TAKING THE BITTER WITH THE SWEET: A LAW OF WAR BASED ANALYSIS OF THE MILITARY COMMISSION*

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> *I do not fall into the most common, flattering and delusive of civilian assumptions, that civilian=good and military=bad. Far from it. So far as one can distinguish them from each other . . . civilians have often been ascendant in the political leadership under which . . . the military are seen to have done terrible things. Militarism . . . may be a nasty thing, but let the military man ponder on my conviction, that there can be no nastier a militarist than a civilian one.*[1]

The military commission, created by President Bush in his capacity as Commander in Chief, is prepared to sit in judgment of individuals alleged to be associated with al Qaeda. These individuals face charges derived from a military order issued by the President. In the approximate two years since the President issued this order, there has been a virtual avalanche of legal commentary related to the theory and process implemented to hold such individuals accountable. A cursory review of this body of le-

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* This Article was completed prior to the decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (June 29, 2006), in which the United States Supreme Court held that the military commissions, as currently structured, were illegal under both the Uniform Code of Military Justice and the Geneva Conventions.

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1. Geoffrey Best, *Humanity in Warfare* 26–27 (Colum. U. Press 1980).

gal scholarship reveals the tendency of authors to plant their conclusions in one of two polar opposite camps—the clearly illegal camp or the clearly legal camp. Few such commentaries have approached the issue from a pragmatic perspective that seeks to identify shortfalls in the current concept for the use of military commissions and to propose a remedy for these shortfalls that could enhance the legitimacy of the proposed use of military commissions.

In *Waging War, Deciding Guilt: Trying the Military Tribunals*,[2] Professors Neal K. Katyal and Laurence H. Tribe provided an early, pointed, and comprehensive critique of the military commission. According to the authors of that essay, the military order promulgated by President Bush on November 13, 2001, authorizing the use of military commissions to try members of al Qaeda and other international terrorists, was patently unconstitutional. The basic thesis of the Katyal/Tribe essay, which has been echoed in numerous subsequent critiques, is that through this military order, the executive branch has installed itself as "lawgiver as well as law-enforcer, law-interpreter, and law-applier."[3] This, the authors argue, violates the Constitution, which they define as requiring that:

> offenses be defined in advance by positive legislation, that the judicial branch be open to test whether any given individual is properly subject to the jurisdiction of the tribunals at issue and whether the system of tribunals as a whole comports with [the] constitutional commands, and that appeal to some body independent of the President as the convening and prosecuting authority be available to test whether any conviction and sentence handed down by one of the President's tribunals is supportable in law on the evidence presented.[4]

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2. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002). This essay will be referred to throughout this Article to illustrate theories of opposition to the military commission. I consider this justified as a result of the comprehensive nature of the critique offered in this essay, the distinguished backgrounds of the authors, and that Professor Katyal is currently co-counsel defending Mr. Hamdan, a detainee currently pending trial before the military commission.

3. *Id*. at 1265.

4. *Id*. at 1259–1260.

This Article will adopt an alternate approach. It will analyze the legality of the military commission through the lens of military and international law. This analysis will reveal that critiquing this tribunal through the domestic criminal law lens distorts the outcome of any conclusion related to the legitimacy of the proposed process. Analysis through the lens of military and international law is not only more appropriate, but will also result in a more accurate critique of the process. This analysis will reveal that while the presidential order authorizing the use of military tribunals was a legitimate exercise of executive authority under the Constitution to implement the law of war,[5] the nature of the current offenses and process are inconsistent with the law upon which the tribunal is founded.

Part I of this Article will assert that the role of the proposed military commissions is not constitutionally analogous to any other criminal prosecution, but instead an exercise of command authority for the legitimate purpose of contributing to military success by deterring violations of the law of war. Part II of this Article will then demonstrate how careful and precise analysis of the law of war and the Uniform Code of Military Justice (UCMJ)[6]

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5. The term "law of war" will be used throughout this Article to refer to the law governing the conduct of belligerents engaged in armed conflict. This term, while certainly less in favor than "humanitarian law," is the term used in official Department of Defense Doctrine. *See* U.S. Dept. of Defense, Dir. 5100.77, DOD Laws of War Program (May 9, 2006) [hereinafter DOD Dir. 5100.77]; *see also* Chairman, Jt. Chiefs of Staff, Instr. 5810.01B, Implementation of the DOD Laws of War Program (Mar. 22, 2002) [hereinafter CJCS Instr. 5810.01B]. The following excerpt demonstrates the continuing significance of retaining this characterization in lieu of the more popular "humanitarian" law:

> In this Article, I have used the term "law of war" referring to those streams of international law, especially the various Hague and Geneva Conventions, intended to apply in armed conflicts. To some, the term "law of war" is old-fashioned. However, its continued use has merits. It accurately reflects the well-established Latin phrase for the subject of this inquiry, *jus in bello,* and it is brief and easily understood. It has two modern equivalents, both of which are longer. One of these, the "law applicable in armed conflicts" is unexceptionable, but adds little. The other, "international humanitarian law" (IHL), often with the suffix "applicable in armed conflicts", has become the accepted term in most diplomatic and U.N. frameworks. *However, it has the defect that it seems to suggest that humanitarianism rather than professional standards is the main foundation on which the law is built, and thus invites a degree of criticism from academics, warriors and others who subscribe to a realist view of international relations.*

Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 Duke J. Comp. & Intl. L. 11, n. 14 (1995) (emphasis added).

6. 10 U.S.C. §§ 801–950 (2000) [hereinafter UCMJ].

demonstrate that there are offenses to be legitimately brought before such tribunals. However, this Part will also establish that the range of legitimately cognizable offenses related to allegations against al Qaeda and associated personnel is extremely limited. Parts III and IV will assert that both the range of offenses currently available to prosecutors, and the basic procedural construct of the commission, are inconsistent with the law that establishes the foundation for the commission. Part V of this Article will conclude that although conceptually valid, the military commission as currently constructed is too attenuated from its jurisdictional foundation to be considered legitimate. Accordingly, critical modifications are necessary to ensure that the use of the military commission to prosecute al Qaeda operatives for violations of the law of war is both effective and legitimate.

Although this Article will challenge many of the common critiques of the commission, this does not require a conclusion that the commission, as currently constructed, is legally valid. In fact, this Article will conclude that it is not. This conclusion will not, however, be based on violation of the Constitution, but instead by reference to international law—and more specifically the law of war the commission purports to enforce. Thus, this Article will reject the common "all or nothing" approach to critiquing the commission, and instead will focus on how the law the commission has ostensibly been created to enforce mandates modification to both its substantive and procedural construct.

I. PROSECUTION OF WAR CRIMINALS: A LEGITIMATE EXERCISE OF THE COMMAND FUNCTION

The routine reference to constitutional rights reflected in numerous critiques of the military commission and so prominent in the Katyal/Tribe essay reveals a basic failure to appreciate the independent purpose of military tribunals as a mechanism to compel compliance with the laws and customs of war.[7] This purpose is arguably the original foundation of military tribunals.[8]

7. *See* Roberts, *supra* n. 5, at 18–45 (discussing the various mechanisms of implementing the laws of war).

8. Michael O. Lacey, *Military Commissions: A Historical Survey*, 2002 Army Law. 41, 47 (Mar. 2002). Major Lacey summarizes the historical purpose of the military commission as follows:

While it is difficult to extract the criminal adjudication function from this purpose, it is nonetheless critical to do so in order to properly understand why the creation of such tribunals is constitutionally distinguishable from other criminal prosecution tools, a distinction acknowledged by the Supreme Court of the United States in *In re Yamashita*:[9]

> An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law[s] of war. The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war.[10]

This excerpt clearly reflects the unique function of a tribunal established to try individuals for violation of the law of war. Nowhere in this "purpose" statement does the Court indicate that such courts serve an identical function as traditional domestic criminal tribunals. Instead, the focus is on the role such prosecutions play in the overall scheme of ensuring compliance with the law of war, because compliance inherently contributes to the successful accomplishment of the national strategic objectives.

The law of war is the contemporary manifestation of an age-old effort to balance the concept of military necessity with the dictates of humanity.[11] This effort has evolved over the centuries into

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> The use of a military commission to try violators of the law of war is not new. Since before the birth of the United States, warriors have used such tribunals to determine the guilt or innocence of their fellow warriors for law of war violations, as courts of occupation or under martial law. On several petitions for review, the Supreme Court has upheld the legitimacy of such tribunals.

Id.

9. 327 U.S. 1 (1946).

10. *Id*. at 11.

11. *See* A.P.V. Rogers, *Law on the Battlefield* 3–7 (Juris Publg. 1996) (characterizing military necessity and humanity as two "basic principles" of the law of war); *see also* U.S. Dept. of Army, Field Manual 27-10, *The Law of Land Warfare* ¶ 3 (July 1956) [hereinafter FM 27-10]. According to this authoritative Department of the Army statement:

the realm of international law.[12] Today, as in the past, one of the most significant challenges associated with this strand of international law is obtaining compliance from states and their armed forces and, since the latter half of the twentieth century, from certain non-state forces.[13] Indeed, the International Committee of the Red Cross (ICRC), the organization with the special interna-

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> The conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten. It is inspired by the desire to diminish the evils of war by:
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> a. Protecting both combatants and noncombatants from unnecessary suffering;
> b. Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and
> c. Facilitating the restoration of peace.

Id. at ¶ 2.

12. *See* Geoffrey Best, *War and Law Since 1945* at 15–64 (1994) (tracing the evolution of the law of war prior to the Second World War); *see also* Leslie Green, *What Is—Why Is There—the Law of War* in *The Law of Armed Conflict: Into the Next Millennium* vol. 71 at 141 (Michael N. Schmitt & Leslie C. Green eds., Naval War College 1998). According to Professor Green:

> From what has been said herein, it is clear that since earliest times there has been recognition that humanity and the future survival of society demand that limitations be placed upon the means and methods of warfare, and that this remains the case today, whether the hostilities take place in international or non-international conflicts.

Id. at 176.

13. Roberts, *supra* n. 5, at 13. According to Roberts:

> A complicating factor in the application of the laws of war is that the majority of wars in the post-1945 world have failed to fall neatly into the category of "international armed conflict"—the only category of war to which the main body of the laws of war is formally and indisputably applicable. Most conflicts since 1945 have been civil wars, or at least have contained a major element of civil war. The application of the laws of war to civil wars raises both a legal and practical problem. The legal problem is that governments usually have been reluctant to create or sign on to a body of law which would bind their freedom of action in dealing with armed rebellion. Thus, the treaty-based rules formally applicable in such conflicts have been inadequate, though there is now a tendency at the United Nations and elsewhere to view a wide range of humanitarian rules as applicable, as the establishment in 1994 of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda confirmed. The practical problem is that civil wars are notoriously bitter. This heightened level of acrimony arises for several reasons: Each side is likely to deny the legitimacy of the other; training in the laws of war may be limited; the neat distinction between soldier and civilian frequently breaks down; and the scope for a compromise settlement of the war is usually slight. Trying to secure even a minimal level of observance of rules is peculiarly difficult in such circumstances.

Id.

tional legal status to oversee compliance with the law of war, includes within the definition of its mission the obligation to "prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles."[14] This obligation manifests itself in the numerous efforts undertaken by the ICRC to train governments and their armed forces in the law.[15] Unfortunately, compliance with this law is far from realized on the contemporary battlefield.[16]

Ensuring compliance with the law of war involves a complex and often interwoven array of measures:

> Implementation can assume a variety of forms, of which war crimes trials are only one. The term "implementation" is used here to refer to the many ways in which states, *including belligerents in an armed conflict*, generally apply, and sometimes fail to apply the international rules applicable in armed conflict.[17]

In his article *The Laws of War: Problems of Implementation in Contemporary Conflicts*,[18] Adam Roberts analyzes a variety of mechanisms that operate either collectively or independently to ensure compliance with this body of law. One of the mechanisms addressed by Professor Roberts is the prosecution of individuals

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14. Intl. Comm. of Red Cross (ICRC), *The Mission*, http://www.icrc.org/; *select* The Mission of the ICRC (accessed Jan. 2006).

15. These initiatives range from posting current issues related to international humanitarian law on its official website to contributing to seminars on humanitarian law at the Institute for International Humanitarian Law in San Remo, Italy. It should be noted that many governments and other organizations pursue the same objective through their own training and education programs.

16. In a Forward to *Law on the Battlefield*, General Sir Michael Rose writes:

> However, it is clear that nowadays the majority of conflicts are increasingly taking the form of civil war, and this has made the laws of war more difficult to uphold. This is because these new forms of warfare not only have the savage character of the Hundred Years War in Europe but are marked by a total absence of any respect for human values or, indeed, the law[s] of war. Such conflicts have combined to create chaotic situations of anarchy in which hatred and a spirit of revenge run unbridled. The extreme horrors caused by these changed circumstances need no further description, for they are daily illustrated on our TV screens. Within days, modern cities are reduced to rubble by bombardment and entire populations are compelled to exist in conditions of total misery.

Rogers, *supra* n. 11, at xiv.

17. Roberts, *supra* n. 5, at 14 (emphasis added).

18. *Id*.

who fail to comply with this law. This context of "implementation" is essential to understand why a military tribunal established to try alleged violations of the law of war occupies a unique status in the realm of prosecutorial venues. Its purpose is not solely to punish individuals who violate the law. Instead, it is a tool available to belligerent nations to enhance the probability that other belligerents will ensure their combatants adhere to the mandates of the law.[19]

The distinct nature of such forums is reinforced by the fact that they operate in the realm of international law. To equate any international law compliance mechanism with a domestic law court ignores the complex nature of this body of law, and the intricate process by which it operates.[20] The authority of states to create tribunals for the punishment of individuals who violate the law of war is derived from international law.[21] This foundation

19. *Id*. The role of military courts in the enforcement of the laws of war, even vis-à-vis captured enemy personnel, is expressly acknowledged in the *Geneva Convention Relative to the Treatment of Prisoners of War*, Articles 84–85 (entered into force Oct. 21, 1950) (available at http://unhchr.ch/html/menu3/b/91.htm). According to Article 84:

> A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect to the particular offence alleged to have been committed by the prisoner of war.

The applicability of this provision to pre-capture offenses (violations of the law of war) is clearly indicated by the following Article, which requires that: "Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention." *Id*. at art. 85. It is the force and effect of this provision that results in the continued applicability of prisoner of war status to Manuel Noriega, the former general in command of the Panamanian Defense Forces. Subsequent to his capture, Noriega was tried and convicted for pre-capture offenses in violation of United States law, but was determined by the Federal District Court for the Southern District of Florida to be, as a matter of law, entitled to the benefits of the Geneva Convention for the Protection of Prisoners of War. *U.S. v. Noriega*, 808 F. Supp. 791, 803 (S.D. Fla. 1992).

20. For illustrations of the complexity related to the exercise of international criminal jurisdiction for the purpose of extending individual criminal responsibility to violations of the law of war, see generally *In re Yamashita*, 327 U.S. 1 (1946) (reviewing the legality of the prosecution before a military commission of a captured Japanese commander). *See also Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* Case No. IT-94-1-AR72, 35 I.L.M. 32 (Intl. Crim. Trib. for the Former Yugo., App. Chamber, Jan. 1996) (analyzing the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia, an ad hoc tribunal established by the United Nations Security Council to prosecute war crimes associated with the armed conflicts in the former Yugoslavia).

21. *See generally* Cong. Research Serv., *Terrorism and the Law of War: Trying Terrorists As War Criminals before Military Commissions* (Dec. 11, 2001) (available at

reveals that the purpose of creating and using such tribunals is not simply to punish criminal offenders, but to serve the interests of the international community by contributing to the regulation of conduct during armed conflict.[22] Thus, the military tribunal is one of the many mechanisms of international law that facilitate maintenance of the balance between the sovereign rights of states and compliance with community norms. That such a mechanism might operate differently than traditional domestic criminal tribunals is thus not only understandable, but justified by the unique purpose it serves.

The distinction between military tribunals and traditional domestic criminal tribunals is reflected in the Constitution of the United States, laws created by Congress, and in judicial decisions adjudicating the legality of prosecutions carried out under this authority.[23] Article I, section 8, clause 14 of the Constitution gives

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http://www.fpc.state.gov/fpc/c5116.htm; *select* Terrorism and the Law of War) [hereinafter *CRS Report*].

22. *Id*. at 16–25; *see also* Jan E. Aldykiewicz & Geoffrey S. Corn, *Authority to Court Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed during Internal Armed Conflicts*, 167 Mil. L. Rev. 74, 145–148 (2001) (discussing the purposes of war crimes prosecutions); Michael Newton, *Unlawful Belligerency after September 11: History Revisited and Law Revised* in *New Wars, New Laws?: Applying the Laws of War in 21st Century Conflicts* 15 (David Wippman & Matthew Evangelista eds., Transnatl. Publishers, Inc. 2004) (discussing the crime of unlawful belligerency as it relates to compliance with the laws of war); Roberts, *supra* n. 5, at 70–75.

23. *See generally CRS Report*, *supra* n. 21; *see also* Adam Roberts, *Implementation of the Laws of War in Late-Twentieth-Century Conflicts* in *The Law of Armed Conflict: Into the Next Millennium* vol. 71 at 359 (Michael N. Schmitt & Leslie C. Green eds., Naval War College 1998).

The Supreme Court has articulated the unique nature and purpose of a court convened to try individuals for alleged violations of the laws of war in *In re Yamashita:*

> In *Ex parte Quirin*, 317 U.S. 1, we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war. We there pointed out that Congress, in the exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to "define and punish . . . Offences against the Law of Nations . . .," of which the law of war is a part, had by the Articles of War (10 U. S. C. §§ 1471–1593) recognized the "military commission" appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war. Article 15 declares that the "provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals." See a similar provision of the Espionage Act of 1917, 50 U.S.C. § 38. Article 2 includes among those persons subject to the Articles of War the personnel of our own military establishment. But this, as Article 12 indicates, does not exclude from the class of persons

Congress the power to "make Rules for the Government and Regulation of the land and naval forces." Congress is also vested in Article I of the Constitution with the power to "define and punish . . . Offenses against the Law of Nations,"[24] and the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States. . . ."[25] Pursuant to these constitutional provisions, Congress promulgated the UCMJ.[26] This statute provides for the prosecution of both United States service members[27] and enemy personnel who violate the law of war.[28] The authority to prosecute such individuals is expressly granted to general courts-martial.[29] However, Article 21 of the UCMJ recognizes the concurrent jurisdiction of military tribunals over such offenses so long as use of such tribunals is permitted under the law of war. According to that Article,

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction

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subject to trial by military commissions "any other person who by the law of war is subject to trial by military tribunals," and who, under Article 12, may be tried by court martial, or under Article 15 by military commission.

