus on the origins of globalization and its impact on early participants. *1493* also contains important lessons for leaders to consider. The book provides excellent examples of how leaders influence and shape the future through their action or inaction, for better or worse, and deserves a spot on the military reader's professional-development bookshelf.

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¹ CHARLES C. MANN, *1493: UNCOVERING THE NEW WORLD COLUMBUS CREATED* (2011).

² *Id.* at 521.

³ The discovery of America was an accident due, in part, to Columbus's miscalculation of the sea-route to China. Christopher Columbus is not the focus of this book. His forays into the Western Hemisphere are the catalyst for the story, but not the story itself. The author provides many important details of Columbus's life but does not offer a comprehensive biography. *See generally id.* at 1–23.

⁴ *Id.* at 7.

II. Objective, Engaging and Detailed

Very few topics are as polarizing as African slavery, Indian subjugation, or the European colonization of the American continents. These are so polarizing that reasonable people will fight over the very words used to discuss them. Appreciating this fact, Mann devotes an entire appendix, titled “Fighting Words,” to explain his reasons for choosing the terms that he used to describe or identify the principle nationalities and groups discussed in *1493*.⁵ Mann examines these, and related topics, objectively and without an apparent agenda. His objectivity enables him to unpack an era of human interaction and conflict that divides people even today. While Mann examines these topics dispassionately, he does so with an engaging style. In fact, his style is what keeps readers engaged during his telling of the odd (but interesting) global histories of tobacco, rubber trees, corn, potatoes, tomatoes, and earthworms.⁶ Yes, he makes earthworms interesting.⁷

The amount of research and detail Mann presents demonstrates his scholarly approach to the material. However, *1493* reads more like a narrative and less like a collection of facts. Mann does not trivialize facts for readability; *1493* is supported by enough hard data to satisfy the fussiest academic. But where facts and figures obscure Mann’s narrative style, they are assigned to footnotes and endnotes.

Some sections of *1493* contain a distracting level of detail. Mann goes into such detail on some of the more local aspects of the post-1492 world that readers can forget the global focus of *1493*. The value of those detailed sections, however, becomes apparent in the end. From its inception, globalization has had a deep and persistent impact on local people, places, and communities. Mann illustrates that important point through those highly detailed sections. By incorporating the fine details into the larger history of globalization, Mann presents globalization as something more than an economic theory or nebulous system of trade.

⁵ *Id.* at 511–16 (providing an excellent summary of the differences in contemporary and historical self-identity and concepts of race).

⁶ *Id.* at 51–98, 210–355 (focusing heavily on the important role agriculture played in globalization).

⁷ This skill was probably honed during Mann’s work as an author for popular science and technology publications *Science*, *Wired*, *Smithsonian*, and *Technology Review*. See *id.* at vii.

III. Lessons for Leaders

A. Everything Matters

Often, the unknown variable or unintended consequence has the deepest and longest-lasting impact. Mann illustrates this point well when he notes Spain's goal of reaching China by sea was benign; a western sea route would be cheaper and safer than using the Silk Road trade routes or sailing around the continent of Africa. The purpose in pursuing that goal was to improve access to a known market. Spain ultimately established direct trade with China.⁸ But in reaching for that narrow and simple goal, Spain brought profound and unexpected changes to the world:

Babies born on the day the admiral founded La Isabela—January 2, 1494—came into a world in which direct trade and communication between western Europe and East Asia were largely blocked by the Islamic nations between (and their partners in Venice and Genoa), sub-Saharan Africa had little contact with Europe and the Eastern and Western hemispheres were almost entirely ignorant of each other's very existence. By the time those babies had grandchildren, slaves from Africa mined silver in the Americas for sale to China; Spanish merchants waited impatiently for the latest shipments of Asian silk and porcelain from Mexico; and Dutch sailors traded cowry shells from the Maldive Islands, in the Indian Ocean, for human beings in Angola, on the coast of the Atlantic.⁹

This was mission creep on a grand scale.¹⁰ No one anticipated the degree of suffering and achievement, or the massive cultural, demographic, economic, and agricultural changes that followed. Were these changes inevitable? Extraordinarily few leaders of that era stopped to question the consequences of their actions.¹¹

⁸ *Id.* at 26–29.

⁹ *Id.* at 6.

¹⁰ “Mission creep” is a military slang term for the unplanned expansion of a mission's original goal or purpose. See generally Ben Zimmer, ‘Mission Creep’ Crawls Out of the ‘90s, WALL STREET J., June 27, 2014.

¹¹ See generally MANN, *supra* note 1, at 382–87. Of the many changes that followed the discovery of the Americas, Spain's new relationship with the Indian population provides one clear example of a sovereign leader stopping to seriously question what their national

1493 illustrates the costs when leaders fail to evaluate their operations in light of both unknown variables and unintended consequences. Sometimes the unknown variable appears good and useful but leads to harm in the end. Spain's infusion of currency in the form of American silver could have stabilized Spain's government and economy. Instead of using the new currency to evaluate their spending priorities, the Spanish crown simply spent more money and increased its debt load at the very point it could have reduced it.¹² No one believed the good times would end and when the silver dried up, Spain was in worse shape than before.¹³ Failing to evaluate seriously the consequences of a course of action can quickly lead to distractions and disappointment.¹⁴

B. Taking the Gloves Off

Historically, Mann demonstrates, unwarranted or indiscriminate use of force usually backfires. The European settlement of the Americas was particularly heavy-handed in controlling populations, especially when those populations were a source of labor. With little exception, the concept of winning hearts and minds simply did not exist.¹⁵ In almost every instance, forcibly subjugated groups revolted violently and caused great loss of life and property for their subjugators.¹⁶

The desire to "take the gloves off" was not unique to the sixteenth-century conquistador. Leaders have an incredibly difficult and frustrating job operating in occupied areas. The enemy hides among the civilian population and wreaks havoc on their ranks. The civilian population may not readily turn over the terrorist hiding among them. In that environment, it is easy to decide that "taking the gloves off" and

policy should be. Queen Isabel of Spain predicted that enslavement of Indians would incentivize their revolt and pushed laws to prohibit the practice. Her efforts failed, but her prediction proved correct. *Id.*

¹² *Id.* at 36–37.