We further pointed out that Congress, by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law of war or to mark its precise boundaries. *Instead, by Article 15 it had incorporated, by reference, as within the preexisting jurisdiction of military commissions created by appropriate military command, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. It thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts,* and as further defined and supplemented by the Hague Convention, to which the United States and the Axis powers were parties.

327 U.S. at 7–8 (emphasis added). As will be discussed below, Article 18 of the current UCMJ is identical to Article 15 of the Articles of War discussed in the excerpted portion of the *Yamashita* decision.

24. U.S. Const. art I, § 8, cl. 10.

25. *Id*. at art I, § 8, cl. 17.

26. 10 U.S.C. §§ 801–950.

27. 10 U.S.C. § 802.

28. 10 U.S.C. § 818.

29. The general courts-martial is one of three types of courts-martial provided for in the UCMJ, the other two being special courts-martial and summary courts-martial. *Id*. at § 816. Of these three types of courts-martial, the general courts-martial is the court of unlimited jurisdiction.

> with respect to offenders or offenses that by statute or by the law of war may be tried by military commission, provost court, or other military tribunals.[30]

This provision of the UCMJ is the most recent version of an analogous statutory provision promulgated by Congress in 1916 in the Articles of War.[31] It therefore represents a statutory recog-

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30. 10 U.S.C. § 821.

31. Aldykiewicz & Corn, *supra* n. 22, at 145–148. The relationship between Article 18 and prior statutory authorities demonstrates that Congress has historically acknowledged the role of military courts in the enforcement of the law of war:

> The 1920 Articles of War replaced the 1916 Articles of War. Article 12 of the 1920 Articles . . . stated:
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> > General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: Provided, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy: *Provided further, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgement the interest of the service shall so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses set out in Article 13; but the limitations upon jurisdiction as to persons and upon punishing power set out in said article shall be observed.*
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> The italicized language was added in the 1920 legislation. The non-italicized language is virtually identical to the 1916 version of Article 12 [except for insertion of a comma after the word "articles" and before "and." The 1920 version of Article 12 is cited as the precursor to Article 18, U.C.M.J.]. Thus, jurisdiction over non-members of the force, that is, persons not "subject to military law" was unchanged. The key to exercising general court-martial jurisdiction over a non-member of the force remained the commission of an offense in violation of the law[s] of war, subjecting the person to "trial by a military tribunal."
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> In 1950, the Articles of War were codified in the UCMJ. Article 12 of the Articles of War was replaced by Article 18 of the UCMJ, which stated:
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> > Subject to [A]rticle 17, general courts-martial shall have jurisdiction to try persons subject to this code for any offense made punishable by this code and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code, including the penalty of death when specifically authorized by this code. General courts-martial shall also have jurisdiction to try any person who by the law[s] of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law[s] of war.
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> [A] 1956 codification of the UCMJ also included Article 18, which provided:
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> > Subject to section 817 of this title [article 17], general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter [clause 1]. General courts-martial also have jurisdiction to try any person who by the laws of war is

nition of the jurisdiction of military commissions that has been endorsed in the United States for nearly a century, and relied on by the armed forces for an even longer period of time.[32]

The use of military commissions by military commanders of the United States pre-dates even the Constitution.[33] The relevance of this history is that it reflects a customary international law practice, endorsed by Congress and embraced by the President throughout the history of the United States, to employ military commissions as a tool for effectuating the law of war. This use has resulted in review of the practice by domestic courts created pursuant to Article III of the Constitution.[34] These cases have endorsed the use of military commissions, even when it was

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> subject to trial by a military tribunal and may adjudge any punishment permitted by the law[s] of war [clause 2].
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> Finally, as the result of the Military Justice Act of 1968, Article 18 underwent a final revision:
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> > Subject to section 817 of this title [article 17], general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter [clause 1]. General courts-martial also have jurisdiction to try any person who by the law[s] of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law[s] of war [clause 2]. *However, a general court-martial of the kind specified in section 816(1)(B) of this title* [article 16(1)(B)] *shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case* [clause 3].
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> This 1968 version of Article 18 is identical to the current version of Article 18.
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> > What is most significant about the foregoing history is the language of the current Article 18, clause 2, which is almost identical to the language of Article 12 of the 1916 and 1920 Articles of War.
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> *Id.* at 95–98 (citations omitted).
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> > Article 12 authorized a general court-martial of "any other person who by the law[s] of war is subject to trial by military tribunals." *Id.* at 98 (citations omitted). While persons subject to the Code are subject to a general court-martial via clause 1 of Article 18, clause 2 of Article 18 specifically allows for a general court-martial of persons who do not fall into this clause 1 category, and are therefore not subject to the Code. *Id.*

32. Lacey, *supra* n. 8, at 47; *see also* Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinction Between the Two Courts*, Army Law. 19, 19 (Mar. 2002).

33. MacDonnell, *supra* n. 32, at 19; Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes*, 153 Mil. L. Rev. 1, 13 (1996).

34. *E.g. In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942).

established that the rights afforded to individual defendants prosecuted before them were substantially different than those afforded criminal defendants in traditional domestic prosecutions.[35] The consistent rationale running through these cases is linked to the purpose upon which these tribunals are founded: enforcement of the law of war.[36]

Critics of the current commission fail to recognize this distinct, legitimate, and historically recognized mechanism for enforcing the law of war. As a result, they critique the legitimacy of the process through the distorted lens of domestic criminal practice.[37]

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35. The nature of the procedure provided to the accused General Yamashita was the primary issue dividing the majority from the dissent in that opinion. In the holding of the Court, the majority clearly indicated that the procedures used for the military tribunal were to be determined not by reference to statutory authority established in the form of the Articles of War, but instead by the military commander who created the tribunal:

> By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law[s] of war. But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons. The Articles recognized but one kind of military commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not apply in such trials. Being of this latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class. Petitioner, an enemy combatant, is therefore not a person made subject to the Articles of War by Article 2, and the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law[s] of war. *It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command.*

In re Yamashita, 327 U.S. at 21 (emphasis added).

36. *Id.* at 11; *see supra* n. 19 and accompanying text (discussing the rationale for the jurisdiction of these courts).

37. For example, Katyal & Tribe argue:

> Certainly, when a president is to take action that puts basic constitutional guarantees at risk, legislative authorization is presumptively required. Nothing in the Constitution, including the Commander-in-Chief Clause, alters this basic constitutional arrangement . . . in the absence of an emergency that threatens truly irreparable damage to the nation or its Constitution, that Constitution's text, structure, and logic demand approval by Congress if life, liberty, or property are to be significantly curtailed or abridged . . . The military trial of "unlawful combatants" is no different. . . .

Katyal & Tribe, *supra* n. 2, at 1266. Later in the essay, the authors emphasize this position when they write:

This analytical perspective reveals a fundamental failure to appreciate that the military trial of individuals who violate the law of war is indeed different from normal criminal process. The longstanding history of using military commissions as part of the broader scheme of enforcement of the law of war reveals that the purpose of such commissions is not limited to "adjudicating . . . guilt and meting out punishment."[38] It is the broader purpose of military commissions—to effectuate the implementation of international legal obligations related to the conduct of armed conflict[39]—that does indeed implicate the Commander in Chief authority of the President.

As Commander in Chief, the President and his subordinate officers are vested with the responsibility under international law to implement the laws of war when United States forces engage in armed conflict.[40] An aspect of this complex web of authority and obligation is the power to enforce compliance with the law. Trial before a military commission for violation of the law is therefore intended to serve broader purposes than "adjudicating . . . guilt and meting out punishment"[41]—influencing the future conduct of belligerents;[42] demonstrating national commitment to the obligations of the law; and enhancing the effectiveness of United States forces by reinforcing their commitment to compliance with the laws of war and validating their fidelity to that law.[43]

> In our view, a president who sets out to put on trial and then to punish offenders against the laws of war in the course of a constitutionally directed military campaign must generally be regarded as no different from a president who sets out to try and punish those whom he regards as offenders against any other body of law, domestic or international, whom the officials, properly directed by the president in any of his other core functions, happen to encounter and detain in the course of carrying out presidential instructions.

Id. at 1270.

38. *Id.*

39. *See supra* n. 19 and accompanying text (discussing the rationale for the jurisdiction of these courts); *see also* Roberts, *supra* n. 5, at 18–38 (analyzing implementation mechanisms as justifying a military tribunal's jurisdiction and purpose).

40. FM 27-10, *supra* n. 11, at ¶¶ 1–7.

41. Katyal & Tribe, *supra* n. 2, at 1270.

42. Roberts, *supra* n. 5, at 14.

43. This subtle and routinely overlooked purpose of the law of war is eloquently articulated by Telford Taylor in the following extract from his book *Nuremberg and Vietnam, An American Tragedy*:

> Another, and to my mind, even more important basis of the laws of war is that they are necessary to diminish the corrosive effect of mortal combat on the participants.

Analysis of the jurisdictional provisions of the UCMJ reinforce the conclusion that military commissions operate as a tool for enforcing international law. Unfortunately, as the Katyal/Tribe essay reveals, an imprecise understanding of the UCMJ blurs this distinction. For example, their Essay contrasts the authority of the President, as Commander in Chief, to punish an individual who violates the law of war, with his authority to punish an individual held as a prisoner of war for infractions committed while in that status. They contend that in the first instance, the President lacks independent authority as Commander in Chief to adjudicate and punish the crime, whereas in the latter instance, such authority exists. For example, according to the Katyal/Tribe essay:

> Contrast, for example, a prisoner of war punished for infractions committed while detained in that capacity (such as killing prison guards or injuring fellow prisoners) with a captured combatant punished for wantonly slaughtering unarmed and wholly innocent civilians. The first case is ancillary to the commander-in-chief function; the second is logically, morally, and legally separable.[44]

This illustration is inaccurate. Recognizing that a prisoner of war who commits an offense while in the custody of the United States is subject to the proscriptive authority of the United States at the time of the offense, Congress has specifically provided for the prosecution of such prisoners by subjecting them to the punitive articles of the UCMJ.[45] As a result, a prisoner of war who

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> War does not confer a license to kill for personal reasons—to gratify perverse impulses, or to put out of the way anyone who appears obnoxious, or to whose welfare the soldier is indifferent. War is not a license at all, but an obligation to kill for reasons of state; it does not countenance the infliction of suffering for its own sake or for revenge.
>
> Unless troops are trained and required to draw the distinction between military and nonmilitary killings, and to retain such respect for the value of life that unnecessary death and destruction will continue to repel them, they may lose the sense for that distinction for the rest of their lives. The consequence would be that many returning soldiers would be potential murderers.

Telford Taylor, *War Crimes*, in *War, Morality, and the Military Profession* 415, 429 (Malham M. Wakin ed., Westview Press 1979).

44. Katyal & Tribe, *supra* n. 2, at 1270.

45. Article 2 of the UCMJ establishes "Persons subject to this chapter." Included in "this chapter" are the punitive articles—or the specific offenses—of the UCMJ. Accord-

commits "an infraction" is charged, tried, and punished pursuant to domestic United States law and procedure.[46] It is in that situation—where the misconduct is not proscribed by international law, but instead by the domestic law of the detaining State—where the President lacks the unilateral authority to prosecute an individual. Instead, the President, through his military subordinates, acts in the traditional role of the executive asserting jurisdiction and executing the laws established by Congress.

This situation is distinguishable from an assertion of jurisdiction for the pre-capture misconduct alleged to violate the law of war. Unless subject to the jurisdiction of the UCMJ established in Article 2, the perpetrator of such misconduct is not subject to the proscriptive provisions of the UCMJ at the time of the offense.[47] Instead, the laws of war prohibit and criminalize such "pre-capture" offenses. The fact that the perpetrator ultimately ends up in the custody of the United States does not somehow transform the nature of the offense from a violation of international law to a violation of United States domestic law, even if the individual is designated a prisoner of war.

This does not mean, however, that such offenders cannot be punished once they fall into the custody of the United States. Instead, prosecution must be based on a charge alleging a violation of international, and not domestic law, because it is international law that proscribes the pre-capture conduct. A military commis-

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ingly, by operation of Article 2, Congress has established who may be subject to an assertion of criminal liability based on a violation of a punitive article of the UCMJ. The primary category of individuals so subjected to application of the UCMJ are members of the armed forces of the United States, and other individuals associated with the armed forces (such as cadets at military academies). In addition, Article 2, section 9 extends UCMJ jurisdiction to prisoners of war *in the custody of the armed forces*. The effect of this provision is to subject enemy prisoners of war to the punitive articles of the UCMJ *after, and only after* they fall into the custody of the armed forces. This provision *does not* extend application of the punitive articles of the UCMJ to pre-capture misconduct by individuals who subsequently become prisoners of war. 10 U.S.C. § 802.

46. *Id*.

47. If the victim, or the perpetrator, is a United States national, he or she could be subject to prosecution in federal court for violation of the War Crimes Act. *See* The War Crimes Act of 1996, 18 U.S.C. § 2441 (2000) (amended in 1997) (replacing the term "grave breaches" with "war crimes" and including violations of Common Article 3 within the definition of war crimes). This statute, making certain war crimes federal criminal violations, limits the scope of jurisdiction to violations committed by, or against, United States nationals. *See* Aldykiewicz & Corn, *supra* n. 22, at 93–98 (discussing the jurisdictional limits contained in the War Crimes Act).

sion is one of a number of tribunals available for the prosecution of such offenses. The President is vested with the authority under both domestic law (the Constitution) and international law to convene such a tribunal to enforce the law of war.

A review of the UCMJ clearly indicates that Congress acknowledged the power of military courts to sit in judgment of individuals suspected of *pre-capture* violations of the laws of war. According to the first clause of Article 18,

> [G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter.[48]

This provision vests general courts-martial with the authority to try any person subject to the jurisdiction of the code. This grant of jurisdiction is limited to persons Congress determined fell under the proscriptive authority of the United States through operation of Article 2, such as members of the armed forces, certain civilians accompanying the force in time of war, and enemy prisoners of war subject to the authority of the United States at the time of the offense.[49] However, the second clause of Article 18 explicitly extends the jurisdiction of general courts-martial to violations of the law of war:

> General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.[50]

What is significant about this statutory provision for purposes of this analysis is that unlike the first clause of Article 18, this clause does not limit jurisdiction to "persons subject to the code." Congress thereby vested general courts-martial with the express authority to sit in judgment of offenses committed in violation of international law by individuals not subject to the pro-

48. 10 U.S.C. § 818.
49. *Id*. at § 802.
50. 10 U.S.C. § 818.

scriptive jurisdiction of the United States at the time of the offense.

Any doubt as to the meaning of this provision is dispelled by reference to the Rules for Courts-Martial.[51] These are procedural rules enacted by the President pursuant to the delegation of authority granted him in the UCMJ.[52] The 200 series Rules for Courts-Martial expound on the jurisdiction of courts-martial, and Rule for Courts-Martial 201 explicitly acknowledges that general courts-martial possess jurisdiction over violations of the law of war:

> *Cases under the law of war.* (i) General courts-martial may try any person who by the law of war is subject to trial by military tribunal for any crime or offense against: (a) The law of war; or (b) The law of the territory occupied as an incident of war or belligerency . . . [which] includes the local criminal law as adopted or modified by competent authority, and the proclamations, ordinances, regulations, or orders promulgated by competent authority of the occupying power.[53]

This grant of jurisdiction is also reflected in the 300 series of the Rules. These rules establish, inter alia, the procedures for charging offenses to be brought before courts-martial, and include illustrative discussions. Rule for Courts-Martial 307(c) specifically establishes how to allege an offense. The discussion to that rule reads as follows:

> *Charges under the law of war.* In the case of a person subject to trial by general court-martial for violations of the law of war (see Article 18), the charge should be "Violation of the Law of war;"[54]

Taken together, these provisions demonstrate that Congress vested the general courts-martial with the jurisdiction to try of-

51. *See* Manual for Courts-Martial, United States, R.C.M. (2002) [hereinafter MCM].

52. 10 U.S.C. § 836.

53. MCM, *supra* n. 51, at II–11.

54. *Id.* at II–27. The "charge" is the allegation on the charge sheet that is ultimately brought before the court, much like the information or indictment common to criminal practice in the United States. It is the statement of the offense establishing both jurisdiction and notice to the accused.

fenses in violation of the law of war, that Congress extended that jurisdiction to individuals not necessarily subject to the proscriptive jurisdiction of the United States at the time of the offense, and, perhaps most importantly, that the requisite criminality is established by international law ("Violation of the Law of war"), and no further legislative action is necessary to subject a perpetrator to prosecution under this grant of jurisdiction. In short, Congress, through the UCMJ, expressly authorized the use of a tribunal created by that statute (the general courts-martial) to try offenses established by international law (violations of the law of war). This statutory basis for the prosecution of international law violations undermines any assertion that "the Law-of-Nations Clause means that Congress must enact positive law if offenses are to be punished,"[55] a proposition that has been central to much of the criticism of the current military commission.[56]

This statutory grant of authority for a general court-martial to try *any* person subject to individual criminal responsibility for violation of the law of war does not expressly vest the President with authority to establish a military commission. Nor is it suggested that such authority is implied from this provision. Its relevance is, instead, the clear evidence it provides for the conclusion that Congress, when it drafted the UCMJ: (1) acknowledged the existence of offenses in violation of the law of war; (2) acknowledged that such offenses were subject to prosecution in tribunals established by the United States; (3) acknowledged the traditional role of military courts to adjudicate such offenses; and (4) expressly vested general courts-martial, one type of military court established by Congress, with the jurisdiction to try such cases. The sole jurisdictional predicate was that the charge properly allege a violation of the law of war subjecting the accused to individual criminal responsibility.

The significance of the UCMJ to the analysis of the authority of a military commission to try individuals for violations of the law of war is not, however, derived by mere implication through

55. Katyal & Tribe, *supra* n. 2, at 1269.

56. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (supporting the detainee's right to a hearing); Br. of Amicus Curiae Natl. Assn. of Crim. Def. Laws., at 17–20; Br. of Amici Curiae People for the Am. Way Found., The Tutherford Inst. & Eugene R. Fiddell at 17–19.

reference to Article 18. Instead, in Article 21[57] of the UCMJ, Congress expressly acknowledged that the jurisdiction granted to general courts-martial by Article 18[58] to try offenses in violation of the law of war was concurrent with the existing jurisdiction of military commissions (and other military tribunals):

> *Jurisdiction of courts-martial not exclusive*
>
> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses *that by statute or by the law of war* may be tried by military commissions, provost courts, or other military tribunals.[59]

Again, the specific reference to offenses that exist in violation of international law, requiring no further implementation or enactment by Congress, undermines any assertion that statutory offenses are a prerequisite to trial by military commission; or, as the Katyal/Tribe essay asserts, that "the Law-of-Nations Clause means that Congress must enact positive law if offenses are to be punished."[60] The distinct treatment in Article 21[61] of jurisdiction to try offenses established by statute *and* offenses established by the law of war demonstrates that Congress did not embrace the assertion that a violation of international law required enactment into positive law in order to become a viable offense before a military commission.

This theory of jurisdiction was the cornerstone of the Supreme Court's holding in *Ex Parte Quirin*,[62] the seminal case on the use of military commissions for the trial of war criminals. In sustaining the exercise of jurisdiction by a military commission created at the direction of President Roosevelt over captured Nazi saboteurs pursuant to the predecessor of Article 21, the Supreme Court indicated:

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57. 10 U.S.C. § 821.
58. *Id*. at § 818.
59. *Id*. at § 821 (emphasis added); *see also* MacDonnell, *supra* n. 32, at 25–39 (discussing the development of the jurisdiction of military tribunals).
60. Katyal & Tribe, *supra* n. 2, at 1269.
61. 10 U.S.C. § 821.
62. 317 U.S. 1 (1942).

> From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War [the predecessor to the UCMJ], and especially Article 15 [the predecessor to Article 21 of the UCMJ], Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the laws of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.[63]

Critics of the commissions attempt to dismiss the significance of Article 21 and the *Quirin* analysis of the predecessor to Article 21 by asserting that the authority it provides is only triggered during a period of declared war. In support of this assertion, it is routinely noted that *Quirin* was decided during a period of declared war, resulting in an implied declared war predicate for an exercise of jurisdiction pursuant to Article 21. Because Congress authorized military action against al Qaeda not by declaration of war, but through the Authorization for the Use of Military Force (AUMF),[64] this "declaration predicate" is essential to any critique of the commission. However, the implication that the powers of the President incident to war are applicable only when Congress

63. *Id*. at 27–28.

64. *Authorization for the Use of Military Force*, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF].

formally declares war is inconsistent with the well established jurisprudence establishing that a joint or concurrent resolution authorizing the use of force is a "functional equivalent" to such a declaration.[65]

The statutory construction of the UCMJ is also cited in support of this asserted declaration of war predicate. For example, the Katyal/Tribe essay asserts that internal consistency mandates that a declaration predicate be read into Article 21 because such a requirement exists relative to the exercise of UCMJ jurisdiction over civilians who accompany the forces in the field in time of war:

> In general, the UCMJ has been read narrowly to avoid military trials, in the absence of a formal declaration of war, of those who do not serve in our armed forces. For example, when a civilian employee of the Army was charged with criminal violations in Vietnam and tried by court-martial, the United States Court of Military Appeals decided that, in determining the applicability of the UCMJ, "the words 'in time of war' mean . . . *a war formally declared by Congress*." The court believed that "a strict and literal construction of the phrase 'in time of war' should" confine the jurisdiction of military courts.
>
> The UCMJ's term "in a time of war" thus requires a congressionally declared war to provide jurisdiction over civilians

65. *See* Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?* 157 Mil. L. Rev. 180, 231–232, n. 262 (1998).

This principle has already been invoked by the Supreme Court in addressing the authority of the President to order the detention of individuals captured on the field of battle. *See Hamdi*, 542 U.S. 507. In that decision, the Supreme Court rejected a narrow interpretation of the significance of the AUMF when it declared:

> In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.

Id. at 519. This extension of the AUMF by the plurality of the Court to the fundamental incidents of waging war renders the assertion that trial of alleged violations of the law of armed conflict serves not simply a punitive interest, but also a traditional and fundamental military interest, even more significant. If this assertion is valid, then the *Hamdi* decision would support the conclusion that the authority granted to the President by Congress in the AUMF includes the authority to try captured opposition personnel for alleged violations of the law of war, *even though Congress has never formally declared war*.

> for courts-martial or military tribunals. This strict reading provides an answer to those who treat *Quirin* as giving a definitive gloss to § 821, for it explains why the Court's "in time of war" language should be read narrowly. Standard "clear statement" principles—that if the legislature wants to curtail a constitutional right, it should say so clearly or its legislation will be construed to avoid the constitutional difficulty—support this strict reading. Without a clear statement by this Congress about the need for military tribunals, it will be difficult for a civilian court, on habeas review, to assess the exigencies of the situation and to determine whether the circumstances truly justify dispensing with jury trials, grand juries, and the rules of evidence.[66]

This argument once again exposes the danger of an imprecise understanding of the structure and operation of the UCMJ. The cases cited by the authors to support this position addressed authority to subject civilians to the punitive articles of the UCMJ.[67] These cases are therefore inapposite to the issue of jurisdiction of a tribunal established by the UCMJ to try an individual for violations of international law. As noted above, exercise of criminal jurisdiction through application of the punitive articles of the UCMJ is distinct from the exercise of criminal jurisdiction based on an allegation of a violation of the law of war.[68] The legitimate exercise of jurisdiction in such a situation is not based on the applicability of the UCMJ to civilians, but instead on whether the laws of war proscribed the conduct of the civilian, thereby subjecting the civilian to individual criminal responsibility under international law.

The Katyal/Tribe essay also challenges the significance of Article 21 by asserting that an implied declaration of war predicate is necessary in order to avoid an unconstitutional delegation of power from the legislature to the executive:

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66. Katyal & Tribe, *supra* n. 2, at 1288–1290 (citing *U.S. v. Averette*, 19 C.M.A. 363 (1970) (holding that the jurisdiction established by Congress in Article 2 of the UCMJ over civilians accompanying the armed forces in time of war exists only during periods of congressionally declared war)).

67. 10 U.S.C. at §§ 877–934.

68. *See supra* nn. 44–47 and accompanying text (explaining that the President acts within Congress' mandate when dealing with an individual that commits a crime while in the United States' custody).

> Indeed, if the UCMJ were stretched to give the President the power to create the tribunals purportedly authorized by this Order, then it would risk making the statute an unconstitutional delegation of power.[69]

The assertion that in order to sustain the authority of the President to establish the military commission, Article 21 must be read as a "grant of authority" reflects a failure to acknowledge the relationship between Articles 18 and 21 and the punitive articles of the UCMJ.[70] As noted above, Article 21 is not a grant of authority to the President to create a military commission. Instead, it is an acknowledgment that in certain circumstances, international law vests the President (and subordinate commanders) with that authority. It explicitly contrasts itself with Article 18, which is indeed a grant of authority to establish a tribunal—specifically a general court-martial—to try violators of the law of war. The *Quirin* decision recognized this by upholding the authority of a military commission to try individuals for offenses charged as violations of the law of war.[71]

Any critique of the authority of the military commission to try alleged violations of the law of war that fails to address the relationship between Article 18 and Article 21 is fatally flawed. These articles of the UCMJ, when considered in relation to each other, clearly establish that Congress has long acknowledged the authority of military commissions—a tribunal derived not from statute but from the law of war it is intended to enforce—to be established for the trial of offenses in violation of the law of war. Accordingly, it is unpersuasive to attack the validity of the commission by emphasizing a lack of express congressional authorization. Such a tribunal is an accepted venue for holding individuals accountable for misconduct that violates the law of war. Therefore, the linchpin to legitimacy is threefold: First, the law of war must be applicable to the individual at the time of the alleged misconduct; second, the charge against the individual must properly allege a violation of the law of war; finally, the tribunal must comply with the procedural requirements derived from the law of

69. Katyal & Tribe, *supra* n. 2, at 1290.
70. 10 U.S.C. §§ 877–934.
71. 317 U.S. at 17.

war. It is to these three genuine predicates of legitimacy to which this article will now turn.

II. A THEORY OF JURISDICTION: APPLICATION OF THE LAW OF WAR TO ARMED CONFLICT AGAINST TRANSNATIONAL TERRORISTS[72]

Whether brought before a domestic court, a military commission, or a general court-martial, any prosecution for an alleged war crime must be based on the same jurisdictional predicate: individual criminal responsibility resulting from a violation of the law of war. This seemingly apparent prerequisite to such an exercise of criminal jurisdiction has been perhaps the most overlooked aspect of the use of military commissions, but is perhaps the most complex issue related to the proposed prosecutions. Those scholars that have waded into this murky water have struggled to identify the legal basis for concluding that the actions of al Qaeda operatives and associated personnel constitute war crimes because they violate the law of war. There is certainly no doubt that the attorneys detailed to defend these individuals before the military commission will, if provided the opportunity, rely on this issue as a fundamental challenge to the exercise of jurisdiction by the commission.[73]

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72. For further discussion of the issues discussed in this Part, see generally Geoffrey S. Corn, *Snipers in the Minaret—What Is the Rule? The Law of War and the Protection of Cultural Property: A Complex Equation*, 2005 Army Law. 28 (July 2005).

73. *See* Reply Br. for Petr., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). In response to the assertion by the United States that the charges against Hamdan are legally sound, the Petitioner asserts:

> *The Laws of War Do Not Apply to this Stateless, Nonterritorial Conflict.* The government acknowledges that Hamdan is not a traditional war-crimes defendant. It does not allege that he is a soldier in a nation's armed forces, as in *Quirin* and *Yamashita*, nor does it allege his membership in a rebel group in civil war, as in *Milligan*. It alleges, instead, that Hamdan conspired with a terrorist group to commit crimes that have, heretofore, been the subject of criminal trials in civil courts (with near-uniform government success). It is true that Hamdan came into U.S. custody after being captured by bounty hunters in a country in a state of war. But the government does *not* charge him with any offense arising from that conflict. Instead, it asserts that Hamdan conspired with al Qaeda. The place of apprehension has no relevance to Hamdan's charge. Indeed, the charge would be no different, and the government could still insist on its right to try him before a commission, if he had been arrested by the police in a Chicago airport instead of turned over to the U.S. military in Afghanistan.

Id. at 6–7 (citations omitted).

The term "war crime" has been traditionally used to characterize misconduct on the battlefield by participants in "war." It is, however, perhaps a misnomer, the reason for which was so effectively articulated by Telford Taylor, who served as a prosecutor at the Nuremburg Tribunals:

> What is a "war crime"? To say that it is a violation of the laws of war is true, but not very meaningful.
>
> War consists largely of acts that would be criminal if performed in a time of peace—killing, wounding, kidnapping, destroying or carrying off other people[']s] property. Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors . . .
>
> But the area of immunity is not unlimited, and its boundaries are marked by the laws of war. Unless the conduct in question falls within those boundaries, it does not lose the criminal character it would have should it occur in peaceful circumstances. In a literal sense, therefore, the expression "war crime" is a misnomer, for it means an act that remains criminal even though committed in the course of war, because it lies outside the area of immunity prescribed by the laws of war.[74]

Thus, a war crime is an act or omission that falls outside the scope of immunity provided by international law, or more specifically, the law of war. This concept is really not remarkable in any sense, and is a well-established principle of international law. However, no matter how a war crime is defined, the essential predicate is that the act or omission alleged constitutes a violation of the law of war, which, in turn, requires application of the laws of war to both the situation and the actor. It is this aspect of establishing the jurisdiction for use of a military tribunal to prosecute al Qaeda and associated personnel that presents one of the most complex issues related to the validity of the commission.

A well-known theory among law of war practitioners and scholars is that the law of war becomes applicable, as a matter of international law, only when certain triggering criteria have been

74. Taylor, *supra* n. 43, at 415–416.

satisfied.[75] This is not simply a theoretical concept, but is instead a manifestation of the limited circumstances during which international law intrudes upon state sovereignty to dictate a body of regulation for certain activities. With regard to the prosecutions pending before the current military commissions, this concept has profound significance, for a conclusion that the events of September 11 and subsequent "terrorist" actions against the United States did not, as a matter of international law, satisfy these triggering criteria would deprive the military commission of essential jurisdiction. The significance of this determination, and the disparity in perceptions of the validity of such application of the laws of war, is illustrated in the following quote from Derek Jinks:

> What law applies to the September 11 terrorist attacks? Many characterize the atrocities as "acts of war" against the United States—suggesting that the "laws of war" apply. Of course, as a conceptual matter, this characterization is problematic because "war" traditionally involved formally-declared hostilities between sovereign states. The attacks nevertheless resemble "acts of war" in that they were extraordinarily severe, orchestrated from abroad by an organized enemy, and directed against the United States as a whole. Critics of this view maintain that although the attacks constituted aggravated crimes (such as "crimes against humanity" or "international terrorism"), they do not implicate the laws of war. This debate involves much more than descriptive accuracy. Indeed at stake is the proper direction of transnational antiterrorism law and policy; and, more specifically, whether and to what extent the rule of law might guide the collective response to what Harold Koh has called "the globalization of terror."[76]

Prior to 1949, the triggering event for application of the laws of war was simply regarded as war. What qualified as "war" was itself the subject of differing interpretations, the significance of which will be discussed later in this section. What is significant at this point is that the perceived manipulation of the definition of

75. *See e.g.* Leslie C. Green, *The Contemporary Law of Armed Conflict* 54–60 (2d ed., Manchester U. Press 2000) (discussing factors that generally determine when the international law of armed conflict applies to a particular conflict).

76. Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Intl. L. 1, 1–2 (2003) (citing Harold Hongju Koh, *The Spirit of the Laws*, 43 Harv. Intl. L.J. 23, 26 (2002)).

war in order to avoid obligations led to the seminal change in terminology related to this question—the adoption of the "armed conflict" trigger for application of the laws of war.

This change was codified in the four Geneva Conventions of 1949.[77] Those four treaties, three of which existed during World War II, each included "common" articles establishing when the

77. *See Convention (III) Relative to the Opening of Hostilities* (Oct. 18, 1907), http://www.icrc.org/ihl.nsf/FULL/190?OpenDocument. This treaty established the internationally accepted standard for initiating "war," a state of affairs between nations with significant international law consequences. The centrality of the terms "war" and "belligerents" in the seminal pre-1949 treaty addressing the rights, privileges, and duties of participants in armed conflicts, the *Convention Respecting the Laws and Customs of War on Land* and its Annex, suggests that the provisions of this treaty were understood to apply only during periods of war when such a state of affairs existed within the meaning of international law. *Convention (IV) Respecting the Laws and Customs of War on Land* (Oct. 18, 1907), http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument; *Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land* (Oct. 18, 1907), http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument. However, it also seems obvious from a review of both of these treaties that they were written to apply to hostilities between states and were not intended to address military operations conducted against non-state entities.

A cursory review of the history of military operations in the nineteenth and twentieth centuries suggests that the conduct of military operations against non-state actors was not a subject the delegates who drafted these two treaties—or the states that ratified them—were unfamiliar with. Such military operations were a common aspect of maintaining colonial empires. In light of this fact, there is no reason why the focus on state versus state conflict reflected in these treaties should be interpreted as evidence of an intent to exclude application of any law of war principles from conflicts with non-state actors.

Two illustrations from United States practice provide particularly useful examples of large-scale combat operations conducted against non-state entities—operations where United States forces clearly asserted the rights, duties, and obligations of belligerent forces. The first of these was the intervention in China during the Boxer Rebellion. United States forces joined other "coalition" partners to repress an uprising by a non-state entity attacking coalition interests and operating within China. Whether China was unable or unwilling to intervene to repress this entity is unclear. However, it is clear that United States forces engaged in combat operations of a nature, intensity, and duration properly characterized as armed conflict. There is no indication that United States forces treated this operation any differently from a regulatory perspective than any other combat operation. *See* Max Boot, *Savage Wars of Peace: Small Wars and the Rise of American Power* 69–98 (Basic Bks. 2003).

Another illustration is the punitive expedition conducted by United States forces against the forces of Pancho Villa in Mexico. Villa's forces were not the forces of the Mexican government but were instead involved in a rebellion against the Mexican government. In response to several incursions into the United States by Villa's forces, the United States Army (under the command of General Pershing) was ordered to enter the sovereign territory of Mexico (without Mexican consent) and conduct a punitive operation against Villa. This operation involved a large number of forces and spanned several months. Numerous combat engagements occurred between United States forces and Villa's forces. Again, it seems relatively clear that United States forces treated this operation as no different from any other combat operation for purposes of the regulation of the conflict. *Id.* at 182–204.

substance of the treaties would come into force—the triggering provisions. These two articles, Common Article 2[78] and Common Article 3,[79] defined four situations that would trigger application of the Geneva Conventions or limited provisions thereof: declared war; armed conflict of an international character between two or more states (even if a state of war is not recognized by one of them); belligerent occupation; and conflict not of an international character occurring in the territory of one of the states. Reference to the ICRC commentary to these articles reveals that the intent of the inclusion of the "armed conflict" language was to prevent the selective application of the Conventions based on a politicized definition of war. It thus seems clear that the drafters of the Conventions, and the states that ultimately became parties thereto, sought to develop a triggering mechanism that provided a legal analogue to the increasingly politicized term "war." That analogue was "armed conflict."

At the time this change in terminology was offered, two types of armed conflict were addressed. As noted above, these were armed conflicts between two or more states, and armed conflicts not of an international character occurring within the territory of a state. These two types of conflict have come to be known as "international armed conflicts" and "internal armed conflicts." Since that time, there has been an almost myopic focus on these two treaty provisions as the exclusive triggering standards for application of the laws of war.