¹³ *Id.*

¹⁴ The military reader can liken this lesson to the U.S. government's strategic miscalculations of the realities of a post-invasion occupation of Iraq, as a contemporary example.

¹⁵ *Id.* ch. 8. The only exceptions were the missionaries who came to the Americas to evangelize. They *did* want to win hearts and minds and spoke out against the inhumane treatment of native populations and African slaves. These missionaries were routinely ignored primarily because the people behind the inhumane treatment were making a great deal of money in the process. *Id.*

¹⁶ See generally *id.* at 421–88.

dealing forcefully with *everyone* is the best way to secure a population's compliance and cooperation. The historical lessons presented in *1493* reveal the futility of this approach. When groups are coerced into cooperation they tend to close ranks and actively resist, or become tacit supporters of those who do. Mann summarizes it this way:

[P]eople always seek ways to exert their will, even in the most terrible circumstances. Africans and Indians fought with each other, claimed to be each other, and allied together for common goals, sometimes all at the same time. Whatever their tactics, the goals was constant: freedom. More often than is commonly realized they won it.¹⁷

Leaders must always guard against the temptation to strong-arm entire communities or populations to root out the few who pose a genuine threat. Gaining the trust and confidence of an occupied population is not an easy or simple task, and it cannot be accomplished quickly. But the cost of abandoning discrimination and distinction in favor of a heavy-handed approach is much higher in the end.

C. The Importance of Discipline

A lack of discipline carries a high price. Readers of *1493* learn, through Mann's recitation of historical events, the damage undisciplined troops and oblivious, disengaged leaders can cause. One example illustrates the point well. On November 23, 1493, Columbus returned from Spain to Hispaniola and the settlement of La Navidad to find "only ruin."¹⁸ La Navidad and the adjacent native Taino settlement were completely destroyed.¹⁹ The cause? Rape and murder. An unknown number of Columbus's sailors angered the Taino by "raping some women and murdering some men."²⁰ This sparked a war that was soon exploited by another Taino group that "swooped down and overwhelmed

¹⁷ *Id.* at 424.

¹⁸ *Id.* at 8–9 (La Navidad was on the island of Hispaniola; Columbus established a settlement there after his flagship, the *Santa Maria*, ran aground.).

¹⁹ *Id.* Columbus left behind thirty-eight men at the settlement and returned to Spain to report the discovery and gather supplies. He was gone for eleven months. After discovering the ruins of La Navidad, Columbus searched nine days for survivors. None were found. *Id.*

²⁰ *Id.*

both sides.”²¹ Columbus left undisciplined and untrustworthy men in positions where they could do the most damage—and they did. Columbus did not intend this outcome; he simply did not know the disposition of his own troops.

Contemporary battlegrounds present similar challenges for leaders. In Iraq and Afghanistan, commanders were routinely charged with holding a piece of ground, protecting the population, and rooting out the enemy, all at the same time. This often required spreading their troops over a large area, leaving smaller units and their leaders in positions of great responsibility with minimal supervision. When the right leaders and troops held that responsibility, they accomplished monumental tasks with honor. When the leaders disengaged and the undisciplined held that responsibility, disaster followed.²²

IV. Final Thoughts

1493 is a careful look at how the today's world was shaped by the unknown and unanticipated forces of globalization. By weaving seemingly loose threads of history into a broad narrative, Mann reacquaints the reader with the story of the first four centuries of globalization, its successes and failures, and a clearer view of the costs and benefits of human interaction on a global scale.

²¹ *Id.*

²² On March 12, 2006, Private First Class Steven Green and three fellow soldiers, raped and murdered a fourteen-year-old Iraqi girl, Abeer Qassim Hamzah Rashid al-Janabi, and murdered her parents and six-year-old sister. Jim Frederick chronicles the events leading up to, and following, the crime in his book *Black Hearts*. The book is a case study of the difficult job leaders and troops face in combat, and how lethal a combination disengaged leadership and undisciplined troops can be.

The story of Steven Green proves that . . . even one private with a rifle can affect the course of a war . . . Only one out-of-control platoon needs just one Steven Green and a handful of coconspirators to significantly damage the gains that a nearly thousand-strong battalion worked hard to achieve . . . Despite [the battalion commander's] insistence that he and his chain of command practiced what he incessantly calls 'engaged leadership,' facts demonstrate that he and his senior leaders were woefully out of touch with the realities on the ground.

Globalization is, ultimately, about people if it is about anything at all. If the forces of globalization have shaped the world, those forces are not abstractions but the collective conduct and interaction of groups and individuals. The experiences of the early participants of globalization remain relevant and provide an opportunity for leaders to reflect on how they want to lead in modern times. *1493* is an excellent reminder of the challenges of leading in a complex world where seemingly minor or isolated actions can have lasting consequences, for good or bad.

By Order of the Secretary of the Army:

RAYMOND T. ODIERNO
General, United States Army
Chief of Staff

Official:

A handwritten signature in black ink, appearing to read "Gerald B. O'Keefe". The signature is stylized with a large initial "G" and a prominent "B".

GERALD B. O'KEEFE
Administrative Assistant
to the Secretary of the Army
1432201