The events of September 11 and the military operations conducted in its aftermath have challenged this paradigm. Since that date, large scale combat operations have been conducted by the

78. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* ch. I, art. 2 (Aug. 12, 1949), T.I.A.S. No. 3362; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea* ch. I, art. 2 (Aug. 12, 1949), T.I.A.S. No. 3363; *Geneva Convention Relative to the Treatment of Prisoners of War* pt. I, art. 2 (Aug. 12, 1949), T.I.A.S. No. 3364; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* pt. I, art. 2 (Aug. 12, 1949), T.I.A.S. No. 3365 [hereinafter, collectively, *Common Article 2*].

79. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* ch. I, art. 3 (Aug. 12, 1949), T.I.A.S. No. 3362; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea* ch. I, art. 3 (Aug. 12, 1949), T.I.A.S. No. 3363; *Geneva Convention Relative to the Treatment of Prisoners of War* pt. I, art. 3 (Aug. 12, 1949), T.I.A.S. No. 3364; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* pt. I, art. 3 (Aug. 12, 1949), T.I.A.S. No. 3365 [hereinafter, collectively, *Common Article 3*].

United States and numerous coalition allies against terrorist sanctuaries in a failed state; armed groups ostensibly forming the armed forces of that failed state; the regular armed forces of Iraq; foreign volunteers and dissident groups operating in Iraq; and small numbers of al Qaeda operatives in the territory of states not engaged in armed conflict with the United States. Many of these military operations fall outside the traditionally understood definitions of international or internal armed conflict. This has resulted in uncertainty regarding the applicability of the laws of war to these combat operations, which for ease of reference will be referred to as the Global War on Terror, or GWOT.

Analyzing application of the laws of war to the GWOT requires a reassessment of whether Common Article 2 and Common Article 3 do, in fact, establish the exclusive triggering criteria for the laws of war. It is the thesis of this Article that while these respective articles govern the applicability of the treaty provisions to which they relate, they do not exclude application of basic principles of the law of war to armed conflicts that fall outside the international/internal armed conflict paradigm. These basic principles—distinction, necessity and humanity[80]—are triggered by the legal analogue to war: armed conflict, regardless of the location, duration, intensity, or enemy engaged. As will be demonstrated below, this reassessment can lead to a result that is both pragmatic from a national security policy perspective and consistent with the fundamental purposes of the law of war. Indeed, as the law of war practitioner and scholar Charles Garraway has noted,

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80. Adam Roberts offers perhaps the most succinct articulation of these "basic principles":

> Although some of the law is immensely detailed, its basic principles are simple: the wounded and sick, POWs and civilians are to be protected; military targets must be attacked in such a manner as to keep civilian casualties and damage to a minimum; humanitarian and peacekeeping personnel must be respected; neutral or non-belligerent states have certain rights and duties; and the use of certain weapons (including chemical weapons) is prohibited, as also are certain other means and methods of warfare.

Adam Roberts, *The Laws of War in the War on Terror*, in *International Law and the War on Terror* 175, 178 (Fred L. Borch & Paul S. Wilson eds., Naval War College 2003). While Professor Roberts does not expressly include in his articulation of basic principles the principle of military necessity, it seems reasonably implied through his reference to distinction (implying targeting of an adversary) and limits on certain weapons (implying the authority to use non-prohibited weapons). *Accord* Rogers, *supra* n. 11, at 3–6 (discussing military necessity as the first "general principle" of the laws of war).

the law of war is a body of law that, by the very nature of its purpose, must be adaptable to emerging challenges related to armed conflict:

> The law of armed conflict is designed to have a greater degree of flexibility than national law because law, in many respects, always focuses on the last conflict. Accordingly, there is a requirement for built in flexibility so that we can apply the law designed for the last conflict to the new situation.[81]

The importance of exercising this inherent flexibility in order to ensure the applicability of basic principles related to the conduct of military operations is highlighted by Adam Roberts:

> In many counter-terrorist campaigns since 1945 issues relating to the observance or non-observance of basic rules of law, including the laws of war, have perennially been of considerable significance. This has been the case both when a counter-terrorist campaign has been part of an international armed conflict, and when such a campaign has been a largely internal matter, conducted by a government within its own territory, in a situation which may not cross the threshold to be considered an armed conflict. *In such circumstances the laws of war may be of limited formal application, but their underlying principles, as well as other legal and prudential limits, are important.*[82]

Before articulating the rationale for this concededly unorthodox theory, it is useful to consider the policy context for national decisions related to the applicability of the law of war. Any proponent of application of and respect for the laws of war who is unwilling to acknowledge the interplay between national security policy objectives and analysis of when this law applies is denying a reality that provides essential analytical context. There is no question that, in theory, policy considerations should not be permitted to influence such analysis. However, in the realm of national security, decision-making theory and reality often diverge and determinations related to the applicability of the law of war

81. Charles Garraway, *Panel II Commentary*—Jus in Bello, in *International Law and the War on Terror* 231, 232 (Fred L. Borch & Paul S. Wilson eds., Naval War College 2003).

82. Roberts, *supra* n. 80, at 187 (emphasis added).

to a given military operation are in no way immune from this truism.[83]

In relation to the GWOT, it is this context that exposes the deficiency of the "either/or" construct resulting from treating Articles 2 and 3 as the exclusive triggering criteria for application of the basic principles of the law of war. When national security policy makers are called on to decide upon the applicability of the law of war to a given military operation, they essentially will seek to satisfy three primary objectives. The first is to emphasize to their forces, and to the international community, uncompromising commitment to the basic humanitarian principles reflected in the Geneva Conventions. The second is to invoke the authority, on behalf of the forces called upon to engage an enemy, derived from the principle of military necessity. This authority permits those forces to take those measures not expressly prohibited by the law of war to bring about the prompt submission of the designated enemy,[84] wherever they are directed to do so. The third, and perhaps most subtle, is to achieve these two objectives without suggesting that the enemy is vested with any international legal status to which he is not legitimately entitled. The influence of this concern on United States policy is emphasized by Adam Roberts:

> For at least 25 years, the United States has expressed a concern, shared to some degree by certain other states, regarding the whole principle of thinking about terrorists and other irregular forces in a laws-of-war framework. To refer to such a framework, which recognizes rights and duties, might seem to imply a degree of moral acceptance of the right of any particular group to resort to acts of violence, at least against military targets. Successive US administrations have objected to certain revisions to the laws of war on the grounds that they might actually favor guerrilla fighters and terrorists, affording them a status that the United States believes they do not deserve.[85]

83. This observation is based primarily on the Author's experience as a member of the Department of Defense Law of Warworking Group from 2004–2005. During this time, the characterization of armed conflicts was routinely debated.

84. *See* FM 27-10, *supra* n. 11, at ¶ 3.

85. Roberts, *supra* n. 80, at 186 (citations omitted).

Relying exclusively on the Article 2/3 paradigm compromises the ability to satisfy all of these policy objectives, even when applying expanded definitions of the meaning of international or internal armed conflict. Using the example of military operations directed against an al Qaeda safe haven illustrates this point. One option would be to stretch the definition of international armed conflict to apply to such operations on the theory that al Qaeda should be treated as a de facto state armed force for purpose of law of war application. Assuming the credibility of this theory arguendo, it reveals a basic flaw: it purports to vest members of al Qaeda with a status reserved for members of regular state-sponsored armed forces, a status in no way justified by either their character or conduct. Thus, while this approach certainly satisfies the objective of invoking the principles of humanity and necessity, it forces the policy makers to explain why the enemy is not entitled to the beneficial status normally associated with international armed conflict—a process that has occurred vis-à-vis individuals captured in Afghanistan.[86]

The second option would be to characterize the military operation as non-international armed conflict triggering the substance of Common Article 3. This theory certainly seems more plausible than the first theory, and, if confined to the "either/or" choice between Common Article 2 and Common Article 3, the more acceptable. However, it not only requires a dismissal of the traditionally understood scope of that article and the plain language purporting to confine applicability to "the territory of a High Contracting Party,"[87] but this theory also fails to satisfy the three critical policy objectives outlined above.

Such a theory would result in application of the principle of humanity, and would prevent the enemy from claiming a status reserved for enemies engaged in state-versus-state conflict.[88]

86. *See* Memo. from Pres. George W. Bush, *Humane Treatment of al Queda and Taliban Detainees* (Feb. 7, 2002) (available at http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/dir_20020207_Bush_Det.pdf) (announcing the President's determination that, although the conflict with Afghanistan triggered the Geneva Convention, captured Taliban forces were not entitled to prisoner of war status because they failed to meet the implied requirements imposed by the Convention on members of the regular armed forces).

87. *Common Article 3*, *supra* n. 79.

88. As an indication of the policy significance states attach to the prospect of vesting an opponent with a "status" not justified by the nature of the organization to which they

However, it would undermine the authority derived by the principle of military necessity through the implication that actions should be limited to operations against an internal threat. It is true that the traditional understanding of the law of war emphasizes a strict distinction between the law that regulates the conduct of armed conflict (*jus in bello*) and the law that governs the legality of the armed conflict (*jus ad bellum*).[89] This division of authorities remains critical to ensuring a uniform application of the laws of war regardless of the perceived legitimacy of a conflict. However, the GWOT has revealed that it is almost unavoidable that characterizing an armed conflict that transcends national borders as a "Common Article 3" conflict will undermine the legitimacy of transnational military operations due to the inference that the conflict is limited to an "internal" fight. As a result, policy makers responsible for acting on the recommendations of government legal advisors perceive such characterization as presenting an unacceptable degradation to the necessity-based authority for the conduct of transnational military operations.[90]

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belong, consider the following excerpt from the ICRC commentary to Common Article 3 noting that, at the time it was proposed, even this baseline humanitarian obligation was considered problematic because it took the form of a provision on an international treaty purporting to mandate the conduct of states in their internal affairs:

> To compel the Government of a State in the throes of internal conflict to apply to such a conflict the whole of the provisions of a Convention expressly concluded to cover the case of war would mean giving its enemies, who might be no more than a handful of rebels or common brigands, the status of belligerents, and possibly even a certain degree of legal recognition. There was also a risk of ordinary criminals being encouraged to give themselves a semblance of organization as a pretext for claiming the benefit of the Convention, representing their crimes as "acts of war" in order to escape punishment for them.

Commentary on the Geneva Conventions of 12 August 1949, Volume III: Geneva Convention Relative to the Treatment of Prisoners of War 32 (Jean de Preux ed., ICRC 1960) (available at http://www.cicr.org/ihl.nsf/COM/375-590006?OpenDocument) [hereinafter *ICRC Commentary—Common Article 3*].

89. Green, *supra* n. 12, at 141–145.

90. This is in no way intended to suggest such a concern is a legitimate consideration in determining applicability of the law of war. Indeed, considering such policy concerns in such analysis is always troubling. However, as noted in the text, in the opinion of this Author, it is simply unrealistic to dismiss the influence of such considerations on applicability analysis. As a result, compliance with the law of war will be better ensured by acknowledging such influences, and developing an effective paradigm to address them. No matter how vehemently critics might object to such a pragmatic approach to this problem, one need only consider the strained interpretations of applicability of this law not only to the GWOT, but also to operations such as Just Cause in Panama or Urgent Fury in Grenada to appreciate why this must be the approach.

This combination of treating the Article 2/3 construct as the exclusive triggering authority for this law with the inability of either theory to satisfy these underlying policy objectives has resulted in a confused and sometimes contradictory legal posture for United States forces. Perhaps a legitimate alternate theory related to application of the laws of war to military operations associated with the GWOT provides not only a solution to this dilemma, but also establishes a valid jurisdictional predicate for the invocation of law of war-based criminal sanction.

The historic trigger for application of the fundamental principles of the law of war is the international legal analogue of what was traditionally characterized as war, which was simply "armed conflict." When armed forces engaged in such armed conflict, they carried with them the fundamental principles of the law of war, both permissive and restrictive. The characterization of these basic principles certainly varied prior to the initiation of the process of codifying rules for the conduct of hostilities in treaty form. Thus, they may have taken the form of codes of conduct, codes of chivalry, military manuals, and orders.[91] This does not, however, undermine the basic conclusion that throughout history, compliance with basic norms of conduct during military operations was viewed as the *sine qua non* of a professional military force.[92] Indeed, many scholars who have written on the law of war begin with a discussion of these historical roots to the contemporary legal regime. For example, A.P.V. Rogers begins his book, *Law on the Battlefield*,[93] with the following introduction:

> Writers delve back through the history of centuries to the ancient civilizations of India and Egypt to find in their writings evidence of the practices intended to alleviate the sufferings of war. This evidence is to be found in agreements and treaties, in the works of religious leaders and philosophers, in regulations and articles of war issued by military leaders, and in the rules of chivalry. It is said that the first systematic code of war was that of the Saracens and was based on the Koran. The writers of the Age of Enlighten-

91. *See generally* Green, *supra* n. 12 (discussing the historical evolution of the law of war).

92. *Id.*

93. Rogers, *supra* n. 11.

> ment, notably Grotious and Vattel, were especially influential. It has been suggested that more humane rules were able to flourish in the period of limited wars from 1648 to 1792 but that they then came under pressure in the drift towards continental warfare, the concept of the nation in arms and the increasing destructiveness of weapons from 1792 to 1914. *So efforts had to be made in the middle of the last century to reimpose on war limits which up to that time had been based on custom and usage.*[94]

This history justifies questioning the Article 2/3 paradigm as the exclusive triggering criteria for application of basic principles of the law of war. As is suggested by Rogers, prior to the development of that "triggering standard," armed forces did not appear to consider "conflict typing" as an essential predicate to compliance with these principles. Instead, they invoked the principle of military necessity, and they were constrained by the basic principle of humanity, as understood in historical context.

This "basic principle" concept was severely strained during the years between the First and Second World Wars, a situation exacerbated by the fact that the scope of treaty-based regulation of hostilities at that time was strictly limited to "war," which was understood in the classic terms of a contention between states.[95] During this period, brutal internal conflicts in Spain, Russia, and China challenged this customary expectation that forces engaged in armed conflict would conduct themselves in accordance with these basic principles. This perceived failure of international law to provide effective regulation for non-international armed conflicts was the primary motivation underlying the creation of Common Article 3.[96] However, it is perhaps overly broad to suggest that Common Article 3 was "necessary" to ensure compliance with basic principles during such conflicts. Instead, Common Article 3 might instead be legitimately viewed as a fail-safe to provide the international community a basis to demand compliance with such principles when armed forces refuse to comply with the customary standards of conduct related to any military operation involving the use of force.

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94. *Id.* at 1 (emphasis added and internal citations omitted).
95. Green, *supra* n. 75, at 54–62.
96. *Id.*

Indeed, even Common Article 2 appears to have been a response to a failure of the traditional expectation that armed forces engaged in "war" between states would acknowledge applicability of the laws of war.[97] The rejection of "war" as a trigger for the laws of war in favor of "armed conflict" was an attempt to prevent what might best be described as "bad faith avoidance" of compliance with the customary standards related to the *jus in bello*.[98] The qualifier of "international" was, as indicated in the ICRC Commentary, an effort to emphasize that specific provisions of the Geneva Conventions were triggered by armed conflicts con-

97. According to the ICRC Commentary,

> Since 1907 experience has shown that many armed conflicts, displaying all the characteristics of a war, may arise without being preceded by any of the formalities laid down in the Hague Convention. Furthermore, there have been many cases where Parties to a conflict have contested the legitimacy of the enemy Government and therefore refused to recognize the existence of a state of war. In the same way, the temporary disappearance of sovereign States as a result of annexation or capitulation has been put forward as a pretext for not observing one or other of the humanitarian Conventions. It was necessary to find a remedy to this state of affairs and the change which had taken place in the whole conception of such Conventions pointed the same way. The Geneva Conventions are coming to be regarded less and less as contracts concluded on a basis of reciprocity in the national interests of the parties, and more and more as a solemn affirmation of principles respected for their own sake, a series of unconditional engagements on the part of each of the Contracting Parties 'vis-à-vis' the others. A State does not proclaim the principle of the protection due to prisoners of war merely in the hope of improving the lot of a certain number of its own nationals. It does so out of respect for the human person.
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> • • •
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> By its general character, this paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for the recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of de facto hostilities is sufficient.
>
> It remains to ascertain what is meant by "armed conflict". *The substitution of this much more general expression for the word "war" was deliberate. It is possible to argue almost endlessly about the legal definition of "war".* A State which uses arms to commit a hostile act against another State can always maintain that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence [sic]. The expression "armed conflict" makes such arguments less easy. Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.

Commentary on the Geneva Conventions of 12 August 1949, Volume III: Geneva Convention Relative to the Treatment of Prisoners of War 19–20, 22–23 (Jean de Preux ed., ICRC 1960) (available at http://www.cicr.org/ihl.nsf/COM/375-590005?OpenDocument) (emphasis added) [hereinafter *ICRC Commentary—Common Article 2*].

98. *Id.*

ducted under state authority. However, as that same commentary indicates, it is the "armed conflict" nature of military operations that distinguish them—and the law that regulates them—from law enforcement activities.

It is clear that the GWOT has strained traditional application of the Common Article 2/3 triggers for law of war application.[99] Such a strain in existing law is not, however, fatal to the ability of that law to adapt to the necessities of the situation. This is particularly true with regard to the law of war, as noted by Professor Charles Garraway:

> All new warfare operates to stress existing law. This is true for every war and every conflict occurring over the last several hundred years. The new type of warfare involved in "the war on terrorism" is no exception. Caution should be taken, however, not to throw out the existing regime but instead we should study and analyze these stresses for such stresses are not necessarily fatal.[100]

Consistent with this flexibility imperative highlighted by Professor Garraway, the Common Article 2/3 construct can be interpreted as triggers for application of their treaty provisions. Thus, they might be understood as a layer of regulation augmenting the basic principles of the law of war triggered by *any* armed conflict.

The significance of the contextual background for these treaty provisions when considering whether they must be strictly interpreted for purposes of determining when the law of war is triggered is noted by Anthony Dworkin, founder of the Crimes of War Project:[101]

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99. *See* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 Am. J. Intl. L. 1, 2–9 (Jan. 2004) (discussing the complex challenge of conflict categorization related military operations conducted against highly organized non-state groups with transnational reach); *see also* Kirby Abbott, *Terrorists: Combatants, Criminals, or . . . ?* in *The Measures of International Law: Effectiveness, Fairness, and Validity, Proceedings of the 31st Annual Conference of the Canadian Council on International Law*, Ottawa (Oct. 24–26, 2002); *CRS Report*, *supra* n. 22 (analyzing whether the attacks of September 11 triggered the law of war).

100. Garraway, *supra* n. 81, at 231.

101. The Crimes of War Project, established in 1999, is "a collaboration of journalists, lawyers and scholars dedicated to raising public awareness of the laws of war and their application to situations of conflict." Crimes of War Project, *About the Project—Objectives*, http://www.crimesofwar.org/about/about.html (accessed May 20, 2006).

> During the period when the laws of war were evolving, it seems to have been assumed that non-international conflicts would also be internal conflicts—that they would be confined to the territory of a single state. But there is no inherent reason of principle why that should be the case. As already stated, the essential point about the concept of non-international armed conflict is that it refers to military contests that are not fought between the armed forces of nation states, which alone under international law have the authority to go to war. In that respect, the conflict between al Qaeda and the United States, which can best be described as a kind of global insurgency, falls clearly into the non-international category.[102]

In short, whenever an armed force engages in operations that rise to the level of armed conflict,[103] basic principles of the law of

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102. Anthony Dworkin, *Military Necessity and Due Process: The Place of Human Rights in the War on Terror*, in *New Wars, New Laws?: Applying the Laws of War in 21st Century Conflicts* 53, 60–61 (David Wippman & Matthew Evangelista eds., Transnatl. Publishers 2005) (citations omitted). Dworkin goes on to assert that although triggered by armed conflict against terrorist organizations, the laws of war provide no basis for the conduct of military action against these entities. This conclusion will be discussed, and questioned, below.

103. In determining what constitutes an armed conflict, the analytical criteria offered by the ICRC Commentary in relation to the distinction between internal civil disturbance and armed conflict seem both logical and effective:

> What is meant by "armed conflict not of an international character"? The expression is so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms—any form of anarchy, rebellion, or even plain banditry. For example, if a handful of individuals were to rise in rebellion against the State and attack a police station, would that suffice to bring into being an armed conflict within the meaning of the Article? In order to reply to questions of this sort, it was suggested that the term "conflict" should be defined or—and this would come to the same thing—that a list should be given of a certain number of conditions on which the application of the Convention would depend. The idea was finally abandoned, and wisely so. Nevertheless, these different conditions, although in no way obligatory, constitute convenient criteria, and we therefore think it well to give a list of those drawn from the various amendments discussed; they are as follows:
>
> 1. That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
> 2. *That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.*
> 3. (a) That the de jure Government has recognized the insurgents as belligerents; or

war are triggered. When such operations also satisfy the criteria of Common Article 2, these principles become augmented by the provisions of the conventions triggered by such a conflict.[104] With regard to the trigger of Common Article 3, operations falling within the traditional definition of internal armed conflict[105] would unquestionably be regulated by the substance of that article. However, the basic principles reflected in Common Article 3 are redundant with the basic principles of humanity triggered by

(b) *That it has claimed for itself the rights of a belligerent; or*
(c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
(d) *That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.*

4. (a) That the insurgents have an organization purporting to have the characteristics of a State.
(b) That the insurgent civil authority exercises de facto authority over the population within a determinate portion of the national territory.
(c) That the armed forces act under the direction of an organized civil authority and are prepared to observe the ordinary laws of war.
(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

ICRC Commentary—Common Article 3, *supra* n. 88, at 35–36.

104. This bifurcated interpretation of principles *reflected* in treaty articles was clearly endorsed by the ICTY in the *Tadic* decision on jurisdiction when the Tribunal discussed the requirements for application of individual criminal responsibility under Article 3 of its Statute (vesting the Tribunal with competence to adjudicate violations of the laws or customs of war):

> The Appeals Chamber deems it fitting to specify the conditions to be fulfilled for Article 3 to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3:
>
> i. the violation must constitute an infringement of a rule of international humanitarian law;
> ii. *the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met . . . .*

Tadic, 35 I.L.M. at 62, ¶ 94.

105. As a general proposition, the traditional conception of "internal armed conflict" involves some dissident group within a state challenging the authority of that state for either a change of government or independence. The ICRC Commentary to the Additional Protocol II, the treaty expressly intended to supplement the provisions of Common Article 3 applicable to non-international armed conflicts, indicates that:

> The Protocol applies on the one hand in a situation where the armed forces of the government confront dissident armed forces, i.e., where there is a rebellion by part of the government army, or where the government's armed forces fight against insurgents who are organized in armed groups, which is more often the case.

Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 at 1351 (Jean Pictet ed., ICRC 1987) (available at http://www.cicr.org/ihl.nsf/COM/475-760004?OpenDocument) [hereinafter *ICRC Commentary—Protocol II*].

any armed conflict, and therefore the substantive effect of such a conclusion would be *de minimis*.

This basic principles concept would, however, supplement the principle of humanity with other basic principles: necessity and distinction. In contrast, however, a narrow interpretation of Common Article 3 with the resulting conclusion that it provides the exclusive source of application for the law of war would undermine application of these principles whenever the strict triggering criteria of Common Article 3 were not satisfied—even when armed forces were engaged in conflict operations (such as operations conducted against non-state actors operating outside the territory of the state targeting those actors).

Such an expanded application of the basic principles of the law of war has actually been a cornerstone of United States military policy for many years. This policy is reflected in the Department of Defense Law of War Program,[106] which mandates that the armed forces of the United States must treat *any* armed conflict as the trigger for application of the law of war.[107] This policy has been the foundation for law of war application during every phase of the GWOT, and reflects the basic proposition that armed conflict requires application of basic principles of the law of war, no matter how that conflict is characterized.

There is, unfortunately, little evidence of how states understood the impact of Common Articles 2 and 3 at the time they were developed. However, nothing in the text of these provisions,

106. DOD Directive 5100.77, *supra* n. 5.

107. The exact language is:

> 4.1. Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.

Id. at ¶ 4.1*; see also* Timothy E. Bullman, *A Dangerous Guessing Game Disguised as an Enlightened Policy: United States Laws of War Obligations during Military Operations Other Than War*, 159 Mil. L. Rev. 152, 173–177 (1999) (analyzing the potential that the United States law of war policy could be asserted as evidence of a customary norm of international law).

Other armed forces have implemented analogous policy statements. For example, the German policy to apply the principles of the law of war to any armed conflict, no matter how characterized, was cited by the ICTY in the *Tadic* jurisdictional appeal as evidence of a general principle of law extending application of the law of war principles derived from treaties governing international armed conflict to the realm of internal armed conflict. *See Tadic*, 35 I.L.M. at 68, ¶ 118 (citing the German Military Manual of 1992); *see also* Bullman, *supra* n. 107, at 164 (discussing the significance of the *Tadic* court's citation to German policy in terms of its effects on the United States).

nor the ICRC Commentary, indicates that they were intended to serve as the exclusive triggers for application of the law of war. The armed conflict in Korea, however, does provide critical insight into the perceptions of armed forces on the applicability of this law when the Geneva Conventions were not triggered. At the time of that armed conflict, neither the United States nor North Korea, were yet parties to these new Conventions. The United States position regarding the treatment of captured personnel in Korea in 1950 lends support to the conclusion that it has long embraced this basic principles concept and did not, at that time, consider the treaty application triggers to be the exclusive authority for applying such principles:

> The United States, in reply to the ICRC on July 3, 1950, stated that without regard to the legal applicability of the Geneva Conventions of 1929 and 1949, the Unite States Government would be guided by the humanitarian principles of the Convention. On July 4th, General MacArthur, Commander in Chief of the United States forces in the Far East, issued a proclamation stating that North Korean personnel captured by armed forces under his command in Korea would be treated in accordance with the *humanitarian principles applied and recognized by civilized nations involved in armed conflict.* Later, after he was designated as UN Commander, General MacArthur announced that he had extended the proclamation to all forces under the UN Command.[108]

This quotation indicates that it was the existence of armed conflict, and not the character of that conflict, that served as the triggering event for application of the humanitarian principles referred to by General MacArthur. A similar emphasis was placed on the existence of "armed conflict" by the Secretary General of the United Nations when, in 1999, he issued a Bulletin titled "Observance by United Nations Forces of international humanitarian law."[109] This Bulletin mandated compliance with basic

108. JAG Off., *Geneva Conventions of 1949, Background and Analysis*, Vol. 1, at Tab E, p. 2 (1955) (emphasis added) (prepared during 1954–1955 by members of the State-Defense-Justice working group for use in conjunction with the Senate's consideration of the *Geneva Conventions of 1949*).

109. *Observance by United Nations Forces of International Law*, Secretary-General's

principles of the law of war (humanitarian law) during any operation that qualified as an "armed conflict." No characterization qualification was included, and the application paragraph demonstrates an extremely expansive interpretation of the concept of armed conflict to which such principles apply:

> Section 1
> (*Field of application*)
>
> 1.1 The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence [sic].[110]

Both of these sources—one from the years immediately following the development of Common Articles 2/3; the other from a time long after these Articles obtained customary international law status—reflect the pragmatic recognition that the trigger for application of the basic principles of the law of war is simply armed conflict.

From a political and/or policy perspective, in order to emphasize the unique nature of the armed conflict ongoing against transnational terrorist organizations, and to distinguish it from the traditionally acknowledged categories of "international" armed conflict and "internal" armed conflict, it would be useful to adopt the characterization of "transnational armed conflict." It is, however, important to emphasize that, consistent with the theory outlined above, this "transnational" qualifier is a reflection of the nature of the operations and not essential for triggering basic law of war principles. It is the armed conflict nature of the operations that results in application of these basic principles. Application of the law of war to such armed conflict seems justified by a careful analysis of the underlying humanitarian rationale of Common

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Bulletin, ST/SGB/1999/13 (Aug. 6, 1999) (available at http://www.un.org/peace/st_sgb_1999_13.pdf).

110. *Id*. at § 1.1.

Article 3, the history of armed conflicts since 1949, and the fundamental purpose of the law of war.

This theory of the transnational armed conflict relies on the meaning of armed conflict represented by Common Article 3 to support the application of the principles of Common Article 3 beyond the realm of purely internal conflicts. Such an extension is consistent with the purpose of Common Article 3 and state practice. Since the inception of Common Article 3, the regular armed forces of nation states, including the armed forces of the United States, have often been called upon to conduct military operations that did not qualify as international armed conflicts, but nonetheless involved activities normally associated with "combat operations."[111] Additionally, in the two seminal international tribunal cases analyzing the relationship between internal and international armed conflicts, the issue of external involvement and sponsorship was addressed and determined not to transform these conflicts from the non-international to international.[112] This historical context and jurisprudence is relevant because it suggests that the concept of non-international armed conflict has always involved a de facto transnational character, even though that character has not been sufficient to transform such conflicts into international armed conflicts.

As a result, and due to the expanding nature of such operations within the broader context of the GWOT, it is essential to carefully assess the meaning of the term "conflicts not of an international character" for purpose of determining applicable provisions of the law of war. In so doing, the following considerations are useful: the interpretive guidance provided by the ICRC Commentary; the humanitarian rationale underlying application of

111. Virtually every non-international armed conflict that has occurred during the later half of the twentieth century involved transnational characteristics—ranging from the use of adjacent territories for safe haven to the receipt of active logistics, training, and command and control support obtained from neighboring states. Indeed, even the Spanish Civil War of 1936–1939, which served as a major motivation for the development of Common Article 3, involved substantial transnational aspects in the form of arm, equip, train, and even voluntary participation programs executed by Germany and Italy (on behalf of the Nationalists) and the Soviet Union (on behalf of the Republicans). *See* Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 Mil. L. Rev. 109, 115–117 (Dec. 2000) (analyzing the impact of the Spanish Civil War on the development of Common Article 3).

112. *Nicaragua v. U.S.*, 1986 I.C.J. 14, 26 (1986); *Tadic*, 35 I.L.M. at 55–57.

baseline standards to military operations not involving two opposing state entities; and United States views with regard to the scope of Common Article 3. Taken together, these sources support the conclusion that transnational armed conflict—an armed conflict that is neither international nor purely internal in terms of the Common Article 2/3 paradigm—is regulated by basic principles of the law of war.

The ICRC Commentary notes that there is no objective set of criteria for determining the existence of an armed conflict not of an international character. The Commentary, however, states:

> Speaking *generally*, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with '*armed forces*' on either side engaged in '*hostilities*'—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.[113]

This excerpt refers to what is traditionally regarded as "internal" armed conflict. This reference, however, need not be treated as dispositive on the question of what is an armed conflict. It is reasonable to consider this quotation as a reflection of the historical context in which the provision was drafted, which is also manifested by the suggestion that Common Article 3 would only apply when "the [p]arty in revolt . . . possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and [has] the means of respecting . . . the Convention."[114]

Common Article 3 is written in much broader terms. What seems clear is that with this article the international community was attempting to respond to the need to ensure some minimal international humanitarian regulation of activities that rose to the level of "armed conflicts," even if such conflicts did not take on an "international" character, without creating the basis for an unjustifiable intrusion into state sovereignty.

When analyzing whether a transnational military operation should be considered an armed conflict within the meaning of Common Article 3, it is important to note that there is absolutely no indication that the drafters considered conflicts between the

113. *See ICRC Commentary—Common Article 3*, *supra* n. 88, at 37.
114. *Id.* at 36.

regular armed forces of a state and a transnational non-state actors. Instead, it appears the primary concern was to ensure that application of this provision of international law would be restricted to activities involving the resort to armed force by a state in response to a threat posed by some type of armed opposition group.

What is most instructive, however, is to consider what is often regarded as the most effective "interpretive aid" provided by the ICRC Commentary related to the meaning of armed conflict—that the line between an internal disturbance immune from international regulation and a conflict requiring international regulation is crossed when "the legal Government is obliged to have recourse to the regular military forces"[115] to combat the party in revolt. This indicates that the nature of the military activities, and not the locale, is most instructive on the applicability of international regulation to any given military operation. Furthermore, this focus seems to transcend operations that were historically considered purely "internal", and provides a logical, analytical justification for determining when the limited law of war regulation associated with armed conflict should be applied to military operations.

There is no doubt that Common Article 3 was motivated by a perceived need to interject some limited humanitarian regulation into the realm of conflicts that are not international in character.[116] However, the GWOT has called into question the basic assumption that because the contextual motivation for this monumental development in the regulation of armed conflict was "internal" conflicts, the fundamental goal of ensuring a baseline of humanitarian regulation of armed conflict falling somewhere below the threshold of Common Article 2 should be restricted to conflicts totally confined to the internal territory of a nation state. An alternate interpretation would disassociate the contextual motivation that resulted in the "internal" emphasis from the underlying desire to inject law of war application to any situation rising above the threshold of domestic law enforcement activity and into

115. *ICRC Commentary—Common Article 3*, *supra* n. 88, at 36.

116. *See id.* at 38–41 (discussing the extent of the obligation to provide a minimum level of humane treatment).

the realm of military armed conflict.[117] The logical result of such an alternate interpretation would be extension of the fundamental humanitarian principles reflected in Common Article 3 to any armed conflict, a concept that seems consistent with the ICRC Commentary:

> Humane treatment. [W]e find expressed here the fundamental principle underlying the four Geneva Conventions. It is most fortunate that it should have been set forth in this Article, in view of the decision to dispense with a Preamble. The value of the provision is not limited to the field dealt with in Article 3. Representing, as it does, the minimum which must be applied *in the least determinate of conflicts*, its terms must [*a fortiori*] be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable.[118]

It is clear that the desire to interject limited humanitarian regulation into a realm of activities historically shielded from international regulation served as the motivating drive behind creation of Common Article 3. Indeed, it was the almost "self evident" legitimacy of requiring such limited humanitarian respect in such conflicts that served as the logical basis for the international

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117. In fact, according to the ICRC Commentary, the humanitarian nature of the mandate established by Common Article 3 was apparently so universally applicable to any internal disturbance that there appeared virtually no risk of embracing the broadest possible application of this Article:

> Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfil any of the above conditions? We do not subscribe to this view. *We think, on the contrary, that the scope of application of the Article must be as wide as possible.* There can be no drawbacks in this, since the Article in its reduced form, contrary to what might be thought, does not in any way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party. It merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the national legislation of the States in question, long before the Convention was signed. What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages? No Government can object to observing, in its dealings with enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, when dealing with common criminals.

Id. at 36–37 (emphasis added).

118. *Id.* at 38 (emphasis added).

regulation of events solely within the sphere of state sovereignty.[119]

United States practice with regard to the scope of Common Article 3 also supports a broad definition of the concept of armed conflict. In 1986, President Reagan submitted to the Senate for advice and consent Protocol II Additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 8, 1977.[120] With certain declarations, reservations, and understandings, he recommended its ratification.[121] The purpose of Additional Protocol II was to supplement, without altering, the field of application of Common Article 3 for the protection of victims of conflicts not of an international character. However, the plain text of the scope provision of Additional Protocol II applied a more constrained cri-

119. It is significant that the original international efforts to codify the laws of war in treaty form included a provision indicating that unanticipated types of conflict must be regulated by the principles of humanity. This provision required that:

> [I]n cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Convention Respecting the Laws and Customs of War on Land preamble (Oct. 18, 1907), http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument [hereinafter *Hague IV*].

This language is known as the Martens Clause in honor of Feodor Martens, the Russian diplomat responsible for first proposing the language in the *Declaration Renouncing the Use, in Times of War, of Explosive Projectiles under 400 Grammes Weight* (Dec. 11, 1868), http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument [hereinafter *St. Petersburg Declaration of 1868*]. It was inserted into the Preamble of the Hague Convention of 1899 and has been replicated in subsequent laws of war treaties. Interestingly, it was omitted from the Geneva Conventions of 1949, but subsequently reappeared in a somewhat modified form in Additional Protocol I to the Geneva Conventions:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.

Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict art. I (entered into force Dec. 7, 1979), http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument [hereinafter *Protocol I*].

120. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts* (entered into force June 8, 1977), http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument [hereinafter *Protocol II*].

121. Ltr. of Transmittal from Pres. Ronald Reagan to the U.S. Sen. (Jan. 29, 1987) reproduced in *United States: Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions, Relating to the Protection of Victims of Noninternational Armed Conflicts*, 26 I.L.M. 561, 562 (1987) [hereinafter *Protocol II* Ltr. of Transmittal].

terion for application than the broad "conflicts not of an international character" language of Common Article 3:

> This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and *which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.*[122]

The United States response to this narrow scope provision rejected the strict requirements codified in Article 1, and accordingly reflected support for a broad application of these protections, and by implication an expanded definition of what qualifies as an armed conflict:

> The final text of Protocol II did not meet all the desires of the United States and other western delegations. In particular, the Protocol only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations. This is a narrower scope than we would have desired, and has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerilla operations over a wide area. We are therefore recommending that the U.S. ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions (and only such conflicts), which will include all non-international armed conflicts as

122. *Protocol II*, *supra* n. 120, at art. 1 (emphasis added).

> traditionally defined (but not internal disturbances, riots and sporadic acts of violence).[123]

While this language refers to "traditionally defined" non-international armed conflicts, it also clearly represents United States opposition to narrowly defining the meaning of armed conflict for purposes of triggering basic law of war regulation. The intent seems clear—exclude only "non-conflict" internal matters from this scope of application. This position seems logical considering the quasi-transnational nature of many "internal" armed conflicts that occurred during this period (*e.g.*, Vietnam, Afghanistan, Nicaragua, El Salvador).

Defining what constitutes a "traditional" non-international armed conflict today differs substantially from how that term would have been defined in 1986. The emergence of transnational, highly organized, and well-equipped groups espousing a goal of waging "war" against democratic nations is primarily a post-Cold War phenomenon.[124] While conflict with such groups was obviously not the object of United States concern at the time this position was asserted, the pragmatic nature of the United States policy reflected in this statement supports an expanded application of law of war principles to armed conflict with such hostile groups. As will be demonstrated in Part III, application of these law of war principles provides the basis for charging al Qaeda members with limited law of war violations.

At least one ally in the GWOT has endorsed such a broad application of the laws of war. In response to the attacks of September 11, Canada committed its armed forces to coalition operations targeting al Qaeda elements in Afghanistan and the Taliban regime that supported them. Canada cited the inherent right of collective and individual self-defense as the international legal basis for its action, based on the conclusion that the attacks of September 11 qualified as an "armed attack":

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123. Ltr. of Submittal from George P. Shultz, Sec. of St., to Pres. Ronald Reagan (Dec. 13, 1986) reproduced in *United States: Message from the President Transmitting Protocol II Additional to the 1949 Geneva Conventions, Relating to the Protection of Victims on Noninternational Armed Conflicts*, 26 I.L.M. 561, 563 (1987).

124. Roberts, *supra* n. 81.

> On 24 October 2001, the Canadian Ambassador to the United Nations wrote to the President of the Security Council pursuant to Article 51 of the UN Charter. In the letter, Canada referred to the "armed attacks in the United States" on 11 September 2001 and noted that Canada would be deploying military forces "in the exercise of the inherent right of individual and collective self-defense in accordance with Article 51." The letter also noted that Canada's actions were "directed against Osama bin Laden's Al-Qaeda terrorist organization and the Taliban regime that is supporting it."[125]

The relevance of this "armed attack" conclusion to application of the law of war was made clear when:

> On 17 January 2002, during the Standing Committee on Foreign Affairs and International Trade, Associate Deputy Minister James Wright noted that "Canada is involved in an armed conflict. Particularly, the laws of armed conflict apply to the conduct of Canadian Forces operations in Afghanistan."[126]

This statement, when read in conjunction with the statement that Canada's actions were directed against not just the Taliban but also al Qaeda, supports the inference that Canada determined the laws of war were applicable as the result of an armed conflict with al Qaeda. As noted above, such a conclusion seems not only pragmatic, but also justified by the analytical criteria for determining when a situation rises to the level of armed conflict justifying application of Common Article 3.

III. THE UNITED STATES' FIGHT AGAINST AL QAEDA: ARMED CONFLICT AND THE JURISDICTION IT CREATES

The United States has explicitly asserted that it is engaged in an armed conflict with al Qaeda. On November 13, 2001, the President of the United States issued a Military Order titled "Detention, Treatment, and Trial of Certain Non-Citizens in the War

125. Abbott, *supra* n. 99, at 372 (quoting Ltr. to Pres. of the UN Sec. Council from the Canadian Ambassador to the UN (Oct. 24, 2001)).

126. *Id*. (quoting Standing Comm. on For. Affairs & Intl. Trade, *Committee Evidence, No. 52*, http://www.parl.gc.ca/infocomdoc/37/1/fait/meetings/evidence/faitev52-e.htm (Jan. 17, 2002)).

Against Terrorism."[127] In this order, the President issued the following finding:

> (a) International terrorists, including members of al Qaida [*sic*], have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.[128]

If armed conflict is the triggering event for application of law of war principles, then this determination by the President of the United States that the attacks of September 11 created a "state of armed conflict"[129] would bring these principles into force. This language certainly does not seem unintentional, but instead, when taken in context of the Military Order, appears to be an explicit attempt to invoke the authorities traditionally associated with the law of war.

Characterizing the fight against al Qaeda as an armed conflict that triggers the law of war implicates both the authorities and obligations of this law. It seems unlikely that applying the principle of humanity to such operations would generate serious criticism. The "protective" nature of this result seems acceptable even to critics of the "expansive" interpretation of the law of war suggested by the President's Military Order. For example, Anthony Dworkin appears to accept that the humanitarian constraint of the law of war results from "armed conflict," even with a non-state enemy:

> International law recognizes a category of armed conflict that is not between states, but in such conflicts it does not grant any right to the parties involved to engage in hostilities. *It merely notes that fighting of a certain level of intensity is taking place, and places some basic legal restraints on how the fighting is conducted*.[130]

127. Mil. Or., *Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism*, 66 Fed. Reg. 57833 (Nov. 13, 2001).

128. *Id*.

129. *Id*.

130. Dworkin, *supra* n. 102, at 54 (emphasis added).

While apparently endorsing the basic premise of this section—that military operations against transnational terrorist organizations qualify as armed conflicts for purposes of analyzing application of the laws of war[131]—Dworkin then identifies the much more controversial aspect—that armed conflict triggers not only the humanitarian (or constraining) principles of the laws of war, but also the principle of military necessity: "It is as such a 'non-international conflict' that the U.S. war on terror should be understood. As such, it is not a conflict in which international law can be said to provide the authority for any military action."[132]

Dworkin categorically rejects the premise that an armed conflict, even if sufficient to qualify as a triggering event for purposes of the law of war, can provide a state with any authority for the execution of the conflict. While his opposition to this premise is illustrative of the consternation associated with an expanded definition of what triggers the law of war, it is inconsistent with both the history of the law of war and the logic that underlies that law as reflected in that history.[133] Any assertion that the law of war, when triggered, brings into force the principle of humanity

131. Later in a footnote, Dworkin notes, in the opinion of this Author, accurately:

> Common Article 3 of the Geneva Conventions refers to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." It could be argued that this limits its application to conflicts that are confined within the territory of a single state. However, it makes more sense to see this clause as limiting the application of Common Article 3 to wars fought within the territories of states that are party to the Geneva Conventions—in other words, confirming that it does not bind states that are not party to the Conventions. Now that Common Article 3 is seen as customary law, it should be understood as binding on all non-international armed conflicts.

Id. at 60 n. 13; *see also* Jinks, *supra* n. 76, at 39 (also asserting that Common Article 3 should be liberally interpreted to apply to any "armed conflict" not covered by Common Article 2).

132. Dworkin, *supra* n. 102, at 54.

133. The law of war has long been understood as a compromise between the invocation of military authority to accomplish national objectives and the interests of diminishing the evils of conflict. This compromise has historically been manifested in the balance struck between the principles of military necessity and humanity, which form the very foundation of the law regulating the conduct of hostilities. According to Rogers:

> The great principles of customary law, from which all else stems, are those of military necessity, humanity, distinction, and proportionality. According to the UK *Manual of Military Law*, the principles of military necessity and humanity as well as those of chivalry have shaped the development of the law of war. Chivalry may, however, be classified as an element of the principle of humanity.

Rogers, *supra* n. 11, at 3.

but not the principle of necessity defies the underlying theory and logic of the law.

The importance of determining the applicability of the principles of the law of war for purposes of assessing the legitimacy of the military commissions cannot be overstated. If applicable as a matter of international law to the armed conflict initiated by al Qaeda against the United States, these principles provide subject-matter jurisdiction for prosecutions before the military commissions, independent of any domestic statutory source of such jurisdiction.[134] This source of jurisdiction is not, however, unlimited. Nor is it broad enough to encompass assertion of criminal liability for any law of war violation. Instead, it provides jurisdiction only for violation of the limited law applicable to transnational armed conflict.

This relationship between the laws of war applicable to the armed conflict during which the alleged misconduct occurred and the charge or charges brought before a military commission was also a critical aspect of the *Quirin* decision upholding the legality of the trials in that case:

> We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform—an offense against the law of war. *We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.*[135]

Accordingly, in relation to individuals associated with al Qaeda, this source of jurisdiction may be legitimately asserted only for a very narrow category of offenses derived from the law of war applicable to non-international armed conflicts: the basic principles of humanity and distinction reflected in the terms of

134. Jinks, *supra* n. 76, at 42–45.
135. *Quirin*, 317 U.S. at 45–46 (emphasis added).

Common Article 3 and Additional Protocol II. This limited source of jurisdiction stands in stark contrast with the broad scope of liability suggested by the list of offenses established for use by the prosecutors for the military commission. A review of these offenses indicates that not only are many of them derived from the laws of war applicable to international armed conflict, but many also seem to lack any connection whatsoever to the law of war. To render prosecutions before the military commission legitimate, it is essential that any charge be linked to a violation of the basic principle of humane treatment[136] and the law applicable to non-international armed conflict.

The principle fault in the charging theory used by the commission to date has been to ignore this requirement to limit charges to the law related to non-international armed conflict. The most profound illustration of this fault is revealed in allegations of unlawful belligerency. This offense, which was validated as legitimate by the *Quirin* decision, is derived from the law related to international armed conflict. It represents a criminal condemnation of individuals who engage in belligerent acts without the combatant immunity derived from membership in the armed forces (or certain associated groups) of a nation state.

In the opinion of this Author, extending this offense into the realm of non-international armed conflict, while conceptually appealing, raises several significant objections. Although as a prima facie matter, it must be conceded that non-state belligerents in a non-international armed conflict are conclusively incapable of ob-

136. *See* U.S. Dept. of Defense, *Military Commission Instruction No. 2* (Apr. 30, 2003) (available at http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf) [hereinafter *MCI No. 1*]. Included among these offenses are crimes that clearly violate the principle of humanity and the basic principles of the law of war asserted herein as applicable to all armed conflicts. These offenses include attacking civilians, attacking civilian objects, denial of quarter, taking of hostages, employing poison, torture, rape, and improper use of a protective emblem. However, numerous offenses include elements ostensibly derived from the law of international armed conflict. For example, many offenses are defined as being directed against "protected persons," a category established by the Geneva Conventions, and accordingly applicable exclusively to conflicts that satisfy the criteria of Common Article 2. Other examples include degrading treatment of a dead body, use of treachery or perfidy, and possibly the improper use of a flag of truce. *Id.* at ¶ 6A.

More troubling are those offenses characterized by the Instruction as "Other Offenses Triable by Military Commissions." *Id.* at ¶ 6B. These crimes include offenses that do not seem to have any relation to the law of war, such as hijacking, spying, perjury or false testimony, obstruction of justice; and offenses committed by "unprivileged belligerents." *Id.*

taining combatant immunity (because legal status as prisoners of war does not extend to non-international armed conflicts), this does not automatically equate to a conclusion that their participation in hostilities amounts to a violation of international law. The offense of unlawful belligerency is clearly based on the desire to deter belligerents from operating in a manner inconsistent with the requirements of lawful belligerents, as was reflected in the *Quirin* case, where the allegation was based on the failure of the defendants to wear military uniforms during their activities.[137] It seems logically inapposite to extend this crime to a type of armed conflict in which the subject of the allegation is conclusively incapable of operating as a lawful belligerent within the meaning of the law applicable to a different type of armed conflict. In such a conflict, the basic deterrent rationale of the offense is inapplicable.

This is not to suggest that non-state belligerents are immune from criminal responsibility for their participation in conflict. Instead, it merely reverts back to the clear presumption reflected in both Common Article 3 and Additional Protocol II: that any assertion of criminal responsibility for the decision to participate in a non-international armed conflict is a matter of domestic law, and not international law.[138] In practice, this has historically been manifested in the use of domestic prohibitions against treason or other dissident activities to prosecute such individuals. Their inability to claim lawful combatant status opens the door for such assertions of domestic criminal liability, but does not result in an international crime.

Of course, this does not mean that such belligerents are beyond the scope of any international legal liability. Indeed, it is the thesis of this Article that violations of the basic principles of the law of armed conflict provide a basis for prosecuting such individuals for violations of international law. However such international law based prosecutions are the result of *acts or omissions* in violation of the laws of war applicable to non-international armed conflict, and not the participation itself.

The wholesale importation of an international law offense, heretofore applicable only to international armed conflict, to the

137. *Quirin*, 317 U.S. at 21–22.

138. *Supra* nn. 109–112 and accompanying text.

realm of non-international armed conflict also appears to be inconsistent with the basic *nulle crimen* norm of international law. Because the criminal sanction for participation in non-international armed conflicts has historically been within the exclusive realm of domestic law, it is difficult to see how this principle could be overcome. Unlike many of the offenses derived from the law of international armed conflict, subsequently determined by the International Criminal Tribunal for the Former Yugoslavia to be applicable to non-international armed conflict,[139] there simply appears to be no evidence of customary practice to support an analogous extension of this offense.

The consequence for the military commissions resulting from a determination that the offense of unlawful belligerency is indeed restricted to the realm of international armed conflict would be profound. It would undermine all allegations based on battlefield conduct that could not be characterized as a violation of the basic principles of the law of armed conflict applicable to non-international armed conflicts. Accordingly, offenses such as "killing of a United States soldier while operating as an unprivileged belligerent" would fail to state an offense.

Although many of the charges currently available to military commission prosecutors lack a sufficient jurisdictional foundation, the principles of humane treatment as a source of criminality is broad enough in scope to provide a sufficient basis for holding the individuals associated with the attacks of September 11 accountable for their actions. As reflected in both Common Article 3 and Additional Protocol II, the principle of humanity in warfare prohibits murder, torture, or other cruel, inhumane, or degrading treatment.[140]

Today, it is well established that international criminal jurisprudence recognizes that violation of the principle of humanity during armed conflict results in individual criminal responsibility.[141] This principle, as reflected in Common Article 3, therefore,

139. *See generally Tadic*, 35 I.L.M. 32.

140. *Common Article 3*, *supra* n. 79; *Protocol II*, *supra* n. 120.

141. *See* Aldykiewicz & Corn, *supra* n. 22, at 108–140 (analyzing the evolution of principles reflected in Common Article 3 and Protocol II into sources of individual criminal responsibility); Melissa J. Epstein & Richard Butler, *The Customary Origins and Elements of Select Conduct of Hostilities Charges before the International Criminal Tribunal for the Former Yugoslavia: A Potential Model for Use by Military Commissions*, 179 Mil. L. Rev.

provides a sufficient legal basis for prosecution before any forum empowered by international law to enforce laws of war. The humane treatment mandate of Common Article 3 therefore reflects the "compulsory minimum"[142] standard of conduct for any and all participants in any armed conflict, not necessarily as a matter of treaty obligation,[143] but as a principle of international law derived

68, 83 (2004) (noting that specific intent makes individual liability).

Since 1991, the international community, through the establishment of ad hoc criminal tribunals for the former Yugoslavia and Rwanda and the prosecutions conducted by these tribunals, and also through the creation of the International Criminal Court, has removed any doubt that violations of the principles reflected in Common Article 3 committed during the course of a non-international conflict provide a valid basis for criminal prosecution. Whether the remaining provisions of Common Article 3, Article 4, and Protocol II are customary in nature for which serious violations give rise to individual criminal responsibility remains to be seen. For example, the statement that Common Article 3, in its entirety, has risen to the level of customary international law is generally accepted. *See e.g.* 10 U.S.C. § 821. Despite this acceptance, there is no evidence to support the proposition that violation of paragraph 2 of Common Article 3, the duty to collect and care for the wounded, is a serious violation of international humanitarian law giving rise to individual criminal responsibility. In short, "every violation of the laws of war is a war crime," but not every war crime is a serious violation of international humanitarian law subjecting the violator to criminal prosecution.

> [T]he violation must be "serious," that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling a foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations [(and the corresponding rule of customary international law)] whereby "private property must be respected" by an army occupying an enemy territory.

Tadic, 35 I.L.M. at 62, ¶ 94. A review of the current indictments from the International Tribunals for Yugoslavia and Rwanda fail to reveal anyone who is charged with a violation of the law or customs of war for either failing to collect and care for the sick and wounded or educate the local children. Common Article 3(2) requires that the "wounded and sick shall be collected and cared for."

142. *Tadic*, 35 I.L.M. at 62, ¶ 94.

143. It is certainly plausible to assert the applicability of Common Article 3, and not merely the principles reflected therein, to any armed conflict not of an international character, even if not occurring in the territory of a High Contracting Party. Jinks, *supra* n. 76, at 31.

In this regard, it is also worth noting that the subject of the binding nature of Common Article 3 has been a significant issue for the ICRC. In fact, the International Committee for the Red Cross along with the League of Red Cross Societies published the *Basic Rules of Humanitarian Law Applicable In Armed Conflicts*, 206 Intl. Rev. Red Cross 246 (Sept.–Oct. 1978) reprinted in *Documents on the Laws of War*, 469–470 (Adam Roberts & Richard Guelff eds., Oxford U. Press 1989). While emphasizing the informal nature of the rules, the ICRC noted the rules "express in useful condensed form some of the most fundamental principles of international humanitarian law governing armed conflicts." *Id.* at 246. The rules are based on the four Geneva Conventions of 1949, the two Protocols Additional to the Geneva Conventions of 1977, the Hague Regulations, and customary interna-

from reference to the basic purpose of the law of war and the long-standing practice of armed forces. That humane treatment represents the very purpose of the Geneva Conventions merely serves to reinforce this conclusion.

This compulsory minimum is both simple and direct, as reflected in the language of Common Article 3, and requires that in all cases of non-international armed conflict, each party is bound to the following provisions:

> 1. Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely . . . .
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

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tional law. The Basic Rules state:

> Fundamental rules of humanitarian law applicable in armed conflicts
>
> 1. Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.
> 2. It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat*.
> 3. The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and *equipment*. The emblem of the red cross [(red crescent, red lion and sun)] is the sign of such protection and must be respected.
> 4. Captured combatants and civilians under authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.
> 5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.
> 6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.
> 7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian population as such nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.

Id. The results of the work of experts from noted international relief organizations lend significant support to the conclusion that these basic principles of the law of war should today be considered customary international law applicable to any armed conflict. *Id.*

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages[144]

Any charge in violation of the law of war based on violation of the principle of humanity as reflected in this article could therefore encompass the taking of the airline passengers as hostages; the targeting of structures filled with civilians, or, in the language of the law, the targeting of "persons taking no active part in hostilities"; the terrorizing of the civilian population; and the killing of thousands of innocent civilians on September 11. No additional "positive legislation" is required. International law clearly provides the proscription for the conduct of the September 11 terrorists—and those who planned, encouraged, and supported them—and makes all such individuals liable as principles for violating these minimum standards of conduct to be adhered to during any conflict.[145]

144. *Common Article 3*, *supra* n. 80.

145. The offense of "unlawful belligerency" would be both much more difficult to sustain and unnecessary to charge due to the clear applicability of Common Article 3 as a basis for criminal prosecution. The essence of a charge of "unlawful belligerency" is that individuals are engaged in armed conflict without satisfying the international law standard for identifying themselves as members of a combatant force. In support of this offense, there has been much said and much written about the "four criteria" from the Geneva Prisoner of War Convention's Article 4 that must be satisfied by conflict participants. However, the criteria relied upon to assert that members of al Qaeda and the Taliban engaged in unlawful belligerency—that they failed to carry arms openly, wear fixed insignia recognizable from a distance, operate under effective command, and comply with the laws of war—are requirements that apply, by the terms of the Convention, only to conflicts of an international (state versus state) character, and not to internal armed conflicts.

This is illustrated by the fact that these criteria are used to determine when a member of a insurgent or militia group becomes entitled to status as an enemy prisoner of war. By the terms of both treaty and customary international law, warriors who engage in non-international armed conflicts are not now, nor have they ever been, legally entitled to prisoner of war status (and the accompanying combatant immunity) upon capture, regardless of their uniform or conduct. It is a simple fact of international law that such warriors receive no immunity for their warlike acts and therefore are fully susceptible to prosecution for violation of domestic law based on the actions in which they engaged while involved in conflict. Based on this, it is difficult to understand how engaging in warlike activities while in civilian clothes during a non-international armed conflict amounts to an offense under international law. There simply is no requirement to be in uniform because there is no benefit of combatant immunity for wearing a uniform.

It seems that the true objection to the conduct of al Qaeda and its Taliban sponsors was not so much who they were, but what they did. Their attacks on non-combatants were certainly unlawful. While they may have therefore been "unlawful belligerents" in the

Additional Protocol II is an equally significant indication of the content of the principle of humanity. As of the date of this article, 159 states were parties to this treaty.[146] While the United States is not a party, it has signed the treaty, which was submitted by President Reagan to the Senate for advice and consent,[147] an action again requested by President Clinton in 1999.[148] In the most recent request for advice and consent submitted by President Clinton, the acceptability of the fundamental rules contained in this treaty was clearly indicted:

> Because the United States traditionally has held a leadership position in matters relating to the law of war, our ratification would help give Protocol II the visibility and respect it deserves and would enhance efforts to further ameliorate the suffering of war's victims . . . .
>
> I therefore recommend that the Senate renew its consideration of Protocol II Additional and give its advice and consent to ratification, subject to the understandings and reservations that are described fully in the report attached to the original January 29, 1987, transmittal message to the Senate.[149]

Like Common Article 3, Article 4 of Additional Protocol II imposes upon participants in a non-international armed conflict the general obligation to treat humanely individuals affected by the armed conflict who are not actively participating in hostilities.[150]

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pragmatic sense of the term, they were not in the legal sense of the term. Instead, their crimes were violations of Common Article 3, and it is this provision of the law of war which should form the basis for any subsequent prosecution.

146. ICRC, *Protocol II: State Parties*, http://www.icrc.org/ihl.nsf/websign?ReadForm&id=475&ps=P (accessed Feb. 4, 2006).

147. *Protocol II* Ltr. of Transmittal, *supra* n. 121.

148. Ltr. of Transmittal from Pres. William Clinton to the U.S. Sen. (Jan. 6, 1999) reproduced at 1956 WL 54428.

149. *Id*.

150. *Protocol II*, *supra* n. 120, at art. 4. Article 4 of Additional Protocol II states that

> All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour [*sic*] and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

Article 4 also expressly defines activities that are per se inconsistent with this obligation:

The list of per se prohibitions in Protocol II is more extensive than that provided in Common Article 3. Thus, based on the theory that this list represents a further illumination of the scope and content of the humane treatment obligation, it adds several potentially viable sources of criminal liability. Among these are pillage, slavery, sexual assaults, and remarkably, acts of terrorism. While terrorism is not defined, the ICRC Commentary indicates that the intent was to prohibit attacks directed against civilians.[151] Attacks intended to spread terror among the civilian population also violate Article 13 of the Protocol:

> Protection of the civilian population
>
> 1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
>
> 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. *Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.*[152]

The ICRC Commentary provides the following explanation for the emphasis of this prohibition:

Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) collective punishments;
(c) taking of hostages;
(d) acts of terrorism;
(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault;
(f) slavery and the slave trade in all their forms;
(g) pillage;
(h) threats to commit any or the foregoing acts.

151. *ICRC Commentary—Protocol II*, *supra* n. 105, at 1453.
152. *Protocol II*, *supra* n. 120, at art. 13 (emphasis added).

> "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited." Attacks aimed at terrorizing are just one type of attack, but they are particularly reprehensible . . . .
>
> Any attack is likely to intimidate the civilian population. The attacks or threats concerned here are therefore those, the primary purpose of which is to spread terror, as one delegate stated during the debates at the Conference.[153]

The collective effect of these treaty provisions is to offer a more precise understanding of the content of the basic law of war principles applicable to all armed conflicts. These provisions, including the substance of Common Article 3, offer a viable source of obligation for all individuals engaged in armed conflict—to include members of transnational armed entities like al Qaeda. Accordingly, they provide a sufficient source of jurisdiction for imposition of individual criminal responsibility based on the law of war. This source of jurisdiction, which is broad enough in scope to allow for the prosecution of members of al Qaeda before a military commission without resort to principles of criminal responsibility, derives from the law of international armed conflict or domestic law. Thus, the most appropriate charge available for the military commission might be

> THE CHARGE: *Violation of the Law of War*
>
> THE SPECIFICATION: *In that, (name of individual), a member of an armed organization engaged in armed conflict against the United States, did, at or near (location) on or about (date), engage in conduct in violation of the principle of (humanity, distinction, prohibition against the use of weapons), to wit: participating in an attack directed against civilians (and) (or) civilian objects (with the intent of terrorizing the population).*

Simple, clear, and founded on applicable law, charges alleging violations of the basic principles of the law of war offer the most viable jurisdictional basis for trial of al Qaeda operatives before a military tribunal, including the military commission.

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153. *ICRC Commentary—Protocol II*, *supra* n. 105, at 1453.

IV. TAKING THE BITTER WITH THE SWEET: THE BASIC PRINCIPLE OF HUMANE TREATMENT AND THE OBLIGATION TO ESTABLISH AN IMPARTIAL TRIBUNAL

As noted in the previous section, the basic principles of the law of war provide a valid source of jurisdiction for the assertion of criminal liability related to armed conflict. However, these same principles must also be considered for assessing the legitimacy of the tribunal empowered to adjudicate such criminal responsibility. Unfortunately for the legality of the military commission as currently constructed, the failure to provide for a tribunal that is objectively impartial runs afoul of the principle of humane treatment. While, as with the available charges, modification to the current construct could conceivably cure this defect, the protective effect of the principle of humanity demands that minimum impartiality be provided for any individual subject to criminal sanction for a violation of the law of war.[154]

Establishing procedures that provide for an impartial tribunal is a component of the principle of humane treatment. This requirement is reflected in several significant treaty provisions related to punishing violations of the law of war. These include not only Common Article 3, but also treaty articles providing "fundamental guarantees" found in both the Additional Protocols to the Geneva Conventions of 1949. The current construct for the military commissions is simply incompatible with this requirement. It is this aspect of the commission process that, in the opinion of this Author, is fatal to compliance with the same law President Bush has invoked to prosecute al Qaeda detainees. Because genuine impartiality is the *sine qua non* of compliance with the law of war for any tribunal used to adjudicate allegations of war crimes, no modification to commission procedures will rectify this

154. Since the inception of the currently convened military commission, there have been a number of challenges to the legitimacy of the procedures. The seminal case involving such a challenge is *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), recently decided by the United States Supreme Court, 2006 U.S. LEXIS 5185 (June 29, 2006). Hamdan challenged the procedural construct of the military commission, focusing particularly on his exclusion from sessions of his trial. However the challenge also focused on the asserted lack of impartiality. The Court held that the military commission convened to try Hamdan violated the UCMJ and the Geneva Convention, both structurally and procedurally. 2006 U.S. LEXIS 5185 at **21–22.

defect so long as the plenary authority of the Executive Branch is retained.[155]

This principle of humane treatment provides the most appropriate basis for an assertion of criminal responsibility for individuals involved in an armed conflict not falling under the express scope of Common Article 2 or Common Article 3. However, the text of Common Article 3, as supplemented by relevant provisions of the Additional Protocols, remains significant for illuminating the meaning of this principle. In this regard, the conflict classification prong of Common Article 3 must be distinguished from the substantive provisions of that article. As noted above, the conflict classification prong need not be regarded as the exclusive trigger for application of the fundamental principles of the law of war to non-international armed conflicts. Nonetheless, the substantive terms of Common Article 3 reflect the basic implementing elements of the principle of humane treatment, as supplemented by the terms of the Additional Protocols.

Common Article 3 makes no express reference to impartiality of criminal tribunals. Instead, it establishes a general requirement that, at a minimum, any tribunal adjudicating alleged misconduct associated with an armed conflict include procedures to ensure "judgement [is] pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[156] This language suggests an impartiality requirement for any such tribunal. While the ICRC Commentary uses the example of "summary justice" to emphasize the motivation for this provision, it is also clear that the ICRC's expectation is that justice be administered in accordance with "regular" process:

> Sentences and executions without previous trial are by definition open to error. "Summary justice" may be effective on

155. It is clear that the Department of Defense has attempted to bolster the perception of legitimacy of the commission process by amending originally established procedures to create more conformity with the court-martial process. *See* U.S. Dept. of Def., *Military Commission Order No. 1* (Aug. 31, 2005) (available at http://www.defenselink.mil/news/Sep2005/d20050902order.pdf). This order issued by the Secretary of Defense revised the original procedural construct for the commissions established in March 2002. However, nothing in this revision, nor any other revision, has altered the unitary authority of the Department of Defense over the commission process.

156. *Common Article 3*, *supra* n. 79.

> account of the fear it arouses—though this has yet to be proved—but it adds too many innocent victims to all the other innocent victims of the conflict. *All civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors. The Convention has rightly proclaimed that it is essential to do this even in time of war.*[157]

That the guarantee of impartiality is an essential safeguard to the administration of justice seems self-evident. Indeed, the concept of justice demands adjudication of an allegation leveled against an individual by a tribunal insulated from the influence of the authority causing the charge to be tried. This impartiality requirement was formally included in Article 75 of Protocol I, the "fundamental guarantee" article drafted for the specific purpose of supplementing the explanation of humane treatment provided in Common Article 3.[158] According to Article 75:

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157. *ICRC Commentary—Common Article 3*, *supra* n. 88, at 39–40 (emphasis added).

158. *Protocol I*, *supra* n. 119, at art. 75. The force and effect of Additional Protocol I *vis a vis* the United States is the subject of a good deal of controversy. Although the United States fully participated in the drafting of this treaty, President Reagan ultimately concluded that the treaty was "fatally flawed," and informed the Senate that he would not submit it for advice and consent. It is clear, therefore, that the United States is not bound to this treaty as a party thereto. The controversy regarding the force and effect of the treaty arises, however, from the fact that many of the provisions of this treaty were considered at the time to codify accepted principles of customary international law. Such provisions would, therefore, be independently binding on the United States. In addition, among those provisions of the treaty not considered by the United States as codifications of existing customary obligations, many were considered to be consistent with the interests of the United States, and therefore would be complied with as a matter of national policy. Analysis of which provisions of the Protocol bind the United States has become even more complex over the years due to the assertion of many states and commentators that provisions not reflecting customary international law in 1977 have ripened to that status since that time. In fact, some commentators have asserted that the entire treaty has attained this customary status. *E.g.* Michael J. Matheson, *Continuity and Change in the Law of War: 1975–2005: Detainees and POWs*, 38 Geo. Wash. Intl. L. Rev. 543 (2006). While this position is clearly inconsistent with the position of the United States, and would also be susceptible to an "opt out" argument by the United States, it is equally clear that it would be legally invalid to simply dismiss entirely the relevance of Protocol I when analyzing the legality of the military commissions. Instead, it is necessary to look to the specific relevant provision of Protocol I and assess whether it should be considered binding on the United States, and if so, what is required to ensure compliance therewith.

The stated purpose of Protocol I was to "reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application." *Protocol I*, *supra* n. 119, at preamble. To that end, Article 75 of Protocol I was developed. Article 75 can in many ways be viewed as an express application of Common Article 3 to international armed conflicts. Entitled "Fundamental Guarantees," it seems

> No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure . . . .[159]

Analogous language was also included in Additional Protocol II, the treaty drafted to supplement the law applicable to conflicts not of an international character. According to Article 6 of that treaty, "No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality."[160] Although the United States is not a party to either of these treaties, there is no indication it considered either of these provisions objectionable.[161] It is therefore justified to refer to these treaty provisions, and the associated ICRC Commentary, to illuminate the meaning of the humane treatment obligation as it relates to the adjudication of allegations of law of war violations.

These provisions indicate that the principle of humane treatment requires compliance with the obligation to ensure a fundamentally fair and impartial tribunal. The importance of such compliance, even when using military commissions, was noted in the Congressional Research Service Report analyzing the use of military commissions to try terrorists:

> Although there may be little judicial review available to persons convicted by U.S. military commissions, it would seem necessary to provide for trials that will be seen as *funda-*

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clear that the primary objective of this provision was to ensure that no individual involved in an international armed conflict fell into a "legal vacuum" due to the inapplicability of more favorable provisions of the Protocol or other treaty provisions. *See* Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Intl. L. & Policy 419 (1987); *see also* Matheson, *Continuity and Change in the Law of War*, *supra* n. 158.

159. *Protocol I*, *supra* n. 119, at art. 75(4).

160. *Protocol II*, *supra* n. 120, at art. 6(2).

161. *See supra* nn. 123–124 and accompanying text (describing the basis of the United States' objection to these treaties); *see also* Matheson, *The United States Position*, *supra* n. 158, at 427–428.

> *mentally fair* under both U.S. and international standards regarding the application of the law of war.[162]

Humane treatment in relation to criminal adjudication requires implementation of minimum procedural provisions to protect the substantive interest of an accurate determination of guilt. Thus, the *sine qua non* of respecting this principle is the prevention of arbitrary or capricious process. Impartiality is expressly mandated in the Additional Protocols because of the presumption that unless an adjudicative tribunal is impartial, there can be no legitimate expectation that the result will not be arbitrary, rendering the process inhumane.

The importance of this express reference to the impartiality requirement is emphasized in the ICRC Commentary to these provisions. With regard to Article 75,

> The wording of this introductory sentence is based on Common Article 3. However, Article 3 refers to a "regularly constituted court", while this paragraph uses the expression "impartial and regularly constituted court". The difference is slight, but it emphasizes the need for administering justice as impartially as possible, even in the extreme circumstances of armed conflict, when the value of human life is sometimes small. Article 3 relies on the "judicial guarantees which are recognized as indispensable by civilized peoples", while Article 75 rightly spells out these guarantees. Thus this article, and to an even greater extent, Article 6 of Additional Protocol II '(Penal prosecutions),' gives valuable indications to help explain the terms of Article 3 on guarantees.[163]

The ICRC Commentary discussion of Article 6 of Additional Protocol II is even more persuasive in support of the requirement that an impartial tribunal is an essential component of adjudication of criminal responsibility in a manner that comports with the principle of humane treatment. The first portion of this Commentary seems eerily predictive of the response to the attacks by al Qaeda:

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162. CRS Report, *supra* n. 21, at 37 (citations omitted) (emphasis added).
163. *ICRC Commentary—Protocol II*, *supra* n. 105, at 878.

> The whole of Part II . . . is aimed at ensuring respect for the elementary rights of the human person in non-international armed conflicts. *Judicial guarantees play a particularly important role, since every human being is entitled to a fair and regular trial, whatever the circumstances;* . . . the guarantees defined in this article refer to the two stages of the procedure: preliminary investigation and trial. . . . Just like [C]ommon Article 3, Protocol II leaves intact the right of the established authorities to prosecute, try and convict members of the armed forces and civilians who may have committed an offence related to the armed conflict; however, such a situation often entails the suspension of constitutional guarantees, the promulgation of special laws and the creation of special jurisdictions. Article 6 lays down some principles of universal application which every responsibly organized body must, and can, respect . . . .[164]

The Commentary proceeds to emphasize the role of genuine impartiality.

> This sentence reaffirms the principle that anyone accused of having committed an offence related to the conflict is entitled to a fair trial. *This right can only be effective if the judgment is given by "a court offering the essential guarantees of independence and impartiality*."[165]

This commentary language dispels any doubt as to the centrality of impartiality to the concept of humane justice. It also seems to be particularly relevant to the issue of the military commissions when it acknowledges the tendency to create extraordinary remedies for offenses associated with non-international armed conflict.

While neither these treaty provisions nor the Commentaries related thereto provide a definition of an impartial tribunal, the basic structure of the military commission seems on its face inconsistent with a common sense understanding of this concept. This fact is effectively noted in the amicus brief filed by the Association of the Bar of the City of New York in the *Hamdan* appellate litigation:[166]

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164. *Id*. at 1396–1397 (emphasis added).

165. *Id*. at 1398 (emphasis added).

166. Br. of Amicus Curiae of the B. of the City of N.Y. in Support of Petr.-Appellee and Affirmance, *Hamdan v. Rumsfeld*, U.S. App. LEXIS 2474 (D.C. Cir. Feb. 11, 2005).

> Finally, the Commissions are not an "independent and impartial tribunal" as required by Common Article 3. The Commission members are appointed by the Secretary of Defense, and can be removed at any time for "good cause." Once the Commission renders a decision, the case passes automatically to a Review Panel, which either recommends disposition to the Secretary of Defense or remands the case to the Commission for further proceedings. The Secretary of Defense, in turn, either forwards the case to the President with a recommended disposition or remands the case to the Commission for further proceedings. The President may approve or disapprove the recommendation; change the conviction to one of a lesser included offense; mitigate, commute, defer or suspend the sentence imposed; or delegate his final authority to the Secretary of Defense. Although the President or Secretary of Defense cannot change a "Not Guilty" finding to "Guilty," a "Not Guilty" disposition will not take effect until it is finalized by the President or Secretary of Defense.
>
> As the foregoing makes clear, the Commissions are under the control of the President and Secretary of Defense. But these two individuals have already asserted that the Guantanamo detainees are guilty.[167]

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167. *Id.* at 27 (internal citations omitted). Both the Office of the Chief Prosecutor and the Office of the Chief Defense Counsel were established by a Military Commission Order issued under the authority of the Secretary of Defense. The purpose of this Order is stated as follows:

> This Order implements policy, assigns responsibilities, and prescribes procedures under references (a) and (b) for trials before military commissions of individuals subject to the President's Military Order. These procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission, as required by the President's Military Order. Unless otherwise directed by the Secretary of Defense, and except for supplemental procedures established pursuant to the President's Military Order or this Order, the procedures prescribed herein and no others shall govern such trials.

U.S. Dept. of Def., *Military Commission Order No. 1*, ¶ 1 (Mar. 21, 2002) (available at http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf). According to this Order, the Chief Prosecutor shall supervise the overall prosecution efforts, and the Chief Defense Counsel shall supervise the overall defense effort. *Id.* at ¶ 4(B)–(C). Having had the opportunity to work closely with members of the Office of the Chief Defense Counsel, and observe the efforts of members of the Office of the Chief Prosecutor, it is clear that the military attorneys detailed to these positions are zealously advocating the interests of their respective clients. However, the omnipresent reality that the defense attorneys fall under the authority of the General Counsel of the Department of Defense certainly results in an

These aspects of the commission clearly provide the individuals responsible for initiating criminal prosecution with substantial potential influence over prosecutions.

One standard of impartiality that seems particularly appropriate for analogy is the standard endorsed by the United States Supreme Court in its ruling on the constitutionality of the court-martial system established pursuant to the UCMJ. In *Weiss v. United States*,[168] the Court was asked to consider whether the lack of a fixed term of office for military judges violated the constitutional rights of United States service members subjected to criminal sanction. The Court sustained the constitutionality of this procedural construct.

In support of this holding, the Court first rejected the assertion that because military judges as commissioned officers were executive branch appointees, the Constitution required an additional appointment as judicial officers.[169] The Court then ad-

uncomfortable appearance of a lack of independence.

Whether this relationship will ultimately transcend the appearance of a conflict of interest and have an actual effect on the performance of the defense counsel is yet to be seen. No proceeding has progressed beyond the initial phase of member selection. However, the resource allocation between the Office of the Chief Defense Counsel and the Office of the Chief Prosecutor certainly suggests that allocation decisions are not being made by the General Counsel on a truly impartial basis. The following statistics reveal a much more robust prosecution office:

> *Defense office*: At the height of staffing: 4 full-time defense counsel, a Deputy Chief Defense Counsel, and a Chief Defense Counsel. The office was also supported by 3 part-time assistant defense counsel.
>
> As of June 2005, the defense office has been substantially depleted. The Deputy Chief Defense Counsel position has been vacant for almost a year, with no replacement identified. The Chief Defense Counsel departs in July 2005, and no replacement has been identified. One defense counsel left the service in December 2004 and was not replaced. Another was reassigned in April 2005 and has not been replaced. Another is being reassigned in July 2005, and no replacement has yet been identified. Until replacements are identified and provided, only one full-time defense counsel is currently available to perform the defense function. This defense office has not been provided with any dedicated investigative support
>
> *Prosecutor office*: This office has approximately 10 full-time prosecutors, a Deputy Chief Prosecutor, and a Chief Prosecutor. The office is also augmented by 4 or 5 full-time attorneys detailed from the Department of Justice and the Department of Defense, who assist the prosecutors. The 200-person CITF (Criminal Investigation Task Force) provides investigative support to prosecution case development.

E-mail from Maj. Mark Bridges, Off. of the Chief Def. Counsel, Mil. Commns., to Geoffrey Corn, Spec. Asst. for L. of War Matters, Off. of the JAG, U.S. Army, *Numbers* (May 27, 2005) (copy on file with Author).

168. 510 U.S. 163 (1994).

169. *Id*. at 170.

dressed the fixed term issue. According to the petitioners, such a fixed term was necessary to ensure compliance with the due process requirement of impartiality.[170] Although the Court rejected the assertion that a fixed term was necessary to sustain the constitutionality of the military judicial system, it did so only because it concluded that the military judiciary procedures established by statute and regulation provided independent assurance of impartiality:

> A fixed term of office, as petitioners recognize, is not an end in itself. It is a means of promoting judicial independence, which in turn helps to ensure judicial impartiality. We believe the applicable provisions of the UCMJ, and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause.[171]

As this excerpt indicates, impartiality was treated by the Court as an essential attribute of the adjudicative process even in the context of military trials. Accordingly, the Court determined that although military judges did not have fixed terms of office, impartiality was protected by statutory and procedural safeguards. Among these safeguards, the Court placed particular emphasis on the supervision of the process by an appellate court composed of civilian judges appointed for fixed terms:

> The entire system, finally, is overseen by the Court of Military Appeals, which is composed entirely of civilian judges who serve for fixed terms of 15 years. That court has demonstrated its vigilance in checking any attempts to exert improper influence over military judges. In *United States v. Mabe*, for example, the court considered whether the Judge Advocate General of the Navy, or his designee, could rate a military judge based on the appropriateness of the judge's sentences at courts-martial. As the court later described: "We held [in *Mabe*] that the existence of such a power in these military officers was inconsistent with Congress' establishment of the military 'judge' in Article 26 and its exercise violated Article 37 of the Code." And in [*United States v.*

170. *Id.* at 179.
171. *Id.*

> *Graf*], the court held that it would also violate Articles 26 and 37 if a Judge Advocate General decertified or transferred a military judge based on the General's opinion of the appropriateness of the judge's findings and sentences.[172]

Of course, the issue addressed by the Court involved compliance with the Due Process Clause of the Constitution, and not the international law obligation of humane treatment. However, in regards to a criminal adjudicative process, these two concepts must share significant content, as both are intended to ensure that the process used for such adjudications is sufficient to provide for an accurate result.

It is also significant that in *Weiss*, the Court expressly held that when analyzing the constitutionality of procedures established for military criminal process, great deference must be afforded to the decisions of Congress.[173] Accordingly, the due process standard applied to the military justice process must be less stringent than that applied to a traditional civilian tribunal.[174] However this deference to the military justice process with the accordant reduced standard of scrutiny in no way undermined the Court's emphasis that impartiality was an essential attribute for a fair trial, when the Court noted "It is elementary that 'a fair trial in a fair tribunal is a basic requirement of due process.' A necessary component of a fair trial is an impartial judge.'"[175]

This decision supports the conclusion that impartiality is indeed the *sine qua non* of criminal adjudicative legitimacy, even when applying the extremely deferential standard of review appropriate in the realm of military trials. Furthermore, although the method of establishing impartiality is far more flexible in the context of a military tribunal than a civilian tribunal, some meaningful insulation between the judicial function and the executive function is required. Nothing close to the combination of statutory, regulatory, and review safeguards that the Court held ensure the legitimate impartiality of the military trial judiciary have been implemented vis-à-vis the military commissions. Instead, the plenary authority of the Secretary of Defense over the

172. *Id*. at 181 (citations omitted).
173. *Id*. at 177.
174. *Id*. at 177–178.
175. *Id*. at 178 (citations omitted).

commission process reflects an antithetical approach to procedural fairness.

Reference to the military justice system also provides significant insight into other necessary indicia of impartiality for a non-Article III criminal tribunal. This impartiality requirement is woven into the fabric of the system and procedures implemented to ensure this impartiality have been essential to upholding the constitutionality of this system.[176] For example, while uniformed members of the Judge Advocate General's Corps serve in both the defense and prosecutorial functions, officers detailed to perform trial defense services are managed, supervised, and evaluated by leadership unrelated to the prosecutorial function or the command initiating the prosecutions.

While there is no express mandate that analogous prophylactic measures be implemented for the commissions, the fact that these are considered essential to ensuring that courts-martial are sufficiently impartial suggests that the construct for the commissions is simply insufficient. Furthermore, any argument that the procedures for the commissions are justified by a theory of necessity is unpersuasive. As noted above, if the principle of humane treatment is broad enough in scope of applicability to support criminal sanction for its violation even in a transnational armed conflict, it must *a fortiori* establish the standard against which to judge the procedures established for imposing such sanction.[177]

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176. For an excellent analysis of the historic relationship between military commissions and courts-martial in United States practice, see David Glazier, Student Author, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 Va. L. Rev. 2005 (2003).

177. There is no military necessity exception to this principle. Indeed, contrary to the President's policy regarding the treatment of al Qaeda and Taliban detainees, there is no legitimate basis in the law of war to rely on military necessity as a basis for derogation from the humane treatment obligation. This is a fundamental tenet of the law, and has been prominently reflected in Field Manual 27-10—the definitive statement of the law of land warfare for the United States Army—since 1956:

> The prohibitory effect of the law of war is not minimized by "military necessity" which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.

FM 27-10, *supra* n. 11, at ¶ 3. The meaning of this provision is clear—military necessity may never be invoked as a legal basis for acts or omissions inconsistent with the princi-

Comparison of the safeguards ensuring impartiality in the United States military justice system and the lack of analogous safeguards for the military commission highlights the dangers of real or perceived improper influence on adjudications of guilt. This comparison seems justified as a method of assessing the legitimacy of the commission procedures. In fact, this is the exact assessment technique relied upon by the law of war to ensure that minimum procedural fairness is provided captured enemy prisoners of war subjected to criminal trials by the detaining power. Although this rule is not applicable to the military commission as a matter of treaty obligation, the underlying premise it reflects—requiring the detaining power to use the same procedures for prisoners as are required for its own soldiers will ensure fundamental fairness—seems as logical to apply to non-international armed conflict as it does to international armed conflict. This "mirror image" rule is found in the Geneva Convention Relative to the Treatment of Prisoners of War.[178] According to Article 102 of this treaty,

> A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.[179]

This provision establishes that the procedures of a tribunal used to try a prisoner of war must be analogous to those of tribunals used to try members of the detaining power's own armed forces. This is a concise and simple method to protect prisoners of war from being brought before tribunals that lack the minimum guarantees of justice, because this Article is based on the presumption that such guarantees will be required for members of a state's own armed forces.

Article 102 is only applicable as a matter of treaty obligation to captured individuals who qualify as prisoners of war in accordance with Article 4 of the Convention, a status the United States

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ple of humanity because the law of war has created an *irrebutable presumption* that it is never necessary to violate the principle of humanity.

178. *Geneva Convention Relative to the Treatment of Prisoners of War*, *supra* n. 19.

179. *Id*. at art. 102.

has determined is not applicable under any circumstances to captured members of al Qaeda.[180] As a result, there is no treaty basis to assert application of this mirror image rule. However, the basic principle reflected therein bolsters the criticism of the lack of procedural impartiality safeguards and the accordant danger of excessive executive influence on commission trials.

Critiquing the military commission against the standard of process used for United States service members in courts-martial leads to only one conclusion—the procedures are fatally flawed. Lack of independence; court members empowered to make legal judgments; procedures that do not mirror the guarantees of courts-martial; limited access to witnesses and evidence; and no genuine appellate opportunity are all characteristics of the military commission. Any of these would be fatal to any court-martial proceeding and, as the Supreme Court has noted, fundamental fairness truly begins with an impartial tribunal.

The basic principle of humane treatment cannot be invoked as a source of criminality without accepting the fundamental fairness requirement it demands for the adjudication of any such allegation. A genuinely impartial tribunal is the cornerstone of such fundamental fairness, an aspect of the current commission that is woefully deficient.

V. CONCLUSION

The use of military commissions to hold individuals captured during the GWOT accountable for alleged violations of the law of war has significantly stressed the accepted paradigms of the law of war. Objections to such use have been based on both law and policy arguments. The process ultimately established for the military commission certainly justifies much of this controversy. It is

180. Analysis of the validity of this determination is beyond the scope of this Article. Suffice to say that while this policy has resulted in substantial criticism, status as a Prisoner of War under the Convention is applicable only during international armed conflicts as defined by Article 2 of the treaty. Application of Article 2, and as a derivative matter, potential status as a prisoner of war, is limited to armed conflicts between the armed forces of two states; or the belligerent occupation by one state of the territory of another state. Because the existence of such a situation is a factual impossibility *vis a vis* the armed conflict between the United States and al Qaeda, proponents of extending prisoner of war status to members of al Qaeda lack any legitimate legal basis upon which to support their assertions.

the belief of this Author that the military commission process, in its current form, does not comply with the impartiality obligation derived from the same basic principles of the law of war that provide the only viable jurisdictional basis for the prosecutions.[181] However, the assertion that the use of military commissions to sit in judgment of members of transnational terrorist organizations engaged in armed conflict against the United States is entirely impermissible ignores the unique nature of such tribunals as tools for enforcing the laws of war. This criticism, particularly when based on application of domestic legal standards, confuses issues related to the commissions. Such confusion unfortunately detracts from the thoroughly justified goal of ensuring the construct of the commissions is modified sufficiently to ensure a legitimate process to enforce the laws of war and at the same time respect the obligation to provide for a fair and impartial adjudication of guilt.

This interest is better served by focusing on the law that is expressly applicable to the military commissions: the law of war. Doing so leads to a similar conclusion—that the process established to hold these captured individuals to account is fatally flawed and must be amended. But by focusing on this proper basis, the efficacy of the laws of war to balance the requirements of accountability and justice can be validated. Balancing the legitimate national security interest of holding enemies of the United States accountable for violation of the most basic principles of the law regulating the conduct of armed conflict with the equally compelling national security interest of ensuring the procedures chosen to do so are objectively legitimate is essential, and a goal

181. Derived from the power vested in the state by international law, and vested in the military commanders by that law, military tribunals are intended first and foremost to serve the interests of the international community by contributing to the conduct of armed conflict in compliance with the rules of international law. While this basic purpose does not exempt such tribunals from the requirement to afford basic rights to individual defendants, those rights must flow from the same source of authority from which the tribunal is derived—international law. As such, the proper methodology for critiquing the legitimacy of such a tribunal is not analogy to a domestic criminal court, but an assessment of the purpose of the tribunal and whether the rights afforded by the detaining state meet the minimum requirements of individual rights established by international law.

Unfortunately for the proponents of the military commissions, the current procedures established for these commissions fail to meet the requirements established by international law for the trial and punishment of individuals who commit war crimes. While the consistent message of proponents of the commissions has been that they have been structured to ensure the process will be "full and fair," repeating this message does not satisfy the standards of international law.

hopefully shared by both proponents and critics of the military commission. The law of war, if properly understood and applied, provides the fulcrum upon which to strike this balance. As the following quotation eloquently emphasizes, the need to conduct the GWOT in accordance with the frameworks of international law related to the conduct of armed conflict is far more important to the long term national security interests of the United States than any short term prosecutorial success:

> In a counter-terrorist war, as in other wars, there can be strong prudential considerations that militate in favor of observing legal standards, which are increasingly seen as consisting of not only domestic legal standards, but also international ones, including those embodied in the laws of war. These considerations include securing public and international support; ensuring that terrorists are not given the propaganda gift of atrocities or maltreatment by their adversaries; and maintaining discipline and high professional standards in the counter-terrorist forces; and assisting reconciliation and future peace. Such considerations may carry great weight even in conflicts, or particular episodes within them, which differ from what is envisaged in the formal provisions regarding scope of application of relevant treaties. These considerations in favor of observing the law may be important irrespective of whether there is reciprocity in such observance by all the parties to a particular war.[182]

The Bush administration would be well served to heed this observation and reassess the chosen approach to prosecuting members of al Qaeda. It should limit the available charges to those derived only from the basic principles of the law of war, and implement procedures that dispel the perceived, if not actual, lack of impartiality of the tribunal. These simple measures would go far to reconcile the authority invoked from the law of war with the obligations imposed by that law. Unless this is done, the military commission will continue to be perceived as an invalid exercise of arbitrary power by the United States—running directly afoul of both international law and the pragmatic wisdom reflected above.

182. Roberts, *supra* n. 80, at 190.